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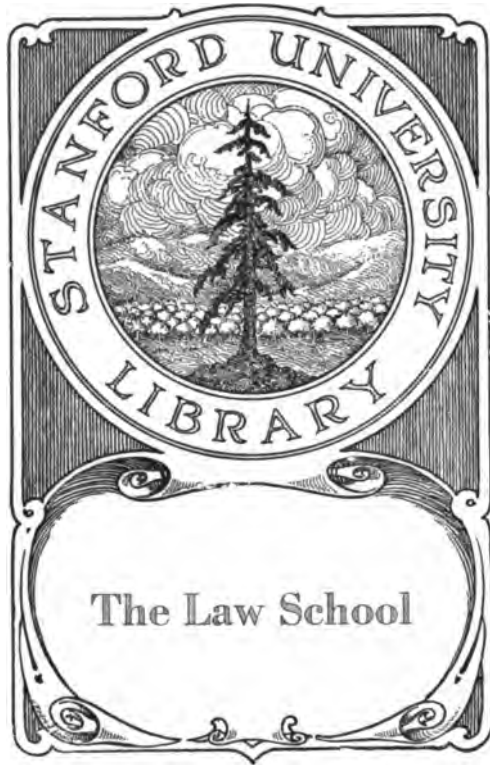
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*J. C. Branner*





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# CASES

ON

# INTERNATIONAL LAW

PRINCIPALLY SELECTED FROM DECISIONS OF

## ENGLISH AND AMERICAN COURTS

EDITED BY

**JAMES BROWN SCOTT**

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"The law of nations is naturally founded on this principle, that different nations ought in time of peace to do one another all the good they can, and in time of war as little harm as possible, without prejudicing their real interests."—Baron de Montesquieu, *The Spirit of Laws*, 1748.

"I am much obliged by the kind present you have made us of your edition of Vattel. It came to us in good season, when the circumstances of a rising state make it necessary frequently to consult the law of nations. Accordingly, that copy which I kept \* \* \* has been continually in the hands of the members of our Congress now sitting."—Benjamin Franklin, 1775.

"Every nation, on being received, at her own request, into the circle of civilized governments, must understand that she not only attains rights of sovereignty and the dignity of national character, but that she binds herself also to the strict and faithful observance of all those principles, laws, and usages which have obtained currency among civilized states, and which have for their object the mitigation of the miseries of war."—Daniel Webster, Secretary of State, to Mr. Thompson, Minister to Mexico, April 15, 1842.

## AMERICAN CASEBOOK SERIES

WILLIAM R. VANCE  
GENERAL EDITOR

ST. PAUL  
WEST PUBLISHING COMPANY

1922

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**(SCOTT INT.LAW.)**

*Inscribed to the Memory of*

*FREEMAN SNOW*

*Instructor of International Law in Harvard University*

*who taught me to love the law of nations,  
and, in doing so, to love him*

(iii)\*



# THE AMERICAN CASEBOOK SERIES

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THE first of the American Casebook Series, Mikell's Cases on Criminal Law, issued in December, 1908, contained in its preface an able argument by Mr. James Brown Scott, the General Editor of the Series, in favor of the case method of law teaching. Until 1915 this preface appeared in each of the volumes published in the series. But the teachers of law have moved onward, and the argument that was necessary in 1908 has now become needless. That such is the case becomes strikingly manifest to one examining three important documents that fittingly mark the progress of legal education in America. In 1893 the United States Bureau of Education published a report on Legal Education prepared by the American Bar Association's Committee on Legal Education, and manifestly the work of that Committee's accomplished chairman, William G. Hammond, in which the three methods of teaching law then in vogue—that is, by lectures, by text-book, and by selected cases—were described and commented upon, but without indication of preference. The next report of the Bureau of Education dealing with legal education, published in 1914, contains these unequivocal statements:

"To-day the case method forms the principal, if not the exclusive, method of teaching in nearly all of the stronger law schools of the country. Lectures on special subjects are of course still delivered in all law schools, and this doubtless always will be the case. But for staple instruction in the important branches of common law the case has proved itself as the best available material for use practically everywhere. \* \* \* The case method is to-day the principal method of instruction in the great majority of the schools of this country."

But the most striking evidence of the present stage of development of legal instruction in American Law Schools is to be found in the special report, made by Professor Redlich to the Carnegie Foundation for the Advancement of Teaching, on "The Case Method in American Law Schools." Professor Redlich, of the Faculty of Law in the University of Vienna, was brought to this country to make a special study of methods of legal instruction in the United States from the standpoint of one free from those prejudices necessarily engendered in American teachers through their relation to the struggle for supremacy so long, and at one time so vehemently, waged among the rival systems. From this masterly report, so replete with brilliant analysis and discriminating comment, the following brief extracts are taken. Speaking of the text-book method Professor Redlich says:

"The principles are laid down in the text-book and in the professor's lectures, ready made and neatly rounded, the predigested essence

of many judicial decisions. The pupil has simply to accept them and to inscribe them so far as possible in his memory. In this way the scientific element of instruction is apparently excluded from the very first. Even though the representatives of this instruction certainly do regard law as a science—that is to say, as a system of thought, a grouping of concepts to be satisfactorily explained by historical research and logical deduction—they are not willing to teach this science, but only its results. The inevitable danger which appears to accompany this method of teaching is that of developing a mechanical, superficial instruction in abstract maxims, instead of a genuine intellectual probing of the subject-matter of the law, fulfilling the requirements of a science.”

Turning to the case method Professor Redlich comments as follows:

“It emphasizes the scientific character of legal thought; it goes now a step further, however, and demands that law, just because it is a science, must also be taught scientifically. From this point of view it very properly rejects the elementary school type of existing legal education as inadequate to develop the specific legal mode of thinking, as inadequate to make the basis, the logical foundation, of the separate legal principles really intelligible to the students. Consequently, as the method was developed, it laid the main emphasis upon precisely that aspect of the training which the older text-book school entirely neglected—the training of the student in intellectual independence, in individual thinking, in digging out the principles through penetrating analysis of the material found within separate cases; material which contains, all mixed in with one another, both the facts, as life creates them, which generate the law, and at the same time rules of the law itself, component parts of the general system. In the fact that, as has been said before, it has actually accomplished this purpose, lies the great success of the case method. For it really teaches the pupil to think in the way that any practical lawyer—whether dealing with written or with unwritten law—ought to and has to think. It prepares the student in precisely the way which, in a country of case law, leads to full powers of legal understanding and legal acumen; that is to say, by making the law pupil familiar with the law through incessant practice in the analysis of law cases, where the concepts, principles, and rules of Anglo-American law are recorded, not as dry abstractions, but as cardinal realities in the inexhaustibly rich, ceaselessly fluctuating, social and economic life of man. Thus in the modern American law school professional practice is preceded by a genuine course of study, the methods of which are perfectly adapted to the nature of the common law.”

The general purpose and scope of this series were clearly stated in the original announcement:

“The General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limi-



tations of the classroom, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest. The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

"The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject. \* \* \* If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief. \* \* \*

"The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the classroom and the needs of the students will furnish a sound basis of selection."

Since this announcement of the Series was first made there have been published books on the following subjects:

*Administrative Law.* By Ernst Freund, Professor of Law in the University of Chicago.

*Agency.* By Edwin C. Goddard, Professor of Law in the University of Michigan.

*Bills and Notes.* By Howard L. Smith, Professor of Law in the University of Wisconsin, and Underhill Moore, Professor of Law in Columbia University.

*Carriers.* By Frederick Green, Professor of Law in the University of Illinois.

*Conflict of Laws.* By Ernest G. Lorenzen, Professor of Law in Yale University.

*Constitutional Law.* By James Parker Hall, Dean of the Faculty of Law in the University of Chicago.

*Contracts.* By Arthur L. Corbin, Professor of Law in Yale University.

- Corporations.* By Harry S. Richards, Dean of the Faculty of Law in the University of Wisconsin.
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- Damages.* By Floyd R. Mechem, Professor of Law in the University of Chicago, and Barry Gilbert, of the Chicago Bar.
- Equity.* By George H. Boke, formerly Professor of Law in the University of California.
- Evidence.* By Edward W. Hinton, Professor of Law in the University of Chicago.
- Insurance.* By William R. Vance, Professor of Law in Yale University.
- International Law.* By James Brown Scott, Lecturer on International Law and the Foreign Relations of the United States in the School of Foreign Service, Georgetown University.
- Legal Ethics, Cases and Other Authorities on.* By George P. Costigan, Jr., Professor of Law in Northwestern University.
- Partnership.* By Eugene A. Gilmore, Professor of Law in the University of Wisconsin.
- Persons (including Marriage and Divorce).* By Albert M. Kales, of the Chicago Bar, and Chester G. Vernier, Professor of Law in Stanford University.
- Pleading (Common Law).* By Clarke B. Whittier, Professor of Law in Stanford University, and Edmund M. Morgan, Professor of Law in Yale University.
- Property (Titles to Real Property).* By Ralph W. Aigler, Professor of Law in the University of Michigan.
- Property (Personal).* By Harry A. Bigelow, Professor of Law in the University of Chicago.
- Property (Rights in Land).* By Harry A. Bigelow, Professor of Law in the University of Chicago.
- Property (Wills, Descent, and Administration).* By George P. Costigan, Jr., Professor of Law in Northwestern University.
- Property (Future Interests).* By Albert M. Kales, of the Chicago Bar.
- Quasi Contracts.* By Edward S. Thurston, Professor of Law in Yale University.
- Sales.* By Frederic C. Woodward, Professor of Law in the University of Chicago.
- Suretyship.* By Crawford D. Henning, formerly Professor of Law in the University of Pennsylvania.

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*Torts.* By Charles M. Hepburn, Dean of the Faculty of Law in the University of Indiana.

*Trusts.* By Thaddeus D. Kenneson, Professor of Law in the University of New York.

It is earnestly hoped and believed that the books thus far published in this series, with the sincere purpose of furthering scientific training in the law, have not been without their influence in bringing about a fuller understanding and a wider use of the case method.

WILLIAM R. VANCE,  
General Editor.

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## AUTHOR'S PREFACE

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THE idea underlying this volume is that international law is part of the English common law; that as such it passed with the English colonists to America; that when, in consequence of a successful rebellion, they were admitted to the family of nations, the new republic recognized international law as completely as international law recognized the new republic. Municipal law it was in England; municipal law it remained and is in the United States. No opinion is expressed on the vexed question whether it is law in the abstract; our courts, state and federal, take judicial cognizance of its existence, and in appropriate cases enforce it, so that for the American student or practitioner it is domestic or municipal law.

If English and American courts of justice enforce international law, and have repeatedly done so in the past two centuries, there must be, and, in fact, there is, a mass of judicial decision on this subject. There should be the same reason for respecting precedent in this as in other branches of the law; and beyond doubt in suits involving a question of international law a case in point is cited and followed, unless overruled or distinguished from the case under consideration. Judicial decisions, then, are an important and indispensable source of authority in international law.

It is the judgment that is authoritative, although the obiter dictum of a distinguished judge is entitled to respect. The opinion of a text-book writer is valuable; but, like the dictum, it is not in itself law. It is at best a statement of the underlying principle of the law or a digest or summary of cases on the subject with which the text-book deals. The opinions of diplomats likewise carry great weight; but the diplomatist does not and cannot consider the question at issue with the impartiality of a judge, for he is influenced by the interests of his country.

For these reasons the cases here printed have been selected from the reported decisions of English and American courts; and opinions of text-book writers and extracts from diplomatic correspondence \* \* \* do not appear in the text.<sup>1</sup>

<sup>1</sup> The above paragraphs are retained from the preface to a collection of cases on international law prepared by the present editor, and published in 1902.

Opinions of writers, extracts from diplomatic correspondence and the literature on the subject are not included; they will be found in John Bassett Moore's *Digest of International Law* (1906).

Later opinions, extracts from diplomatic correspondence and literature on the subject are covered by George A. Finch's *Analytical Index to the American Journal of International Law* (1921).

A single reference, covering every page of the present volume, is made to these two works.

The statement that international law formed a part of the common law of England, and that as such it passed to the United States with that law of which it formed a part, can be based upon judicial decision before the separation of the American colonies from the mother country, upon the authority of the accredited commentator upon the Laws of England, the seventh edition of whose work, containing this statement, appeared in the fateful year of 1775, and upon the authority of Alexander Hamilton, whose opinion as to the law of his country would seem to be conclusive. Thus, Lord Chancellor Talbot was reported by Lord Mansfield to have "declared," in *Barbuit's Case*, "a clear opinion 'that the law of nations, in its full extent, was part of the law of England.'"

There can be no doubt about Lord Talbot's opinion, as Lord Mansfield added that he was "counsel in this case" and that he had "a full note of it." *Triquet v. Bath*, 3 Burrow, 1478, 1482 (1764).

Lord Mansfield himself held, in his own person, in the case of *Heathfield v. Chilton*, that "the privileges of public ministers and their retinue depend upon the law of nations, which is part of the common law of England." *Heathfield v. Chilton*, 4 Burrow, 2016 (1767).

His Lordship was familiar with the law of nations at an early period of his career, for the *Barbuit Case*, in which he appeared as counsel, was decided in 1737. As Solicitor General he put his name, some sixteen years later, to the declaration that the law of nations is "founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage"—a definition quoted with approval by Mr. Elihu Root as leading counsel for the United States in the North Atlantic Fisheries dispute, decided by a tribunal of The Hague in 1910.

Sir William Blackstone stated as a matter of course in the fourth book of his *Commentaries*, published in 1765, that "the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land."

Sir William Blackstone was also familiar with the law of nations, because the year before this part of his *Commentaries* was published he had appeared as leading counsel for the plaintiff in the case of *Triquet v. Bath*. Indeed, in the course of his opinion Lord Mansfield took occasion to say that "Mr. Blackstone's principles are right."

In the letters of *Camillus*, published in 1795, Mr. Hamilton maintained that an affirmative answer should be given to the question which he himself put: "Does this customary law of nations, as established in Europe, bind the United States?"

In behalf of the affirmative answer he advanced the following reasons, which he himself called conclusive:

"1. The United States, when a member of the British Empire, were in this capacity a party to that law, and not having dissented from it, when they became independent, they are to be considered as having continued a party to it.

"2. The common law of England, which was and is in force in each of these states, adopts the law of nations, the positive equally with the natural, as a part of itself."

The fact that later judges may be inclined to consider Lord Mansfield's statement as too sweeping cannot detract from the binding effect at the time of its delivery of the unanimous decision of the court over which he presided. But, however Lord Mansfield may have fared at the hands of his successors, Hamilton's authority is unshaken. For did not Mr. Justice Gray say, only a few years ago, in delivering the opinion of the court in the case of *The Paquete Habana*, decided in 1899, and in language which is a paraphrase, if it cannot be considered as a direct quotation from Sir William Blackstone, that "international law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." 175 U. S. 677, 700, 20 Sup. Ct. 290, 44 L. Ed. 320 (1899).

The late Sir Henry Maine spoke as an historian, as well as a man of affairs, when he said, in his lectures on International Law, delivered in 1887, before the University of Cambridge: "The statesmen and jurists of the United States do not regard International Law as having become binding on their country through the intervention of any Legislature. They do not believe it to be of the nature of immemorial usage, 'of which the memory of man runneth not to the contrary.' They look upon its rules as a main part of the conditions on which a state is originally received into the family of civilized nations. This view, though not quite explicitly set forth, does not really differ from that entertained by the founders of International Law, and it is practically that submitted to, and assumed to be a sufficiently solid basis for further inferences, by governments and lawyers of the civilized sovereign communities of our day. If they put it in another way it would probably be that the state which disclaims the authority of International Law places itself outside the circle of civilized nations." *International Law*, London, 1888, pp. 37, 38.

It is to be hoped that the views attributed to the statesmen and jurists of the United States may ultimately prevail in all parts of the world. In the editor's opinion they will because they should. If he is mistaken in this, he nevertheless prefers to be generously wrong than to be niggardly right.

International law seems to have stood fairly well the strain of war. It is no doubt true that the belligerent practices of nations have not squared with their peaceful professions. Nevertheless the law of nations emerges from the World War as a system with foundations unimpaired, although the structure bears outward marks of violence and unsightly scars, which only time can cover.

The prediction, however, of the late William Edward Hall, set out at length in the preface to the third edition of his *Treatise on Interna-*

tional Law, dated August 1, 1889, exactly twenty-five years to the day before the outbreak of the World War, has stood the test of what is commonly called the greatest of all wars.

"Probably in the next great war," he said, "the questions which have accumulated during the last half century and more will all be given their answers at once. Some hates, moreover, will crave for satisfaction; much envy and greed will be at work; but above all, and at the bottom of all, there will be the hard sense of necessity. Whole nations will be in the field; the commerce of the world may be on the sea to win or lose; national existences will be at stake; men will be tempted to do anything which will shorten hostilities and tend to a decisive issue. Conduct in the next great war will certainly be hard; it is very doubtful if it will be scrupulous, whether on the part of belligerents or neutrals; and most likely the next war will be great. But there can be very little doubt that, if the next war is unscrupulously waged, it also will be followed by a reaction towards increased stringency of law. In a community, as in an individual, passionate excess is followed by a reaction of lassitude and to some extent of conscience. On the whole, the collective seems to exert itself in this way more surely than the individual conscience; and in things within the scope of international law, conscience, if it works less impulsively, can at least work more freely than in home affairs. Continuing temptation ceases with the war. At any rate it is a matter of experience that times in which international law has been seriously disregarded have been followed by periods in which the European conscience has done penance by putting itself under stricter obligations than those which it before acknowledged. There is no reason to suppose that things will be otherwise in the future. I therefore look forward with much misgiving to the manner in which the next great war will be waged, but with no misgiving at all as to the character of the rules which will be acknowledged ten years after its termination, by comparison with the rules now considered to exist."

Whether we admit it with open eyes, or ostrich-like bury our heads in the sand, there is such a thing as justice, independent of the State, above it and beyond it, although the formulation of its principles may change according to time, place, and circumstances. This is not the language of mere theory, or of idle speculation. It is apparently the view of the Supreme Court of the United States. As late as 1880, that august tribunal, "speaking of the universal law of reason, justice, and conscience, of which the law of nations is necessarily a part," quoted with approval, the language of Cicero: "Nor is it one thing at Rome and another at Athens, one now and another in future, but among all nations it is, and in all time will be, eternally and immutably the same."

From this opinion, delivered by Mr. Justice Swayne, on behalf of the court, in the case of *Wilson v. McNamee*, 102 U. S. 572, 574, 26 L. Ed. 234, there was no recorded expression of dissent on the part of any of its members.



From this justice nations must derive their rules of law. And this is so, although they may affect to consider themselves the source instead of the agent whereby the principles of justice, expressed and made visible in rules of law, enter the minds and the thoughts of men before they pervade the practice of nations.

The topics here selected are, in the editor's opinion, calculated to give the student a knowledge of the fundamental principles of international law, and the cases will, it is hoped, furnish him training in the discovery of those principles and in their application to the concrete problems of international life as they present themselves to courts of justice and to tribunals of arbitration.

The facts of the case may be new, the rule of law may seem to be new, and the decision is necessarily so; but the principle of justice which the rule of law announces is old. "For out of the old fields must come the new corn," as Sir Edward Coke says in his report of Calvin's Case, 7 Reports, 3 B. (1608).

To the same effect is the language of Sir William Scott, later Lord Stowell, which is sufficiently broad and comprehensive to include future agencies, whether they operate under sea or in the air:

"I am warranted to hold, that it is an act which will affect the vehicle, without any fear of incurring the imputation, which is sometimes strangely cast upon this court, that it is guilty of interpolations in the law of nations. If the court took upon itself to assume principles in themselves novel, it might justly incur such an imputation; but to apply established principles to new cases cannot surely be so considered. All law is resolvable into general principles. The cases which may arise under new combinations of circumstances, leading to an extended application of principles, ancient and recognized, by just corollaries, may be infinite; but so long as the continuity of the original and established principles is preserved pure and unbroken, the practice is not new, nor is it justly chargeable with being an innovation on the ancient law, when, in fact, the court does nothing more than apply old principles to new circumstances." *The Atlanta*, 6 C. Rob. 440, 458 (1808).

And also from the bench a Chief Justice has more recently said:

"It was contended on behalf of the owners of the *Prometheus* that the term 'law,' as applied to this recognized system of principles and rules known as international law, is an inexact expression; that there is, in other words, no such thing as international law; that there can be no such law binding upon all nations, inasmuch as there is no sanction for such law; that is to say, that there is no means by which obedience to such law can be imposed upon any given nation refusing obedience thereto. I do not concur in that contention. In my opinion a law may be established and become international—that is to say, binding upon all nations—by the agreement of such nations to be bound thereby, although it may be impossible to enforce obedience thereto by

any given nation party to the agreement. The resistance of a nation to a law to which it has agreed does not derogate from the authority of the law, because that resistance cannot, perhaps, be overcome. Such resistance merely makes the resisting nation a breaker of the law to which it has given its adherence, but it leaves the law, to the establishment of which the resisting nation was a party, still subsisting. Could it be successfully contended that, because any given person or body of persons possessed for the time being power to resist an established municipal law, such law had no existence? The answer to such a contention would be that the law still existed, though it might not for the time being be possible to enforce obedience to it." Sir Henry Berkeley in *The S. S. Prometheus*, Supreme Court of Hongkong, 2 Hongkong Law Reports, 207, 225 (1906).

The knowledge thus acquired is the knowledge of law and the training obtained is the training in law.

The editor has borne in mind Dr. Johnson's advice that a book should not require references to other works in order to complete it. Therefore the material portions of *The Hague Conventions* and some other documents of an international character are brought together and placed in an appendix.

These relate primarily to war and the method of its conduct, thus laying before the student the laws and customs of war which have not as yet become the subject of judicial decision.

It is devoutly to be wished that members of the profession in foreign countries examine the decisions of their own courts, the awards of mixed commissions and sentences of arbitral tribunals in whose cases their respective countries have special interest, and produce collections of cases, not only for the benefit of the profession to which they belong, but also for the purpose of instruction in the law schools, universities, and other seats of learning in their respective states.

The many cases of foreign courts involving international law which have come to the editor's attention convince him that this can be done, and he had chosen not a few foreign cases for this collection. It seemed, however, better on the whole to confine the present work to the English-thinking world and to leave the selection of foreign cases to more competent hands.

If our friends in other parts of the world take kindly to the suggestion that they prepare collections of cases of an international character, the causes decided by courts which are foreign to them might in some instances predominate; but the collections would, nevertheless, be made up of adjudged cases. International law could then be taught quite generally from cases, and those selected would be the ones which appealed most strongly to the profession in each nation accepting and applying the law of nations, and which, in the judgment of competent persons, were best fitted for purposes of instruction in their various countries.

It needs but a slight familiarity with foreign cases to see how they are conditioned in form by local procedure and in substance by local law. The stream is indeed everywhere colored by the soil through which it reaches the sea, but the sea itself is international.

In conclusion, the editor tenders his thanks to Mr. Ammi Brown, formerly instructor of Law in the Catholic University of America, who prepared an imposing list of cases from which to select, and to Mr. Henry G. Crocker, of the Division of International Law of the Carnegie Endowment for International Peace, whose suggestions as to the choice and shortening of cases have often been followed.

JAMES BROWN SCOTT.

WASHINGTON, D. C., May 18, 1922.

SCOTT INT.LAW—b



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## NOTE

It was felt in many quarters that the date of Germany's declaration of war against Russia, August 1, 1914, would end an old and begin a new era, and that international law would require to be built up as from that date. With this in view the Carnegie Endowment for International Peace arranged to have a statement made of the laws of war as then existing, and the material was printed in four volumes, by the government, for eventual use of the Conference at Paris. The titles and authors are as follows:

Joseph R. Baker and Henry G. Crocker: *The Laws of Land Warfare Concerning the Rights and Duties of Belligerents as Existing on August 1, 1914*. Washington, Government Printing Office, 1919.

Harold H. Martin and Joseph R. Baker: *Laws of Maritime Warfare Affecting Rights and Duties of Belligerents as Existing on August 1, 1914*. Washington, 1918.

[Joseph R. Baker]: *The Laws of Neutrality as Existing on August 1, 1914*. Washington, 1918.

Joseph R. Baker and Louis W. McKernan: *Selected Topics Connected with the Laws of Warfare as of August 1, 1914*. Washington, 1919.

These volumes furnish a standard by which to test the actions of the belligerents in the World War of 1914-18.



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# CASES

ON

# INTERNATIONAL LAW

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## INTRODUCTION

### SECTION 1.—THE NATURE AND EXTENT OF INTERNATIONAL LAW

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#### I. BRITISH CASES

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#### AN ACT FOR PRESERVING THE PRIVILEGES OF AMBASSADORS, AND OTHER PUBLIC MINISTERS OF FOREIGN PRINCES AND STATES. 1708.

(1 Chitty's Statutes [5th Ed.] Title Ambassadors.)

Whereas several turbulent and disorderly persons having in a most outrageous manner insulted the person of his excellency Andrew Artemonowitz Matueof, ambassador extraordinary of his czarish majesty, emperor of Great Russia, her majesty's good friend and ally, by arresting him, and taking him, by violence, out of his coach in the public street, and detaining him in custody for several hours, in contempt of the protection granted by her majesty, contrary to the law of nations and in prejudice of the rights and privileges which ambassadors and other public ministers, authorized and received as such, have at all times been thereby possessed of, and ought to be kept sacred and inviolable: Be it therefore declared, That all actions and suits, writs and processes, commenced, sued, or prosecuted, against the said ambassador by any person or persons whatsoever, and all bail bonds given by the said ambassador, or any other person or persons on his behalf, and all recognizances of bail given or acknowledged in any such action or suit, and all proceedings upon or by pretext or colour of such action or suit, writ or process, and all judgments had thereupon, are utterly null and void, and shall be deemed and judged to be utterly null and void, to all intents, constructions and purposes whatsoever. \* \* \*

## TRIQUET et al. v. BATH.

## PEACH et al. v. BATH.

(Court of King's Bench, 1764. 3 Burr. 1478.)

Mr. Blackstone, Mr. Thurlow, and Mr. Dunning, on behalf of the plaintiffs, showed cause why the bill of Middlesex in each of these causes should not be set aside, and the bail-bond be cancelled.

The rule was made upon affidavits "Of the defendant's being a domestic servant of a foreign minister; and having taken all the proper steps to entitle him to the privilege of such domestics."

The only question was, "Whether the defendant (Christopher Bath) was really and truly and bona fide a domestic servant of Count Haslang, the Bavarian minister;" or, "Whether his service was only colorable, and a mere sham and pretence calculated to protect him from the just demands of his creditors." \* \* \*

LORD MANSFIELD. This privilege of foreign ministers and their domestic servants depends upon the law of nations. The act of Parliament of 7 Anne, c. 12, is declaratory of it. All that is new in this act, is the clause which gives a summary jurisdiction for the punishment of the infractors of this law.

The act of Parliament was made upon occasion of the Czar's ambassador being arrested. If proper application had been immediately made for his discharge from the arrest, the matter might and doubtless would have been set right. Instead of that, bail was put in, before any complaint was made. An information was filed by the then attorney-general against the persons who were thus concerned, as infractors of the law of nations, and they were found guilty, but never brought up to judgment.

The Czar took the matter up, highly. No punishment would have been thought by him an adequate reparation. Such a sentence as the court could have given, he might have thought a fresh insult.

Another expedient was fallen upon and agreed to; this act of Parliament passed, as an apology and humiliation from the whole nation. It was sent to the Czar, finely illuminated, by an ambassador extraordinary, who made excuses in a solemn oration.

A great deal relative to this transaction and negotiation appears in the annals of that time; and from a correspondence of the Secretary of State there printed.

But the act was not occasioned by any doubt "Whether the law of nations, particularly the part relative to public ministers, was not part of the law of England, and the infraction, criminal; nor intended to vary an iota from it."

I remember in a case before Lord Talbot, of *Buvot v. Barbut*, in Canc. 16th July, 1736, upon a motion to discharge the defendant

SCOTT INT.LAW



(who was in execution for not performing a decree), "Because he was agent of commerce, commissioned by the King of Prussia, and received here as such;" the matter was very elaborately argued at the bar; and a solemn deliberate opinion given by the court. These questions arose and were discussed.—"Whether a minister could, by any act or acts, waive his privilege."—"Whether being a trader was any objection against allowing privilege to a minister, personally."—"Whether an agent of commerce, or even a consul, was entitled to the privileges of a public minister."—"What was the rule of decision: the act of Parliament or the law of nations." Lord Talbot declared a clear opinion—"That the law of nations, in its full extent, was part of the law of England."—"That the act of Parliament was declaratory, and occasioned by a particular incident."—"That the law of nations was to be collected from the practice of different nations, and the authority of writers." Accordingly, he argued and determined from such instances, and the authority of Grotius, Barbeyrac, Binkershoek, Wiquefort, &c.; there being no English writer of eminence upon the subject.

I was counsel in this case, and have a full note of it.

I remember, too, Lord Hardwicke's declaring his opinion to the same effect; and denying that Lord Chief Justice Holt ever had any doubt as to the law of nations being part of the law of England, upon the occasion of the arrest of the Russian ambassador.

Mr. Blackstone's principles are right; but as to the facts in the present case, the affidavits on the part of the defendant have outsworn those on the part of the plaintiffs. [And his Lordship, as well as Mr. Justice WILMOT, took notice that the person who drew the affidavits on the part of the defendant had very exactly pursued the course of the cases that had been determined upon questions of this kind; and had taken care to meet and answer all objections that might arise from them.] Lord MANSFIELD observed also, that the defendant was employed in the service of Monsieur Haslang, before the plaintiff took out his writ.

It was not to be expected, he said, that every particular act of the service should be particularly specified; it is enough if an actual bona fide service be proved. And if such a service be sufficiently proved by affidavit, we must not, upon bare suspicion only, suppose it to have been merely colorable and collusive.

As to the latter point, "Of his being a trader"—his having been so in Ireland (and even that seven years ago) will not bring him within the exception of the 5th clause of this act, which provides "That no merchant or other trader whatsoever, within the description of any of the statutes against bankrupts, who hath or shall put himself into the service of any such ambassador or public minister, shall have or take any manner of benefit by that act."

And there is no color for bringing this case within that of *Dodsworth v. Anderson*, Sir T. Raym. 375, Sir T. Jones, 141; for here is no connection between the goods bought in England and those sold in Ireland. It does not appear that they were the same goods; neither is any time specified, when they were bought, or when they were sold.

PER CUR. Both rules were made absolute, but without costs, by reason of the suspicious circumstances of this case.<sup>1</sup>

### THE MINERVA.

(Vice-Admiralty Court for Bombay, 1806. 1 Robert J. Mackintosh's *Mem-oirs of the Life of Sir James Mackintosh* [1835] 817.)

It was that of the *Minerva*, an American ship taken in a voyage from Providence, in the course of which she touched at the Isle of France, from which place she sailed to Tegall and Manilla, and on her voyage back from this last place to Batavia, she was detained as trading between enemies' ports, in violation of His Majesty's Instructions of June, 1803. Restitution was insisted on by the claimants, on the ground that neither Manilla nor Batavia, nor the Isle of France, were enemies' colonies in such a sense, as to render the trading thereto by a neutral, in time of war, illegal; inasmuch as the trade to these places was open to foreigners in time of peace. For the purpose of ascertaining this last point, commissions had been sent to Calcutta and Madras; and the judge, finding that the trade had been as alleged, open to foreigners, pronounced for restitution, but without costs.

In pronouncing the judgment he [Sir JAMES MACKINTOSH] observed, "that the sole point in the case was, whether Manilla and Batavia were colonies, according to the true meaning of His Majesty's Instructions of 1803; or, in other words, whether they were settlements administered, in time of peace, on principles of colonial monopoly. The word "colony" was here not a geographical, but a political term. His Majesty's Instructions must be construed so as not to be at variance with the principle of public law, maintained by Great Britain, called the rule of 1756. No settlement could be called a colony under that rule, which was open to foreigners in time of peace. As, from the return to the commissions, it appeared that Batavia and Manilla were not such colonies, he did not therefore conceive that trading to them was illegal under the law of nations, as relaxed by His Majesty's Instructions of 1803.

<sup>1</sup> In *Heathfield v. Chilton*, 4 Burr. 2015, 2016 (1787), Lord Chief Justice Mansfield thus restated the views which he had expressed in the principal case: "The privileges of public ministers and their retinue depend upon the law of nations, which is part of the common law of England. And the act of Parliament of 7 Anne, c. 12, did not intend to alter, nor can alter the law of nations."

"Something had been said of the obedience due to the letter of these Instructions. Undoubtedly the letter of the Instructions was a sufficient warrant for His Majesty's officers for detaining ships, which appeared to offend against it; but, as to the doctrine that courts of prize were bound by illegal instructions, he had already, in a former case (that of *The Erin*), treated it as a groundless charge by an American writer against English courts. In this case (which had hitherto been, and, he trusted, ever would continue, imaginary), of such illegal instructions, he was convinced that English courts of admiralty would as much assert their independence of arbitrary mandates as English courts of common law. That happily no judge had ever been called upon to determine, and no writer had distinctly put the case of, such a repugnance. He had, therefore, no direct and positive authority; but he never could hesitate in asserting, that, in such an imaginary case, it would be the duty of a judge to disregard the Instructions, and to consult only that universal law, to which all civilized princes and states acknowledge themselves to be subject, and over which, none of them can claim any authority."<sup>2</sup>

WEST RAND CENTRAL GOLD MINING CO., Limited, v.  
THE KING.

(Court of King's Bench, 1905. L. R. [1905] 2 K. B. 391.)

Petition of right by the West Rand Central Gold Mining Company, Limited.<sup>3</sup> \* \* \*

LORD ALVERSTONE, C. J. In this case the Attorney-General, on behalf of the crown, demurred to a petition of right presented in the month of June, 1904, by the West Rand Central Gold Mining Company, Limited. The petition of right alleged that two parcels of gold, amounting in all to the value of £3804, had been seized by officials of the South African Republic—£1104 on October 2 in course of transit from Johannesburg to Cape Town, and £2700 on October 9, taken from the bank premises of the petitioners. No further statement was made

<sup>2</sup> This decision of Sir James Mackintosh is quoted with approval by Sir Robert Phillimore, *Commentaries upon International Law* (8d Ed., 1885) 655. It has had the good fortune to be confirmed by the highest judicial authorities of Great Britain. Thus, Lord Parker, speaking for the Judicial Committee of the Privy Council in *The Steamship Consul Corfitzon*, [1917] L. R., App. Cas. 550, 555, said: "The substantive law administered by the court is international law, which cannot be affected by the municipal legislation of any one state, and its practice and procedure are governed by the municipal law of the state from which it derives its jurisdiction, and cannot be modified by the municipal legislation of any other state."

For an elaborate statement of this position see *The Zamora*, 1916, L. R. [1916] 2 A. C. 77, post, p. 1052.

<sup>3</sup> The statement of facts contained in the report is omitted, and only the portion of the opinion of the court dealing with international law is given.

For the balance of the opinion, dealing with the liability of the succeeding state, see post, p. 74.

in the petition of the circumstances under which, or the right by which, the government of the Transvaal Republic claimed to seize the gold; but it was stated in paragraph 6:

"That the gold was in each case taken possession of by, and on behalf of, and for the purposes of, the then existing government of the said Republic, and that the said government, by the laws of the said Republic, was under a liability to return the said gold, or its value, to your suppliants. None of the said gold has been returned to your suppliants, nor did the said government make any payment in respect thereof."

The petition then alleged that a state of war commenced at 5 p. m. on October 11, 1899, that the forces of the late queen conquered the Republic, and that by a proclamation of September 1, 1900, the whole of the territories of the Republic were annexed to, and became part of, her majesty's dominions, and that the government of the Republic ceased to exist. The petition then averred that by reason of the conquest and annexation her majesty succeeded to the sovereignty of the Transvaal Republic, and became entitled to its property; and that the obligation which vested in the government was binding upon his present majesty the king.

Before dealing with the questions of law which were argued before us, we think it right to say that we must not be taken as acceding to the view that the allegations in the petition disclosed a sufficient ground for relief. The petition appears to us demurrable for the reason that it shews no obligation of a contractual nature on the part of the Transvaal government. For all that appears in the petition the seizure might have been an act of lawless violence. \* \* \*

Lord Robert Cecil argued that all contractual obligations incurred by a conquered state, before war actually breaks out, pass upon annexation to the conqueror, no matter what was their nature, character, origin, or history. \* \* \* His main proposition was divided into three heads: First, that, by international law, the sovereign of a conquering state is liable for the obligations of the conquered; secondly, that international law forms part of the law of England; and, thirdly, that rights and obligations, which were binding upon the conquered state, must be protected and can be enforced by the municipal courts of the conquering state.

In support of his first proposition Lord Robert Cecil cited passages from various writers on international law. In regard to this class of authority it is important to remember certain necessary limitations to its value. There is an essential difference, as to certainty and definiteness, between municipal law and a system or body of rules in regard to international conduct, which, so far as it exists at all (and its existence is assumed by the phrase "international law"), rests upon a consensus of civilized states, not expressed in any code or pact, nor possessing, in case of dispute, any authorized or authoritative interpreter,

and capable, indeed, of proof, in the absence of some express international agreement, only by evidence of usage to be obtained from the action of nations in similar cases in the course of their history. It is obvious that, in respect of many questions that may arise, there will be room for difference of opinion as to whether such a consensus could be shown to exist. Perhaps it is in regard to the extraterritorial privileges of ambassadors, and in regard to the system of limits as to territorial waters, that it is least open to doubt or question.

The views expressed by learned writers on international law have done in the past, and will do in the future, valuable service in helping to create the opinion by which the range of the consensus of civilized nations is enlarged. But in many instances their pronouncements must be regarded rather as the embodiments of their views as to what ought to be, from an ethical standpoint, the conduct of nations *inter se*, than the enunciation of a rule or practice so universally approved or assented to as to be fairly termed, even in the qualified sense in which that word can be understood in reference to the relations between independent political communities, "law." The reference which these writers not infrequently make to stipulations in particular treaties as acceptable evidence of international law is as little convincing as the attempt, not unknown to our courts, to establish a trade custom which is binding without being stated, by adducing evidence of express stipulations to be found in a number of particular contracts.

Before, however, dealing with the specific passages in the writings of jurists upon which the suppliants rely, we desire to consider the proposition, that by international law the conquering country is bound to fulfil the obligations of the conquered, upon principle; and upon principle we think it cannot be sustained. \* \* \*

The second proposition urged by Lord Robert Cecil, that international law forms part of the law of England, requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must shew either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized state would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognized, are not in themselves sufficient. They must have received the express sanc-

tion of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations.

We adopt the language used by Lord Russell of Killowen in his address at Saratoga in 1896 on the subject of international law and arbitration: "What, then, is international law? I know no better definition of it than that it is the sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another." In our judgment, the second proposition for which Lord Robert Cecil contended in his argument before us ought to be treated as correct only if the term "international law" is understood in the sense, and subject to the limitations of application, which we have explained. The authorities which he cited in support of the proposition are entirely in accord with and, indeed, well illustrate our judgment upon this branch of the arguments advanced on behalf of the suppliants; for instance, *Barbuit's Case*, Cas. t. Tal. 281, *Triquet v. Bath*, 3 Burr. 1478, and *Heathfield v. Chilton*, 4 Burr. 2016, are cases in which the courts of law have recognized and have given effect to the privilege of ambassadors as established by international law. But the expressions used by Lord Mansfield when dealing with the particular and recognized rule of international law on this subject, that the law of nations forms part of the law of England, ought not to be construed so as to include as part of the law of England opinions of text-writers upon a question as to which there is no evidence that Great Britain has ever assented, and a fortiori if they are contrary to the principles of her laws as declared by her courts. The cases of *Wolff v. Oxholm*, 6 M. & S. 92, 18 R. R. 313, and *Rex v. Keyn*, 2 Ex. D. 63, are only illustrations of the same rule—namely, that questions of international law may arise, and may have to be considered in connection with the administration of municipal law.

We pass now to consider the third proposition upon which the success of the suppliants in this case must depend—namely, that the claims of the suppliants based upon the alleged principle that the conquering state is bound by the obligations of the conquered can be enforced by petition of right. \* \* \* We are of opinion, for the reasons given, that no right on the part of the suppliants is disclosed by the petition which can be enforced as against his majesty in this or in any municipal court; and we therefore allow the demurrer, with costs.

Judgment for the crown.

## II. AMERICAN CASES

## THE ANTELOPE.

(Supreme Court of the United States, 1825. 10 Wheat. 66, 6 L. Ed. 268.)

Appeal from the Circuit Court of Georgia.

These cases were allegations filed by the vice consuls of Spain and Portugal, claiming certain Africans as the property of subjects of their nation. A privateer, called the *Columbia*, sailing under a Venezuelan commission, clandestinely shipped a crew mostly of citizens of the United States in Baltimore in 1819 and proceeded to sea, hoisted a foreign flag and assumed the name of the *Arraganta*. Off the coast of Africa she captured several Portuguese vessels and a Spanish vessel called the *Antelope*, from each of which vessels she took off a considerable number of Africans. The two vessels then sailed to the coast of Brazil, where the *Arraganta* was wrecked and a part of the crew were made prisoners, and some of the Africans were lost. The rest of the crew and the remainder of the Africans were transferred to the *Antelope*. This vessel later was captured off the coast of the United States by the revenue cutter *Dallas*, and brought into the port of Savannah for adjudication. The vessel and the Africans were libelled by the Portuguese and Spanish vice consuls. The Africans were also claimed by the United States as having been transported from foreign parts by American citizens, in contravention of the laws of the United States, and as entitled to their freedom by those laws and by the law of nations.

The court dismissed the claim of the United States, except as to that portion of the Africans which had been taken from the American vessel. The residue was divided between the Spanish and Portuguese claimants.<sup>4</sup>

Mr. Chief Justice MARSHALL. In prosecuting this appeal, the United States assert no property in themselves. They appear in the character of guardians, or next friends, of these Africans, who are brought, without any act of their own, into the bosom of our country, insist on their right to freedom, and submit their claim to the laws of the land, and to the tribunals of the nation. The consuls of Spain and Portugal, respectively, demand these Africans as slaves, who have, in the regular cause of legitimate commerce, been acquired as property, by the subjects of their respective sovereigns, and claim their restitution under the laws of the United States. \* \* \*

In the United States, different opinions have been entertained in the different circuits and districts; and the subject is now, for the

<sup>4</sup> A statement of the facts of the case has been substituted for that of the report.

first time, before this court. The question, whether the slave trade is prohibited by the law of nations has been seriously propounded, and both the affirmative and negative of the proposition have been maintained with equal earnestness. That it is contrary to the law of nature will scarcely be denied. That every man has a natural right to the fruits of his own labor is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission. But from the earliest times war has existed, and war confers rights in which all have acquiesced. Among the most enlightened nations of antiquity, one of these was that the victor might enslave the vanquished. This, which was the usage of all, could not be pronounced repugnant to the law of nations, which is certainly to be tried by the test of general usage. That which has received the assent of all, must be the law of all. Slavery, then, has its origin in force; but as the world has agreed, that it is a legitimate result of force, the state of things which is thus produced by general consent, cannot be pronounced unlawful.

Throughout Christendom, this harsh rule has been exploded, and war is no longer considered as giving a right to enslave captives. But this triumph of humanity has not been universal. The parties to the modern law of nations do not propagate their principles by force, and Africa has not yet adopted them. Throughout the whole extent of that immense continent, so far as we know its history, it is still the law of nations, that prisoners are slaves. Can those who have themselves renounced this law, be permitted to participate in its effects, by purchasing the beings who are its victims? Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself as a part, and to whose law the appeal is made. If we resort to this standard, as the test of international law, the question, as has already been observed, is decided in favor of the legality of the trade. Both Europe and America embarked in it; and for nearly two centuries, it was carried on, without opposition, and without censure. A jurist could not say that a practice, thus supported, was illegal, and that those engaged in it might be punished, either personally or by deprivation of property. In this commerce thus sanctioned by universal assent, every nation had an equal right to engage. How is this right to be lost? Each may renounce it for its own people; but can this renunciation affect others?

No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights.<sup>5</sup>

<sup>5</sup> "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open



It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all, by the consent of all, can be divested only by consent; and this trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it. If it be consistent with the law of nations, it cannot in itself be piracy. It can be made so only by statute; and the obligation of the statute cannot transcend the legislative power of the state which may enact it.

If it be neither repugnant to the law of nations, nor piracy, it is almost superfluous to say, in this court, that the right of bringing in for adjudication, in time of peace, even where the vessel belongs to a nation which has prohibited the trade, cannot exist. The courts of no country execute the penal laws of another; and the course of the American government, on the subject of visitation and search, would decide any case in which that right had been exercised by an American cruiser, on the vessel of a foreign nation, not violating our municipal laws, against the captors. It follows, that a foreign vessel engaged in the African slave trade, captured on high seas, in time of peace, by an American cruiser, and brought in for adjudication, would be restored. \* \* \*

We think, then, that all the Africans, now in possession of the marshal for the district of Georgia, and under the control of the circuit court of the United States for that district, which were brought in with the *Antelope*, \* \* \* except those which may be designated as the property of the Spanish claimants, ought to be delivered up to the United States, to be disposed of according to law. So much of the sentence of the circuit court as is contrary to this opinion, is to be reversed, and the residue affirmed.\* \* \* \*

to be availed of by sovereign powers, as between themselves." Mr. Chief Justice Fuller in the case of *Underhill v. Hernandez*, 168 U. S. 250, 252, 18 Sup. Ct. 83, 42 L. Ed. 456 (1897).

\* For a discussion of the same question from a different point of view, in which the principle of equality of nations is asserted and applied to the high seas, reference should be made to the decision of Sir William Scott in *Le Louis*, post, p. 338.

On other occasions Chief Justice Marshall had to consider and pass upon questions of International Law. In one of his earlier cases, that of *The Charming Betsy*, 2 Cranch, 64, 118, 2 L. Ed. 208 (1804), he said:

"It has been very properly observed, in argument, that the building of vessels in the United States for sale to neutrals, in the islands, is, during war, a profitable business, which Congress cannot be intended to have prohibited, unless that intent be manifested by express words, or a very plain and necessary implication. It has also been observed, that an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country. These principles are be-

## THE PAQUETE HABANA. THE LOLA.

(Supreme Court of the United States, 1900. 175 U. S. 677, 20 Sup. Ct. 290,  
44 L. Ed. 820.)

During the Spanish-American war of 1898 two small fishing smacks, the Paquete Habana and the Lola, were respectively captured at sea by the United States gunboat Castine and the United States steamship Dolphin, and taken by their captors into Key West, Fla., where they were libelled and condemned as enemy's property, and sold under decree of the court. On appeal to the Supreme Court of the United States, the question before the court was, are fishing smacks, in the absence of municipal law or treaty, protected from capture by the law of nations, and is such law of nations part of the municipal law of the United States? <sup>1</sup>

Mr. Justice GRAY. \* \* \* International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.<sup>2</sup> For this purpose where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and

believed to be correct, and they ought to be kept in view, in construing the act now under consideration."

For a further expression of the views of Chief Justice Marshall on the nature and extent of international law, see *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch, 191, 198, 3 L. Ed. 701 (1815), post, p. 682, and *The Nereide*, 9 Cranch, 388, 422, 428, 3 L. Ed. 769 (1815) post, p. 499.

<sup>1</sup> This brief statement is substituted for the elaborate presentation of the facts and circumstances of the case contained in the opinion of Mr. Justice Gray. The dissenting opinion of Chief Justice Fuller is omitted.

<sup>2</sup> It is of interest to note that Sir William Blackstone, the distinguished writer on the laws of England, whose Commentaries were a text-book to the colonial and revolutionary statesmen, as they are even to-day in the United States, was of counsel in the *Triquet Case*, just as Lord Mansfield, who decided it, was counsel in the case of *Buvot v. Barbut*. The law laid down by Lord Talbot and Lord Mansfield in these cases passed into the Commentaries, where it is thus stated:

"In arbitrary states this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power; but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world." Commentaries on the Laws of England, book IV, chapter 5, published in 1769 (7th Ed.) 1775, p. 67.

In the *Emperor of Austria v. Day and Kossuth*, 2 Gifford, 628, 678, 679 (1861). Sir John Stuart quotes with approval this paragraph of the learned commentator.

commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton v. Guyot*, 159 U. S. 113, 163, 164, 214, 215, 16 Sup. Ct. 139, 40 L. Ed. 95.\*

Wheaton places, among the principal sources of international law, "Text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent." As to these he forcibly observes: "Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments

\* For the view of Mr. Justice Story—certainly a high authority—as to the nature and sources of international law, see *La Jeune Eugénie*, 2 Mason, 409, Fed. Cas. No. 15,551 (1822).

In the course of his opinion in this case, the learned Justice of the Supreme Court, sitting at circuit, said:

"Now the law of nations may be deduced, first, from the general principles of right and justice, applied to the concerns of individuals, and thence to the relations and duties of nations; or, secondly, in things indifferent or questionable, from the customary observances and recognitions of civilized nations; or, lastly, from the conventional or positive law, that regulates the intercourse between states. What, therefore, the law of nations is, does not rest upon mere theory, but may be considered, as modified by practice, or ascertained by the treaties of nations at different periods. It does not follow, therefore, that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations. Nor is it to be admitted, that no principle belongs to the law of nations, which is not universally recognized, as such, by all civilized communities, or even by those constituting, what may be called, the Christian states of Europe. Some doctrines, which we, as well as Great Britain, admit to belong to the law of nations are of but recent origin and application, and have not, as yet, received any public or general sanction in other nations; and yet they are founded in such a just view of the duties and rights of nations, belligerent and neutral, that we have not hesitated to enforce them by the penalty of confiscation. There are other doctrines, again, which have met the decided hostility of some of the European states, enlightened as well as powerful, such as the right of search, and the rule, that free ships do not make free goods, which, nevertheless, both Great Britain and the United States maintain, and in my judgment with unanswerable arguments, as settled rules in the law of Prize, and scruple not to apply them to the ships of all other nations. And yet, if the general custom of nations in modern times, or even in the present age, recognized an opposite doctrine, it could not, perhaps, be affirmed, that that practice did not constitute a part, or, at least, a modification of the law of nations.

"But I think it may be unequivocally affirmed, that every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations; and unless it be relaxed or waived by the consent of nations, which may be evidenced by their general practice and customs, it may be enforced by a court of justice, whenever it arises in judgment. And I may go farther and say, that no practice whatsoever can obliterate the fundamental distinction between right and wrong, and that every nation is at liberty to apply to another the correct principle, whenever both nations by their public acts recede from such practice, and admit the injustice or cruelty of it."

and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles." Wheaton's International Law (8th Ed.) § 15.

Chancellor Kent says: "In the absence of higher and more authoritative sanctions, the ordinances of foreign states, the opinions of eminent statesmen, and the writings of distinguished jurists are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law." 1 Kent, Com. 18.

It will be convenient, in the first place, to refer to some leading French treatises on international law, which deal with the question now before us, not as one of the law of France only, but as one determined by the general consent of civilized nations. \* \* \*

The modern German books on international law, cited by the counsel for the appellants, treat the custom, by which the vessels and implements of coast fishermen are exempt from seizure and capture, as well established by the practice of nations. Heffter, § 137; 2 Kaltenborn, § 237, p. 480; Bluntschli, § 667; Perels, § 37, p. 217. \* \* \*

Two recent English text-writers, cited at the bar, (influenced by what Lord Stowell said a century since,) hesitate to recognize that the exemption of coast fishing vessels from capture has now become a settled rule of international law. Yet they both admit that there is little real difference in the views, or in the practice, of England and of other maritime nations; and that no civilized nation at the present day would molest coast fishing vessels, so long as they were peaceably pursuing their calling, and there was no danger that they or their crews might be of military use to the enemy. Hall, in section 148 of the fourth edition of his Treatise on International Law, after briefly sketching the history of the positions occupied by France and England at different periods, and by the United States in the Mexican War, goes on to say: "In the foregoing facts there is nothing to show that much real difference has existed in the practice of the maritime countries. England does not seem to have been unwilling to spare fishing vessels so long as they are harmless, and it does not appear that any State has accorded them immunity under circumstances of inconvenience to itself. It is likely that all nations would now refrain from molesting them as a general rule, and would capture them so soon as any danger arose that they or their crews might be of military use to the enemy; and it is also likely that it is impossible to grant them a more distinct exemption." So T. J. Lawrence, in section 206 of his Principles of International Law, says: "The difference between the

English and the French view is more apparent than real; for no civilized belligerent would now capture the boats of fishermen plying their avocation peaceably in the territorial waters of their own State; and no jurist would seriously argue that their immunity must be respected if they were used for warlike purposes, as were the smacks belonging to the northern ports of France, when Great Britain gave the order to capture them in 1800."

But there are writers of various maritime countries, not yet cited, too important to be passed by without notice. \* \* \*

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

The exemption, of course, does not apply to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way.

Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals, or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.

This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.

Calvo, in a passage already quoted, distinctly affirms that the exemption of coast fishing vessels from capture is perfectly justiciable, or, in other words, of judicial jurisdiction or cognizance. Calvo, § 2368. Nor are judicial precedents wanting in support of the view that this exemption, or a somewhat analogous one, should be recognized and declared by a prize court. \* \* \*

To this subject, in more than one aspect, are singularly applicable the words uttered by Mr. Justice Strong, speaking for this court: "Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation, or in the ordinances

of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which, when generally accepted, became of universal obligation." "This is not giving to the statutes of any nation extra-territorial effect. It is not treating them as general maritime laws; but it is recognition of the historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation. Of that fact, we think, we may take judicial notice. Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations." *The Scotia*, 14 Wall. 170, 187, 188, 20 L. Ed. 822.<sup>10</sup> \* \* \*

The two vessels and their cargoes were condemned by the District Court as prize of war; the vessels were sold under its decrees; and it does not appear what became of the fresh fish of which their cargoes consisted.

Upon the facts proved in either case, it is the duty of this court, sitting as the highest prize court of the United States, and administering the law of nations, to declare and adjudge that the capture was unlawful, and without probable cause; and it is therefore, in each case,

Ordered, that the decree of the District Court be reversed, and the proceeds of the sale of the vessel, together with the proceeds of any sale of her cargo, be restored to the claimant, with damages and costs.

Mr. Chief Justice FULLER, with whom concurred Mr. Justice HARLAN and Mr. Justice McKENNA, dissenting. \* \* \*

<sup>10</sup> Maritime law (unless part of international law) has the effect of law only in so far as it is adopted by the laws, usages, and customs of the particular country. *Norwich Co. v. Wright*, 13 Wall. 104, 20 L. Ed. 585 (1872), especially *The Lottawanna*, 21 Wall. 558, 572-578, 22 L. Ed. 654 (1874), where the subject is discussed in detail; *The Scotland*, 105 U. S. 24, 26 L. Ed. 1001 (1881), where cases in 13 and 21 Wall. are cited and approved.

In *The Manhasset* (D. C.) 18 Fed. 918, 920-923 (1884) this subject was considered and the following résumé is found on page 922 of the judgment of Hughes, J.: "From all that has been said, these things would seem to be clear: First, that the maritime law, existing as it does by the common consent of nations, and being a general law, cannot be changed or modified as to its general operation by any particular sovereignty; second, that it has force in any country only by its adoption, express or implied, by that country, and may be modified in its special operation in that jurisdiction at the will of that special sovereignty; third, that it is by such adoption part of the federal law of the United States, and incapable of modification by state enactment,—Congress having exclusive power, under the Constitution, 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes,' and the judicial power of the United States, 'exclusive of the state courts,' extending 'to all cases of admiralty and maritime jurisdiction.'"

The leading cases on mercantile and maritime law are collected and annotated in *Tudor's Mercantile Cases* (3d Ed., 1884).

For the origin, nature, and extent of admiralty jurisdiction in the United States, see Ames, *Cases on Admiralty* (1901).

## SECTION 2.—COMITY.

GRAY, J., in *THE PAQUETE HABANA*, 1900, 175 U. S. 677, 693, 694, 20 Sup. Ct. 290, 44 L. Ed. 320:

"Lord Stowell's judgment in *The Young Jacob and Johanna*, 1 C. Rob. 20, above cited, was much relied on by the counsel for the United States, and deserves careful consideration.

"The vessel there condemned is described in the report as 'a small Dutch fishing vessel taken April, 1798, on her return from the Dogger Bank to Holland'; and Lord Stowell, in delivering judgment, said: 'In former wars, it has not been usual to make captures of these small fishing vessels; but this rule was a rule of comity only, and not of legal decision; it has prevailed from views of mutual accommodation between neighboring countries, and from tenderness to a poor and industrious order of people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment, and, as they are brought before me for my judgment, they must be referred to the general principles of this court; they fall under the character and description of the last class of cases; that is, of ships constantly and exclusively employed in the enemy's trade.' And he added: 'It is a farther satisfaction to me in giving this judgment to observe that the facts also bear strong marks of a false and fraudulent transaction.' \* \* \*

"But some expressions in his opinion have been given so much weight by English writers, that it may be well to examine them particularly. The opinion begins by admitting the known custom in former wars not to capture such vessels—adding, however, 'but this was a rule of comity only, and not of legal decision.' Assuming the phrase 'legal decision' to have been there used, in the sense in which courts are accustomed to use it, as equivalent to 'judicial decision,' it is true that, so far as appears, there had been no such decision on the point in England. The word 'comity' was apparently used by Lord Stowell as synonymous with courtesy or good will. But the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law. As well said by Sir James Mackintosh: 'In the present century a slow and silent, but very substantial mitigation has taken place in the practice of war; and in proportion as that mitigated practice has received the sanction of time, it is raised from the rank of mere usage, and becomes part of the law of nations.' *Discourse on the Law of Nations*, 38; 1 *Miscellaneous Works*, 360."<sup>11</sup>

<sup>11</sup> For the relation of international law to the municipal law of Great Britain and the United States, see Cyril Moses Picciotto, *The Relation of International*

Law to the Law of England and of the United States of America (1915); Philip Quincy Wright, *The Enforcement of International Law through Municipal Law in the United States* (1916).

For the general relation of international law to municipal law, see Heinrich Triepel, *Völkerrecht und Landesrecht* (1899), French translation under title of *Droit International et Droit Interne*, by René Brunet (1920). See, also, a briefer treatment of the same subject by Wilhelm Kaufman, *Die Rechtskraft des Internationalen Rechts und das Verhältnis der Staatsgesetzgebungen und der Staatsorgane zu demselben* (1899).

The tendency to regard international law as having the force and effect of municipal law is admirably stated in article 4 of the present Constitution of the German Republic, adopted August 11, 1919:

"Die allgemein anerkannten Regeln des Völkerrechts gelten als bindende Bestandteile des deutschen Reichsrechts."

This article may be freely, but accurately, rendered as follows:

"The generally recognized rules of international law form an integral part of the law of the German Reich and are binding as such."

See, also, to the same effect, article 9 of the Constitution of the Republic of Austria, of October 1, 1920. The German text is as follows:

"Die allgemein anerkannten Regeln des Völkerrechtes gelten als Bestandteile des Bundesrechtes."

Of this the following is an English equivalent:

"The generally recognized rules of international law form an integral part of the federal law."

SCOTT INT. LAW



# PART I

## RIGHTS AND DUTIES OF NATIONS IN TIME OF PEACE

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### CHAPTER 1

#### STATES

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#### SECTION 1.—NATURE AND KINDS :

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##### YRISARRI v. CLEMENT.

(Court of Common Pleas, 1825. 2 Car. & P. 223.)

In an action brought by the plaintiff against defendant for a libel published in the Morning Chronicle, it appeared that the plaintiff had been appointed minister and diplomatic agent to Great Britain; that he employed Messrs. Hullett and Widder to raise a loan of £100,000 for the service of Chili; that the Morning Chronicle imputed fraud to plaintiff in the application of the money raised by him.<sup>1</sup>

BEST, C. J. It occurs to me at present, that there is this distinction. If a foreign state is recognized by this country, it is not necessary to prove that it is an existing state; but if it is not so recognized, such proof becomes necessary. There are hundreds in India, and elsewhere, that are existing states, though they are not recognized. I take the rule to be this—if a body of persons assemble together to protect themselves, and support their own independence, and make laws, and have courts of justice, that is evidence of their being a state. We have had, certainly, some evidence here to-day that these provinces formerly belonged to Spain; but it would be a strong thing to say, that because they once belonged, therefore they must always belong. We have recognized lately some of these states. It makes no difference whether they formerly belonged to Spain, if they do not continue to acknowledge it, and are in possession of a force sufficient to support themselves in op-

<sup>1</sup> A shortened statement of facts is substituted for that of the original report, and only so much of the opinion is given as relates to Chile as a "foreign state."

position to it. This is my present opinion; but I will give my brother Taddy leave to move the court upon the subject.<sup>2</sup>

### REPUBLIC OF HONDURAS v. SOTO.

(Court of Appeals of New York, 1889. 112 N. Y. 310, 19 N. E. 845, 2 L. R. A. 642, 8 Am. St. Rep. 744.)

RUGER, C. J.<sup>3</sup> Section 3268 of the Code of Civil Procedure provides that a defendant, in an action brought in a court of record, may require security for costs, in cases, among others, where the plaintiff was, when the action was commenced, either "a person residing without the state," or "a foreign corporation." The plaintiff claims to be a foreign independent state.

It is urged by the plaintiff that it is neither a person nor a foreign corporation, within the meaning of the Code. It is not disputed but that the plaintiff is an independent government, recognized as such by the United States, and capable of entering into contracts and acquiring property, as well as competent, through the rule of comity, of bringing and maintaining actions in the courts of this country; but it is claimed that it does not come within the description of legal entities authorized to require security for costs. That it is within the spirit of the enactment, we think cannot be disputed, and we are also of the opinion that it is within the letter as well.

Vattel defines "nations or states to be bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint effort of their combined strength. Such a society has her affairs and her interests. She deliberates and takes resolutions in common, thus becoming a moral person, who possesses an understanding and a will peculiar to himself, and is susceptible of obligations and rights." Law of Nations, 1; Wheaton's International Law, c. 2, §§ 1, 2; Bouvier's Institutes, title "Nation."

That such a being constitutes a legal entity, capable of acquiring and enjoying property and protecting itself from injuries thereto in the courts of foreign countries, has long been recognized and established in the tribunals of civilized nations. Republic of Mexico v. De Arangoiz, 12 N. Y. Super. Ct. 636; Hullet v. King of Spain, 1 Dow. & C. 169; Cherokee Nation v. Georgia, 5 Pet. 52, 8 L. Ed. 25.

<sup>2</sup> On leave given the court "thought that the opinion of the Chief Justice which he gave at the trial was correct. But they decided on another ground, viz. the incorrectness of some material innuendoes, which was not adverted to at nisi prius, and therefore made the rule absolute for a new trial." 2 Car. & P. 229.

For the characteristics of nation, tribe, or band, see *Montoya v. United States*, 180 U. S. 261, 21 Sup. Ct. 358, 45 L. Ed. 521 (1901), post, p. 538.

For application of international law to backward nations or states, see Sir William Scott's judgment in *The Helena*, 4 C. Rob. 4 (1801).

<sup>3</sup> The facts of the case and part of the opinion are omitted.

There can be no doubt but that under title 2, chapter 10, part 3, of the Revised Statutes, providing for security for costs in an action brought by any plaintiff, not residing within the jurisdiction of the court, that foreign states and nations were required to give such security, and we do not think that the provisions of the Code were intended to change the law in that respect.

Section 3268 of the Code is stated to be a re-enactment of the previous statute, and it cannot, we think, have been intended thereby to take away the right which resident defendants had to require security for costs. No reason is seen for such a change, and we do not think any was intended to be made. The word "person" was, we think, used in its enlarged sense, as comprising all legal entities except foreign corporations, which were authorized to bring actions in this state. In that sense it embraces moral persons having legal rights, capable of entering into contracts and incurring obligations, as well as natural persons. The statute must be construed with reference to the objects it had in view, the evils intended to be remedied and the benefits expected to be derived from it; and, as thus construed, we can see no reason why the plaintiff is not included within the description of persons intended to be subjected to its obligations. \* \* \*

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### THE IONIAN SHIPS.

(High Court of Admiralty, 1855. 2 Spinks, 212.)

Some ships under the flag of the Ionian states were captured in the Black Sea by some of her Majesty's cruisers, and brought in for adjudication, on the ground that the Ionians being British subjects they were illegally trading with the enemy. On the first case, *The Leucade*, coming on for hearing, the Queen's Advocate submitted that it was a case for further proof; but the Court was of opinion that it would be useless to order further proof until the preliminary question was decided, whether the inhabitants of the Ionian Islands were to be considered as British subjects or not. That question was, therefore, elaborately argued.

Dr. LUSHINGTON. It must be distinctly understood that all I am about to say on the present occasion applies only to the general question, and not to the particular circumstances of any individual case. \* \* \*

Now, what are the facts necessary to constitute the propositions for the consideration of the Court. They are few indeed. The vessel proceeded against is an Ionian vessel, under the Ionian flag, destined, for the purpose of the present inquiry at least, to Taganrog, a Russian port. The captors say that such a voyage by an Ionian ship subjects her to condemnation. The claimants say that neither by the Law of Nations, nor any other law, are they liable to condemnation; that the

Russian port of Taganrog was not blockaded; that they did not carry contraband; that the expedition in which they were engaged was lawful, and that they are entitled to restitution. Such is merely a general statement of the averment of each party. I must now endeavour to set forth, as clearly as I can, the reasons and principles on which the prayers for condemnation and restitution are founded.

The counsel for the captors allege that all Ionian vessels are to be considered as British vessels; that as British vessels are prohibited from trading with Russia during the war, so for the same reason are Ionian vessels; in other words, the British and Ionian vessels are to be placed in the same category; that as regards a power hostile to Great Britain, the Ionian islanders stand in the same position as British subjects.

If this proposition be true, it necessarily follows, as a corollary from it, that all trade with the enemy of Great Britain not allowed to British subjects is prohibited to the inhabitants of the Ionian islands. There is no doubt that a British vessel could not trade with this port of Taganrog; therefore, if British and Ionian vessels are in eadem conditione, this vessel could not lawfully prosecute her enterprise, and the cargo must be condemned.

The claimants deny all these propositions; they say they were not British subjects, they are not at war with Russia, and they have a right to carry on with Russia any trade that the subjects of a neutral nation could lawfully be engaged in. \* \* \*

But the question I have to decide assumes this shape, not whether Great Britain has power to declare the Ionian states in hostility with Russia, but whether, Great Britain being at war with Russia, it follows, as an inevitable consequence, that the Ionian states are placed at war with Russia also. \* \* \*

Therefore, and for the reasons I have now stated, I have only to consider the last proposition, whether Great Britain, being at war with Russia, the Ionian states are, ex necessitate, at war also, exactly in the same way as Jersey, Guernsey, Jamaica and Canada would be placed in hostility by a declaration of war against Great Britain by any other power. This view of the case opens a very wide question; for if I should hold that the declaration of war by Great Britain against Russia would at once place the Ionian Islands in a state of war with Russia, then it follows, as it appears to me, as an inevitable consequence, that if war be declared by Great Britain against China, against the United States of America, against any other power, the subjects of the Ionian states must be constituted, ipso facto, enemies of such nation, for it has not been and cannot be contended that the empire of Russia stands in any peculiar relation, so as to make war with her an exception.

The political history of these islands was traced from an early period with great care by the counsel on both sides; it will not, in my view of the case, be necessary for me to recapitulate it. I proceed upon the

assumption which I believe to be accurate, for it matters not if it be not precisely accurate in all its particulars, but to this effect that all these islands were conquered by Great Britain during the war ending 1815. I proceed on that assumption; whether Corfu surrendered at that time, or some other, I need not inquire. I proceed on the assumption that Great Britain dealt with them as conquered. Had they continued after the peace in the same state, they would have been a part of the dominions of Great Britain, governed as other conquered territories were governed, by the Crown and acts of Parliament.

Great Britain, however, did not retain these islands in the ordinary course of conquered territories, but she exercised a right indisputably belonging to her of making, in conjunction with other powers, a new and different status for these islands. Great Britain ceded her original rights, and merged them in the new settlement. I am of opinion that no right remained in Great Britain after the treaty to which I am about to refer, except the rights conferred by that treaty; that, from the nature of that transaction and from the terms of the treaty itself, Great Britain can at this period exercise no rights whatever that are not to be found within the four corners of that treaty; that there does not remain a scintilla of the original right of conquest; that, for reasons with which I have no concern, Great Britain laid at the feet of the contracting parties, as she had a right to do, the power and authority she had previously acquired. Henceforward the treaty is the sole guide; from this document must be derived all the rights of the contracting parties, and all the rights and the obligations of the Ionian states.

The treaty of Paris of the 5th of November, 1815, was made between Great Britain, Austria, Russia, and Prussia. I apprehend it is a mere truism to say it was equally binding upon all and each of them.

The first article declares that these islands shall form a free and independent state. My province is simply that of construction—of ascertaining to the best of my ability what the contracting powers intended by the contract into which they entered, and that with reference in the first instance to the words of the contract itself; but I must look to the whole of the instrument and not to a part. Terms however strong and clear in themselves, whatever meaning may be attributed—necessarily attributed—to them, standing alone, may be modified by other parts of the same instrument. The construction, therefore, I put on the first article is that the Ionian islands shall form a single free and independent state, according to the plain meaning of those terms, subject to and liable to be controlled by the rest of the treaty; the whole treaty creates one obligation.

The second article is one of great importance—the declaration that this state shall be placed under the immediate and exclusive protection of the King of Great Britain. I am strongly inclined to think that the necessary and inevitable consequence of such a condition is, that the

King of Great Britain has the right of making war and peace; indeed, such a power is inseparable from protection; for how could the duty of protection be fulfilled without such a right? and how could the Ionian islands be secured from aggression but by the exercise of that power? and how could their tranquillity be secured afterwards, save by the power to conclude peace, with all its concomitants.

But it is another and wholly different question whether, in consequence of this protectorate right, the Ionian states become, ipso facto, the enemies of all or any power or powers with which Great Britain may happen to be at war; and it is also another and different question whether, if Great Britain were, on account of Ionian grievances alone, to adopt measures for their protection against any other state, the kingdom of Great Britain would necessarily be at war with such state. \* \* \*

Some of the secondary propositions of this treaty I may omit to notice with much convenience.

By the third article the united Ionian states were, with the approbation of Great Britain, to regulate their internal organization.

By the fourth there is to be a legislative assembly and a new constitutional charter, also to be ratified by the King of Great Britain. Until such charter was ratified no alteration was to be made in the existing constitution save by the King in Council. Until that period, therefore, as to internal concerns, these islands remained nearly, though not altogether, in the position of conquered islands belonging to the crown of Great Britain.

The fifth article declares that the Britannic Majesty shall have a right to occupy the fortresses of the islands, to maintain garrisons, and have the control of the Ionian forces.

By the sixth, a particular convention is to regulate the maintenance of the forces, payment of the garrisons, and the number of men in time of peace.

This is a remarkable limitation, because it evidently leads to the conclusion that in time of war, non constat what war, Great Britain was not to be subject to any such restriction.

The seventh article is one deserving great attention. The trading flag of the Ionian islands was acknowledged by all the contracting parties as the flag of a free and independent state. The effect of this provision, I apprehend, is, if war existed between Russia and Austria, Great Britain having no part in it, the Ionian flag would be respected as the flag of a neutral power. In one respect, and one only, therefore, the neutral character would clearly belong to the subjects of these islands. The description of the flag to be carried I need not enlarge upon. I must also observe that the whole diplomatic power is lodged in Great Britain by virtue of this treaty.

The constitutional charter does not, in my opinion, essentially influence any view I may take of the question on which I am unfortunate-

ly called to pronounce my opinion. The status of the subjects of the Ionian states must be governed by the treaty, not by the charter, so far as any question may arise affecting the right or interest of the powers, parties to that treaty.

I will now make a short summary of this treaty; it will show some of the anomalies. A single free and independent state, having the flag of a free and independent state,—the military, naval, and diplomatic power all vested in the protecting state,—the protected, not the subjects of the protector,—not British subjects, for that is perfectly clear. I apprehend that I must endeavour to give effect to all these main provisions of this treaty. I must maintain the quality of independence, save as modified by the treaty itself, and, by parity of reasoning, the independence of the flag, or rather the rights and attributes of the flag of an independent state.

Having carefully addressed myself to these considerations, I come to the question of whether I ought to condemn the ship and cargo proceeded against as the property of British subjects trading with the enemy, as the property of allies trading with the enemy, or as the property of subjects of the Ionian states being at war with Russia. There is no other state of things in which I conceive it to be possible to pronounce a decree of condemnation.

With respect to the first ground of condemnation, I am of opinion that this property cannot be condemned, for, according to all the authorities and all the principles on which the authorities are founded, no property can be condemned on that ground, unless it belong to British subjects, in the proper sense of the term—which the Ionians are not. As to the second ground, I am of opinion I cannot condemn, because the Ionians are not allies in the war. No act whatsoever of the Ionian Government or of the protecting power has brought them within the fair meaning of that term. On the third ground I am of opinion that it does not follow of necessity that the Ionian subjects are at once, by a declaration of war by the Crown of Great Britain,—confined to a declaration of war by Great Britain only against another power,—comprised within that declaration, and constituted enemies of that power. This being so, I know of no act of the protecting power to place the Ionians in that predicament. Great Britain may have authority to do so, as the protecting power is possessed of all the rights of treating with foreign nations, and of the right to place them in the category of enemies; but she has not thought proper to do so.

This observation, I think, is entitled to more weight from a consideration of the manner in which Great Britain has exercised the great powers secured to her by the treaty. I refer to the convention dated January, 1852, between the Queen and the King of the Netherlands. The terms of that treaty are:

“The inhabitants and vessels of the Ionian islands shall enjoy in the dominion of his Majesty the King of the Netherlands all the advantages which are guaranteed by the treaty of the 27th of October, 1837,

between Great Britain and the Netherlands, and by the convention additional to that treaty, signed in March, 1851, so soon and for as long as the Government of the Ionian islands shall grant to the inhabitants and vessels of the Netherlands the same advantages which were granted in these islands to the inhabitants and vessels of Great Britain."

The commencement, too, of that treaty is not unworthy of observation. The Queen negotiates on behalf of the Ionian states as perfectly separate and distinct from the dominions of the Crown of Great Britain. It commences:

"Her Majesty the Queen of the United Kingdom of Great Britain and Ireland on the one part, and his Majesty the King of the Netherlands on the other part, being desirous of promoting the relations of commerce and navigation existing between the United States of the Ionian islands, which are under the protection of her Britannic Majesty and the kingdom of the Netherlands, have agreed to conclude a convention for that purpose, and have named as their respective plenipotentiaries," etc.

Nothing can be more manifest than this preamble to show that the Queen of Great Britain has negotiated for the Ionian islands as an entirely separate and distinct state.

Certain conclusions, therefore, appear to me to follow from a consideration of this treaty: First, it is evident that her Majesty ascribes to herself the right of making treaties on behalf of the Ionian states. Secondly, that no treaty between Great Britain with another state does include the Ionian islands, except specially named. I think that is perfectly evident, because otherwise there is no necessity for this treaty if it was included in the former. Thirdly, that this power, vested in the Crown of Great Britain, is limited as to the Ionian states in the same way that the power is limited with respect to the British territories themselves, namely, the Crown may contract, but as to all internal legislation necessary to carry such contracts into execution, it rests with the Government of the Ionian states to adopt the required measures as it would so in similar cases rest with the British Parliament. \* \* \*

But confining myself to the consideration of the question whether, by the terms of the treaty, the subjects of the Ionian states, as a necessary consequence of the provisions of that treaty, became the enemies of the protecting power, at least I ought to consider from what cause such necessity springs. Again I must repeat the terms of the proposition, to prevent mistake. I am not putting, or attempting to put, bounds to the authority of Great Britain under this treaty. I am considering the import of the treaty only where Great Britain has not declared the exercise of her power. In this view of the case, is it at all immaterial, at all inconsistent with the powers of the treaty, at all injurious to the subjects of the protected states themselves, that whatever might be the relations of Great Britain towards Russia or any other country, peace with the Ionian states should continue, at



least until war was declared on their part by Great Britain? Are there not many instances in which Great Britain herself might wish not to involve the Ionian states in a warfare in which she herself is engaged, but in which they have no interest? But above all, I must repeat what I have so often said before in substance—could it have been the intention of the contracting powers, evinced by the terms of the treaty, that a state of warfare should necessarily follow upon hostilities breaking out between themselves and others without giving, in the terms of the proposition, even an option to the protecting powers to leave the Ionian states at peace? To make the extension of all wars to the Ionian states inevitable would be to deprive the protecting power of her discretion to leave them at peace.

Now, I am told that anomalous consequences must follow, if the Ionian states are allowed to maintain a neutral character. I admit it must be so. But will such consequences be more repugnant to the treaty, than to hold that a guaranteed free and independent state is involved necessarily in war by the act of another state, contrary to their own interests, and without the least regard to them? and that not by the act, the deliberate act, of the protecting power, but merely by an inevitable inference? But again, are anomalous consequences resulting from a treaty a reason for abrogating its main provisions? For construing such provisions, if possible, so as not to produce such consequences, no doubt there is a very strong reason; for abrogating them, none. Though all contracting powers may be bound by what they have done, yet surely it would be difficult to contend that such a construction as this must be taken as actually foreseen, and intentially provided for too, by the stipulations of the treaty to the effect of entailing on the Ionian states any war in which Great Britain may be involved. But to this I ought to add that if anomalous consequences, or such as can be deemed so, could dissolve treaties, I fear there would be little security for compacts amongst states. It often happens, unfortunately, from the want of care and caution, treaties are so framed, that when they come to be put in practice, consequences wholly unforeseen by the contracting parties may arise. \* \* \*

I have mentioned, at least, some of the reasons which have induced me to come to that conclusion.

I shall restore, because the property is not the property of allies in the war, for neither by the treaty nor by the law of nations can I impose on the subjects of the Ionian states that character.

Again, I shall restore, because if Great Britain had the right by treaty of declaring war between the Ionian islands and Russia, she had not done it.

Because, in the absence of all such declaration or solemn act, in whatever form, I am of opinion that the Ionian subjects are not placed in any state of war.

Because I hold it to be the duty of every Court professing to administer the Law of Nations to carry into effect and operation the plainest

terms of a treaty, though the consequences may not be perceived. Various anomalous results may follow, but they are infinitely less important in their consequences than if a Court of Justice should take upon itself to disregard a solemn compact carefully expressed. I hardly need go further.\* \* \*

<sup>4</sup> In 1864, the Ionian Islands were annexed to Greece, and thereafter ceased to be, in law and in fact, a protected state.

For the history of the Ionian Islands, in so far as it is material to the present purpose, and for the steps by which they became incorporated with Greece, see Sarah Wambaugh, *A Monograph on Plebiscites* (1920), pp. 122-132, 838-863.

The stock example of a personal union of states—that is to say, the union of two independent states in the person of one and the same sovereign—was that of Hanover. This state of affairs was produced by the accession of George Louis, Elector of Hanover, to the throne of Great Britain, as George I, in 1714, as by act of Parliament the succession was vested in the nearest Protestant heir of the royal house of Stuart. The personal union continued until the death of William IV. Queen Victoria succeeded him as British sovereign in 1837. His nephew, the Duke of Cumberland, succeeded him in his capacity of King of Hanover. Hanover, as such, ceased to be a kingdom by its conquest by Prussia, in 1866.

The union between Sweden and Norway, from 1815 to 1905, was more complicated; it being contended on the part of Sweden that it was a real union, and on the part of Norway that it was only a personal and voluntary union. The difficulty was settled in 1905 by the peaceable separation of the two countries, which thereafter were universally recognized as sovereign and independent in law as well as in fact. For this union, and the steps leading to and including the separation in 1905, see Sarah Wambaugh, *Id.* 165-169, 1051-1072.

For the status of the Transvaal Republic before its conquest and annexation by Great Britain in 1900, see *In re Taylor* (D. C.) 118 Fed. 196 (1902).

For the status of Cuba during American occupation in consequence of the war with Spain, of 1898, till May 20, 1902, when it was evacuated and turned over to a government elected by its people, see *Neely v. Henkel*, 180 U. S. 109, 21 Sup. Ct. 302, 45 L. Ed. 448 (1901). For the relations of the United States and Cuba, see the treaty concluded on May 23, 1903, by these two republics, incorporating in its text the Platt Amendment, so called from Senator Platt, of Connecticut, who introduced it into the Senate as an amendment to the Army Appropriation Bill, although the amendment was devised by Elihu Root, then Secretary of War of the United States. See, also, Elihu Root, *Military and Colonial Policy of the United States*, pp. 185-188 (1916).

In the case of *Rex v. The Earl of Crewe*, *Ex parte Sekgome*, L. R. 2 K. B. 576, 619, 620 (1910), the court had occasion to consider the status of a protectorate in the narrower sense of the word.

In ordering a writ of habeas corpus on behalf of Sekgome, a native chieftain within the Batawana Protectorate, Lord Justice Kennedy said, in the course of his judgment:

"Upon the first question, namely, whether Sekgome is or is not a British subject, I think that the latter view is correct. Sekgome was born and has remained a member of a native African tribe called the Batawana tribe, dwelling in a region which has for some years (see proclamation of March 29, 1899) become officially entitled 'The Batawana Native Reserve,' near Lake Ngami, within the Bechuanaland Protectorate. Now the features of protectorates differ greatly, and of this a comparison of the British protectorates of native principalities in India, the British protectorate of the Ionian Islands between 1815 and 1864, the protectorate of the Federated Malay States, and the Bechuanaland Protectorate as constituted by the Orders in Council and proclamation before mentioned, affords ample illustration. Other instances of protectorates will be found in Wheaton, *International Law* (4th Ed.) pp. 51 to 66. The one common element in protectorates is the prohibition

## THE CHARKIEH.

(High Court of Admiralty, 1878. L. R. 4 Adm. &amp; Ecc. 59.)

This was a cause instituted on behalf of the Netherlands Steamship Co., the owners of the steamship *Batavier*, and on behalf of the master, crew and passengers thereof against the screw steamship *Charkieh* and her freight, for damages arising out of a collision between the *Batavier* and the *Charkieh* in the river Thames in 1872.

As a bar to the action for damages resulting from the collision, it was maintained that the ship was the property of Ismail Pacha, Khedive of Egypt, the reigning sovereign of the state of Egypt and that the *Charkieh* was a public vessel of the government and semi-sovereign state of Egypt.\*

Sir ROBERT PHILLIMORE. \* \* \* From these averments in the pleadings, and these facts in the evidence, the following questions arise:

1. Is the international status of the Khedive that of sovereign prince of Egypt?

2. Is he entitled by virtue of that status to claim the exemption of this ship from the jurisdiction of this court?

3. If he be entitled to this privilege, has he waived or forfeited it?

I proceed to consider these questions in their order, and first, as to the international status of His Highness the Khedive.

[After sketching the history of Egypt from Arabian conquest in 838 A. D. to the year 1833, the learned judge says:]

of all foreign relations except those permitted by the protecting state. Within a protectorate, the degree and the extent of the exercise by the protecting state of those sovereign powers which Sir Henry Maine has described (*International Law*, p. 58) as a bundle or collection of powers which may be separated one from another, may and in practice do vary considerably. In this Bechuanaland Protectorate every branch of such government as exists—administrative, executive, and judicial—has been created and is maintained by Great Britain. What the idea of a protectorate excludes, and the idea of annexation on the other hand would include, is that absolute ownership which was signified by the word 'dominium' in Roman law, and which, though perhaps not quite satisfactorily, is sometimes described as territorial sovereignty. The protected country remains in regard to the protecting state a foreign country; and, this being so, the inhabitants of a protectorate, whether native born or immigrant settlers, do not by virtue of the relationship between the protecting and the protected state become subjects of the protecting state. As Dr. Lushington said in regard to the inhabitants of the Ionian States, then under a British protectorate, in his judgment in *The Ionian Ships*, 2 Ecc. & Adm. 212, at page 226 (1855): 'Allegiance in the proper sense of the term undoubtedly they do not owe; because allegiance exists only between the sovereign and his subjects, properly so called, which they are not.' A limited obedience the dwellers within a protectorate do owe, as a sort of equivalent for protection; and in the present case the Orders in Council relating to the Bechuanaland Protectorate and the proclamations of the High Commissioner made thereunder imply the duty of obedience on the part of Sekgome and other persons within the area of the protectorate to a practically unlimited extent."

\* Short statement substituted for that of the report, and parts of the opinion are omitted.

Here I will pause a moment to consider the law applicable to the facts as now stated.

What were the relations at this epoch existing between the Khedive and the Porte, and what was the nature and character of the authority of the former, so far as foreign states are connected with these considerations? Did they entitle the Khedive to the privilege of the sovereign of an independent state? These are questions which must be answered, like all others appertaining to international jurisprudence, by a reference to usage, authority, and the reason of the thing.

Many accredited writers and jurists have drawn a distinction, which seems not to have escaped the framer of the Khedive's petition on protest now before me—between a sovereignty absolute and pure, and that less complete and perfect dominion to which the name of half-sovereignty (*demi-souverain*) has been given. I am inclined to think that the sovereign of a state in the latter category may be entitled to require from foreign states the consideration and privileges which are unquestionably incident to the sovereign of a state who is in the former category. There are also certain acts of feudal homage, or, as jurists say, *servitutes juris gentium*, which do not disentitle the state obliged to them to an international existence as a separate state.

Some examples of half sovereignties are to be found in history. Some of the smaller states (*halb souverain*) of the German confederation, before it was virtually destroyed by Napoleon's confederation of the Rhine, and formally extinguished by the abdication of the Emperor Francis in 1806, also furnished examples of states *cum imminutione imperii*—to borrow the expression of Grotius, *De Jure Belli et Pacis*, lib. ii., c. xv., s. vii., 1; Cambridge edition, 1853, vol. 2, p. 136—but entitled to be treated as states by foreign powers. The old feudal relations of the Dukes of Burgundy, Normandy, and Brittany to France did not, I believe, prevent these princes from being considered as sovereigns at home and abroad, and from being entitled to be represented by ambassadors at foreign courts.

Other instances might be mentioned, in which neither the payment of tribute, as in the cases of the Kingdom of the Two Sicilies to the Pope, continued till 1818 A. D., or of the King of Hungary to the Sultan, from the reign of Ferdinand the First till the Treaty of Silvarok in 1606 A. D., nor other acts of purely feudal homage,—such as the presentation of the white palfrey presented to the Pope by the King of the Two Sicilies,—See *Phill. Int. Law* (2d Ed.) vol. 2, 434, disentitled the representative of a state in these conditions to the enjoyment abroad of the privileges usually accorded to a foreign sovereign or his representatives.

It has been well said by a commentator on Martens' work:

*"La souveraineté extérieure n'est autre chose que l'indépendance de l'État vis-à-vis des autres états."* Pinheiro Ferreira on Martens, *Précis du droit des gens*, edited by Vergé, l. i. c. 3, § 23, t., i. p. 98, Paris, 1858.

It may, moreover, be that if such a status existed *de facto*, it would

not be the province of the tribunals of a foreign state to look beyond the fact, or to inquire minutely or at all into the history of its establishment. International law has no concern with the form, character, or power of a state, if, through the medium of a government, it has such an independent existence as to render it capable of entertaining international relations with other states. An apt illustration of this position is furnished by the status accorded by European Powers in more modern times to what were once commonly called the Barbary States. They had practically shaken off the Ottoman dominion. Bynkershoek describes them as "*civitates quæ certam sedem atque ibi imperium habent, et quibuscum nunc pax est nunc bellum, non secus ac cum aliis gentibus, quique propterea ceterorum principum jure esse videntur.*" Bynkershoek, *Quæstiones Juris Publici*, lib. i., c. 17; *Opera Omnia*, vol. 2, p. 223, ed. 1767. And in the year 1801 Lord Stowell fully adopted this position, and asserted that the African states had "long acquired the character of established governments, with whom we have regular treaties, acknowledging and confirming to them the relations of legal states," and he remarked that, "although their notions of international justice differ from those which we entertain, we do not on that account venture to call in question their public acts,"—that is to say, that although they are perhaps on some points entitled to a relaxed application of the principles of international law, derived exclusively from European custom, they are nevertheless treated as having the rights and duties of states by the civilized world. *The Helena*, 4 C. Rob. 3.

It is to be observed, however, that the court proceeded upon the principle that a nation with whom we had regular treaties was *de facto* acknowledged without a formal recognition to have what jurists have termed the right of a political personality (Klüber, § 25—*Droit des gens moderne de l'Europe*, par M. A. Ott, Paris, 1861, p. 35), that is, the position of a state in the great commonwealth of nations.

If, at this period, I had been obliged to decide whether the Pacha of Egypt was entitled to the privilege of a sovereign in this country, my decision would have been influenced by a regard to the *de facto* sovereign rights apparently exercised at this period by his Highness; and perhaps the analogy of a European state having absolute dominion over its own subjects with feudal subordination to another state might have been cited with effect.

Though, even in this crisis of the history of Egypt, when the independence of that country was so nearly established, it must be observed that no attempt appears to have been made on behalf of the Pacha to exercise the principal international attribute of sovereignty, namely, the *jus legationis*, to be represented by an ambassador or diplomatic agent at the court of foreign sovereigns; nor is there any reason to believe that such an attempt, if made, would have been successful.

But in the interval between 1833 A. D. and 1841 A. D. the scene is greatly changed. \* \* \*

The result, then, of the historical inquiry as to the status of his Highness the Khedive, is as follows: That in the firmans, whose authority upon this point appears to be paramount, Egypt is invariably spoken of as one of the provinces of the Ottoman Empire. That the Egyptian army is regulated as part of the military force of the Ottoman Empire. That the taxes are imposed and levied in the name of the Porte. That the treaties of the Porte are binding upon Egypt, and that she has no separate *jus legationis*. That the flag for both the army and the navy is the flag of the Porte.

All these facts, according to the unanimous opinion of accredited writers, are inconsistent and incompatible with those conditions of sovereignty which are necessary to entitle a country to be ranked as one among the great community of states.

Against this array of negative proof is to be set the solitary circumstance that the office of Khedive is hereditary. It requires but little consideration to see that this peculiarity cannot affect the question. Egypt remains a province of an empire, and does not become an empire, because her viceroy is hereditary. The viceroy does not become a sovereign prince because his sovereign permits him to transmit the viceroyalty to his descendants in the direct male line. The hereditary character does not confer on the holder, in this case, the right of making war and peace, of sending an ambassador, or of maintaining a separate military or naval force, or of governing at all, except in the name and under the authority of his sovereign.

The hereditary character of the viceroyalty may make the viceroy the chief subject of the Porte, but he is still a subject prince, and not a sovereign prince or "reigning sovereign" even "of a semi-sovereign state," according to the terms of the petition on protest.

I have one more observation to make before I leave this branch of the subject. It cannot be urged in favour of the exemption of the Charkieh, that, though she may have been erroneously claimed as a public vessel of the Egyptian government, it is substantially the same thing if she be a public vessel of the Ottoman government of which the government of Egypt is a part; because at the beginning of these proceedings I directed the Registrar to write the following letter to the ambassador of the Porte: \* \* \*

No answer has been sent to this letter, and no intervention of any sort has taken place on behalf of the Porte. Thereupon this argument occurs. It cannot be denied that for the abuse of the privilege of the sovereign or the ambassador, some remedy must be found. It has been shown that the Khedive has six or seven ships acting as merchantmen, for whom he claims the same privilege as for the Charkieh, and the number may be indefinitely increased. It has been said that the remedy is to be found in an application to the sovereign to abate the abuse.

Any such application must be made in the present instance to the Porte. But the ambassador of the Porte asserts no such claim. It is

the governor of a province of the state that insists upon the privilege. To communicate directly with the governor in this matter would be to derogate from the dignity of his sovereign, and to place in the rank of a sovereign a governor whom his own sovereign has placed in the rank of a subject.

Lastly, no treaty ever having been made with his Highness, no ambassador ever received from or sent to him, British consuls in Egypt receiving no exequatur from him, there being, in other words, no de facto recognition of his Highness as a sovereign by our government, has there been any recognition de jure of him in this capacity?

The Court of Chancery, when a plaintiff averred in his bill that a certain republic in Central America had been recognized as an independent government, put itself in communication with the Foreign Office, and after such communication, declared itself authorized to state that the republic in question had never been recognized by the government of this country, and on the ground that what was pleaded was "historically false," allowed a demurrer to the bill: *Taylor v. Barclay*, 2 Sim. 213. I have communicated with the Foreign Office, and have received the following answer to my questions, viz.: "that the Khedive has not been and is not now recognized by Her Majesty as reigning sovereign of the state of Egypt." "He is recognized by Her Majesty's government as the hereditary ruler of the province of Egypt under the supremacy of the Sultan of Turkey."

Upon all these facts I have arrived at the conclusion that independently of any other consideration, his Highness the Khedive has failed to establish his claim to exempt his vessel from the process of this court.\* \* \* \*

\* The bankruptcy which marked the reign of Ismail, the khedive of Egypt, caused the European Powers to intervene, in order to safeguard their financial interests. Ismail was summarily removed by the Porte in 1879, and was succeeded by his son, Tewfik Pasha.

A movement under an Egyptian officer, commonly called Arabi Pasha, who was later Minister of War, to free Egypt from foreign control, assumed, in 1882, the proportions of a rebellion against Tewfik and his authority. The seizure of Alexandria and the massacre of June 11, 1882, caused the British fleet to bombard the forts of the city.

In view of the gravity of the situation, a conference of ambassadors was held in Constantinople, and the Sultan was invited to quell the revolt. This he hesitated to do at the instance of Christian Powers. Great Britain decided to employ armed forces, and invited France and Italy to co-operate. They refused. Therefore, Great Britain took the initiative, landed troops to put down the disorders, and occupied Egypt.

The occupation was not intended to be permanent, but as often happens in such cases, it appeared more difficult to withdraw than to enter into occupation. Abbas Pasha, the son and successor of Tewfik, was opposed to the British occupation and submitted to a control which he could not resist. Upon the outbreak of the World War, in 1914, Great Britain felt it necessary to remove him, which it did. It did not, however, annex Egypt, but proclaimed Abbas' brother Sultan thereof, and established a protectorate on December 18, 1914. On February 28, 1922, Great Britain acknowledged the independence of Egypt upon the terms and conditions set forth in Parliamentary Papers, No. 1 (1922) pp. 29-30.

## STATE OF TEXAS v. WHITE et al.

(Supreme Court of the United States, 1868. 7 Wall. 700, 19 L. Ed. 227.)

The CHIEF JUSTICE [CHASE] delivered the opinion of the court.<sup>7</sup>

This is an original suit in this court, in which the State of Texas, claiming certain bonds of the United States as her property, asks an injunction to restrain the defendants from receiving payment from the National government, and to compel the surrender of the bonds to the State. \* \* \*

The first inquiries to which our attention was directed by counsel, arose upon the allegations \* \* \* (1), that no sufficient authority is shown for the prosecution of the suit in the name and on the behalf of the State of Texas; and (2) that the State, having severed her relations with a majority of the States of the Union, and having by her ordinance of secession attempted to throw off her allegiance to the Constitution and government of the United States, has so far changed her status as to be disabled from prosecuting suits in the National courts.

The first of these allegations is disproved by the evidence. \* \* \*

The other allegation presents a question of jurisdiction. It is not to be questioned that this court has original jurisdiction of suits by States against citizens of other States, or that the States entitled to invoke this jurisdiction must be States of the Union. But, it is equally clear that no such jurisdiction has been conferred upon this court of suits by any other political communities than such States.

If, therefore, it is true that the State of Texas was not at the time of filing this bill, or is not now, one of the United States, we have no jurisdiction of this suit, and it is our duty to dismiss it.

We are very sensible of the magnitude and importance of this question, of the interest it excites, and of the difficulty, not to say impossibility, of so disposing of it as to satisfy the conflicting judgments of men equally enlightened, equally upright, and equally patriotic. But we meet it in the case, and we must determine it in the exercise of our best judgment, under the guidance of the Constitution alone.

Some not unimportant aid, however, in ascertaining the true sense of the Constitution, may be derived from considering what is the correct idea of a State, apart from any union or confederation with other States. The poverty of language often compels the employment of terms in quite different significations; and of this hardly any example more signal is to be found than in the use of the word we are now considering. It would serve no useful purpose to attempt an enumeration of all the various senses in which it is used. A few only need be noticed.

<sup>7</sup> The statement of facts and parts of the opinion of Chief Justice Chase and the dissenting opinions of Justices Grier and Swayne are omitted.



It describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government.

It is not difficult to see that in all these senses the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state.

This is undoubtedly the fundamental idea upon which the republican institutions of our own country are established. It was stated very clearly by an eminent judge,<sup>8</sup> in one of the earliest cases adjudicated by this court, and we are not aware of anything, in any subsequent decision, of a different tenor.

In the Constitution the term state most frequently expresses the combined idea just noticed, of people, territory, and government. A state in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country.

The use of the word in this sense hardly requires further remark. In the clauses which impose prohibitions upon the States in respect to the making of treaties, emitting of bills of credit, and laying duties of tonnage, and which guarantee to the States representation in the House of Representatives and in the Senate, are found some instances of this use in the Constitution. Others will occur to every mind.

But it is also used in its geographical sense, as in the clauses which require that a representative in Congress shall be an inhabitant of the State in which he shall be chosen, and that the trial of crimes shall be held within the State where committed.

And there are instances in which the principal sense of the word seems to be that primary one to which we have adverted, of a people or political community, as distinguished from a government.

In this latter sense the word seems to be used in the clause which provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion.

<sup>8</sup> Mr. Justice Paterson, in *Penhallow v. Doane's Adm'rs*, 3 Dall. 93, 1 L. Ed. 507 (1795).

In this clause a plain distinction is made between a State and the government of a State.

Having thus ascertained the senses in which the word state is employed in the Constitution, we will proceed to consider the proper application of what has been said.

The Republic of Texas was admitted into the Union, as a State, on the 27th of December, 1845. By this act the new State, and the people of the new State, were invested with all the rights, and became subject to all the responsibilities and duties of the original States under the Constitution.

From the date of admission, until 1861, the State was represented in the Congress of the United States by her senators and representatives, and her relations as a member of the Union remained unimpaired. In that year, acting upon the theory that the rights of a State under the Constitution might be renounced, and her obligations thrown off at pleasure, Texas undertook to sever the bond thus formed, and to break up her constitutional relations with the United States.

On the 1st of February,<sup>9</sup> a convention, called without authority, but subsequently sanctioned by the legislature regularly elected, adopted an ordinance to dissolve the union between the State of Texas and the other States under the Constitution of the United States, whereby Texas was declared to be "a separate and sovereign State," and "her people and citizens" to be "absolved from all allegiance to the United States, or the government thereof."

It was ordered by a vote of the convention<sup>10</sup> and by an act of the legislature,<sup>11</sup> that this ordinance should be submitted to the people, for approval or disapproval, on the 23d of February, 1861.

Without awaiting, however, the decision thus invoked, the convention, on the 4th of February, adopted a resolution designating seven delegates to represent the State in the convention of seceding States at Montgomery, "in order," as the resolution declared, "that the wishes and interests of the people of Texas may be consulted in reference to the constitution and provisional government that may be established by said convention."

Before the passage of this resolution the convention had appointed a committee of public safety, and adopted an ordinance giving authority to that committee to take measures for obtaining possession of the property of the United States in Texas, and for removing the national troops from her limits. The members of the committee, and all officers and agents appointed or employed by it, were sworn to secrecy and to allegiance to the State.<sup>12</sup> Commissioners were at once appointed, with instructions to repair to the headquarters of General Twiggs,

<sup>9</sup> Paschal's Digest Laws of Texas, 78.

<sup>10</sup> Paschal's Digest Laws of Texas, 80.

<sup>11</sup> Laws of Texas, 1859-61, p. 11.

<sup>12</sup> Paschal's Digest, 80.

then representing the United States in command of the department, and to make the demands necessary for the accomplishment of the purposes of the committee. A military force was organized in support of these demands, and an arrangement was effected with the commanding general, by which the United States troops were engaged to leave the State, and the forts and all the public property, not necessary to the removal of the troops, were surrendered to the commissioners.<sup>18</sup>

These transactions took place between the 2d and the 18th of February, and it was under these circumstances that the vote upon the ratification or rejection of the ordinance of secession was taken on the 23d of February. It was ratified by a majority of the voters of the State.

The convention, which had adjourned before the vote was taken, reassembled on the 2d of March, and instructed the delegates already sent to the Congress of the seceding States, to apply for admission into the confederation, and to give the adhesion of Texas to its provisional constitution.

It proceeded, also, to make the changes in the State constitution which this adhesion made necessary. The words "United States," were stricken out wherever they occurred, and the words "Confederate States" substituted; and the members of the legislature, and all officers of the State, were required by the new constitution to take an oath of fidelity to the constitution and laws of the new confederacy. \* \* \*

The position thus assumed could only be maintained by arms, and Texas accordingly took part, with the other Confederate States, in the war of the rebellion, which these events made inevitable. During the whole of that war there was no governor, or judge, or any other State officer in Texas, who recognized the National authority. Nor was any officer of the United States permitted to exercise any authority whatever under the National government within the limits of the State, except under the immediate protection of the National military forces.

Did Texas, in consequence of these acts, cease to be a State? Or, if not, did the State cease to be a member of the Union?

It is needless to discuss, at length, the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States.

The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declar-

<sup>18</sup> Texas Reports of the Committee (Library of Congress), 45.

ed to "be perpetual." And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," and that "without the States in union, there could be no such political body as the United States."<sup>14</sup> Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.

Considered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must

<sup>14</sup> *Lane County v. State of Oregon*, 7 Wall. 76, 19 L. Ed. 101 (1868).

have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation.

Our conclusion therefore is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any act or declaration of any department of the National government, but entirely in accordance with the whole series of such acts and declarations since the first outbreak of the rebellion.<sup>15</sup> \* \* \*

<sup>15</sup> Some further judicial definitions of states or nations follow: "A distinction was taken at the bar between a state and the people of a state. It is a distinction I am not capable of comprehending. By a state forming a republic (speaking of it as a moral person) I do not mean the Legislature of the state, the executive of the state, or the judiciary, but all the citizens which compose that state, and are, if I may so express myself, integral parts of it; all together forming a body politic. The great distinction between monarchies and republics (at least our republics) in general is, that in the former the monarch is considered as the sovereign, and each individual of his nation as subject to him, though in some countries with many important special limitations: This, I say, is generally the case, for it has not been so universally. But in a republic, all the citizens, as such, are equal, and no citizen can rightfully exercise any authority over another but in virtue of a power constitutionally given by the whole community, and such authority, when exercised, is in effect an act of the whole community, which forms such body politic. In such governments, therefore, the sovereignty resides in the great body of the people, but it resides in them not as so many distinct individuals, but in their politic capacity only." Per Iredell, J., in *Penhallow et al. v. Doane's Administrators*, 3 Dall. 54, 93, 1 L. Ed. 507, Fed. Cas. No. 16,925 (1795).

"The terms state and nation are used in the law of nations, as well as in common parlance, as importing the same thing, and imply a body of men, united together, to procure their mutual safety and advantage by means of their union. Such a society has its affairs and interests to manage; it deliberates, and takes resolutions in common, and thus becomes a moral person, having an understanding and a will peculiar to itself, and is susceptible of obligations and laws. Vattel, 1. Nations being composed of men naturally free and independent, and who, before the establishment of civil societies, live together in the state of nature, nations or sovereign states, are to be considered as so many free persons, living together in a state of nature. Vattel, 2, § 4. Every nation that governs itself, under what form soever, without any dependence on a foreign power, is a sovereign state. Its rights are naturally the same as those of any other state. Such are moral persons who live together in a natural society, under the law of nations. It is sufficient if it be really sovereign and independent; that is, it must govern itself by its own authority and laws. We ought, therefore, to reckon in the number of sovereigns those states that have bound themselves to another more powerful, although by an unequal alliance. The conditions of these unequal alliances may be infinitely varied; but whatever they are, provided the inferior ally reserves to itself the sovereignty or the right to govern its own body, it ought to be considered an independent state. Consequently, a weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power. Tributary and feudatory states do not thereby cease to be sovereign and independent states, so long as self-government, and sovereign and independent authority is left in the administration of the state. Vattel, c. 1, pp. 16, 17." Thompson, J., in *Cherokee Nation v. State of Georgia*, 5 Pet. 1, 52, 53, 8 L. Ed. 25 (1831).

"The argument rests entirely upon an assumption which, it appears to us, is certainly groundless; the assumption that personality cannot be truly

## WILLIAMS v. BRUFFY.

(Supreme Court of the United States, 1877. 96 U. S. 176, 24 L. Ed. 716.)

Error to the Supreme Court of Appeals of the State of Virginia.

This was an action of assumpsit for certain goods sold by the plaintiffs in March, 1861, to George Bruffy, since deceased, brought against the administrator of his estate in the circuit court of Rockingham county, Virginia. The plaintiffs at the time of the sale were and still are residents of the state of Pennsylvania; and the deceased was then, and until his death, which occurred during the war, continued to be, a resident of the state of Virginia.

The defendant pleaded the general issue, and two special pleas, in one of which he averred, in substance, that Pennsylvania was one of the United States, and that Virginia was one of the states which had formed a confederation known as the Confederate States; that from some time in 1861 until some time in 1865 the government of the United States was at war with the government of the Confederate States; that on the 30th of August, 1861, the Confederate States enacted a law sequestrating the lands, tenements, goods, chattels, rights, and credits within the Confederate States, and every right and interest therein, held by or for any alien enemy since the 21st of May, 1861, excepting such debts as may have been paid into the treasury of one of the Confederate States prior to the passage of the law, and making it the duty of every attorney, agent, former partner, trustee, or other person holding or controlling any such property or interest, to inform the receiver of the Confederate States of the fact, and to render an account thereof, and, so far as practicable, to place the same in the hands of the receiver, and declaring that thereafter such person should be acquitted of all responsibility for the property thus turned over, and that any person failing to give the information mentioned should be deemed guilty of a high misdemeanor; that on the 1st of January, 1862, this law being in force, the defendant's intestate paid over to the re-

predicated of a republic. A republic, acknowledged as such by our own government, is an independent sovereign power; in other words, a state, just as certainly, and in the same sense as a monarchy, limited or absolute; and every state is a person, an artificial person in a more extensive and far higher sense than an ordinary corporation. A state, whatever may be the form of its internal government, and by whatever appellation it may be known, is, in the language of Vattel, 'a moral person, having an understanding and a will, capable of possessing and acquiring rights, and of contracting and fulfilling obligations.' Vattel *Droit des Gens*, liv. 1, c. 1, § 4. Vide, also, Wheaton's *Elem. of Internat. Law*, vol. 1, c. 2, §§ 1 and 2.

"The definition given by other writers on the law of nations is substantially the same, and, indeed, it is upon the truth of this definition that the whole science of international law is founded, since it is evident, that it is only upon persons, having an understanding and a will, that law can operate. Every valid law implies the duty of obedience, and it is only by persons that obedience can be rendered." Duer, J., in *Republic of Mexico v. De Arangoiz*, 12 N. Y. Super. Ct. 634, 636, 637 (1856).

ceiver of the Confederate States the amount claimed by the plaintiffs, and that by virtue of such payment he is discharged from the debt. The second special plea is substantially like the first, with the further averment that the debt due to the plaintiffs was sequestrated by the decree of a Confederate district court in Virginia, upon the petition of the receiver, who afterwards collected it with interest. <sup>a</sup>

The plaintiffs demurred to these pleas; but the demurrers were overruled. The case was then submitted to the court upon certain depositions and an agreed statement of facts. They established the sale and delivery of the goods, the residence of the plaintiffs and of the deceased during the war, and the payment by the latter of the debt in suit to the sequestrator of the Confederate government under a judgment of a Confederate district court. The court below gave judgment for the defendant; and the subsequent application of the plaintiffs to the Supreme Court of Appeals for a supersedeas was denied, that court being of opinion that the judgment was plainly right. Such a denial is deemed equivalent to an affirmance of the judgment, so far as to authorize a writ of error from this court to the Court of Appeals. \* \* \*

Mr. Justice FIELD delivered the opinion of the court.

The question for our determination arises upon the special pleas, and relates to the sufficiency of the facts therein set forth as a defence; that is, to the effect of the sequestration of the debt by the Confederate government as a bar to the action.

There is, however, a preliminary question to be considered. It is contended by the defendant that the record presents no ground for the exercise of our appellate jurisdiction. \* \* \*

We have no doubt of our jurisdiction, and we proceed, therefore, to the merits of the case.

Treating the Confederate enactment as a law of the state which we can consider, there can be no doubt of its invalidity. The constitutional provision prohibiting a state from passing a law impairing the obligation of contracts, equally prohibits a state from enforcing as a law an enactment of that character, from whatever source originating. And the constitutional provision securing to the citizens of each state the privileges and immunities of citizens in the several states could not have a more fitting application than in condemning as utterly void the act under consideration here, which Virginia enforced as a law of that commonwealth; treating the plaintiffs as alien enemies because of their loyalty to the Union, and decreeing for that reason a sequestration of debts due to them by its citizens.

The defendant, however, takes the ground that the enactment of the Confederate States is that of an independent nation, and must be so treated in this case. His contention is substantially this: That the Confederate government, from April, 1861, until it was overthrown in 1865, was a government de facto, complete in all its parts, exercising jurisdiction over a well-defined territory, which included that portion

of Virginia where the deceased resided, and as such de facto government it engaged in war with the United States, and possessed, and was justified in exercising within its territorial limits, all the rights of war which belonged to an independent nation, and, among them, that of confiscating debts due by its citizens to its enemies.

In support of this position, reference is made to numerous instances of de facto governments which have existed in England and in other parts of Europe and in America; to the doctrines of jurists and writers on public law respecting the powers of such governments, and the validity accorded to their acts; to the opinion of this court in *Thorington v. Smith* and in the *Prize Cases*; to the concession of belligerent rights to the Confederate government; and to the action of the state during our own revolutionary war and the period immediately following it.

We do not question the doctrines of public law which have been invoked, nor their application in proper cases; but it will be found, upon examination, that there is an essential difference between the government of the Confederate States and those de facto governments. The latter are of two kinds. One of them is such as exists after it has expelled the regularly constituted authorities from the seats of power and the public offices, and established its own functionaries in their places, so as to represent in fact the sovereignty of the nation. Such was the government of England under the Commonwealth established upon the execution of the king and the overthrow of the loyalists. As far as other nations are concerned, such a government is treated as in most respects possessing rightful authority; its contracts and treaties are usually enforced; its acquisitions are retained; its legislation is in general recognized; and the rights acquired under it are, with few exceptions, respected after the restoration of the authorities which were expelled. All that counsel say of de facto governments is justly said of a government of this kind. But the Confederate government was not of this kind. It never represented the nation, it never expelled the public authorities from the country, it never entered into any treaties, nor was it ever recognized as that of an independent power. It collected an immense military force, and temporarily expelled the authorities of the United States from the territory over which it exercised an usurped dominion: but in that expulsion the United States never acquiesced; on the contrary, they immediately resorted to similar force to regain possession of that territory and re-establish their authority, and they continued to use such force until they succeeded. It would be useless to comment upon the striking contrast between a government of this nature, which, with all its military strength, never had undisputed possession of power for a single day, and a government like that of the Commonwealth of England under Parliament or Cromwell.

The other kind of de facto governments, to which the doctrines cited relate, is such as exists where a portion of the inhabitants of a country have separated themselves from the parent state and established an



independent government. The validity of its acts, both against the parent state and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed, and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation. Such was the case of the state governments under the old Confederation on their separation from the British crown. Having made good their declaration of independence, everything they did from that date was as valid as if their independence had been at once acknowledged. Confiscations, therefore, of enemy's property made by them, were sustained as if made by an independent nation. But if they had failed in securing their independence, and the authority of the king had been re-established in this country, no one would contend that their acts against him, or his loyal subjects, could have been upheld as resting upon any legal foundation.

No case has been cited in argument, and we think none can be found, in which the acts of a portion of a State unsuccessfully attempting to establish a separate revolutionary government have been sustained as a matter of legal right. As justly observed by the late Chief Justice in *Shortridge & Co. v. Macon*, decided at the circuit, and, in all material respects, like the one at bar: "Those who engage in rebellion must consider the consequences. If they succeed, rebellion becomes revolution, and the new government will justify its founders. If they fail, all their acts hostile to the rightful government are violations of law, and originate no rights which can be recognized by the courts of the nation whose authority and existence have been alike assailed." *Chase's Decisions*, 136.

When a rebellion becomes organized, and attains such proportions as to be able to put a formidable military force in the field, it is usual for the established government to concede to it some belligerent rights. This concession is made in the interests of humanity, to prevent the cruelties which would inevitably follow mutual reprisals and retaliations. But belligerent rights, as the terms import, are rights which exist only during war; and to what extent they shall be accorded to insurgents depends upon the considerations of justice, humanity, and policy controlling the government. The rule stated by Vattel, that the justice of the cause between two enemies being by the law of nations reputed to be equal, whatsoever is permitted to the one in virtue of war is also permitted to the other, applies only to cases of regular war between independent nations. It has no application to the case of a war between an established government, and insurgents seeking to withdraw themselves from its jurisdiction or to overthrow its authority. Halleck's *Int. Law*, c. 14, sect. 9. The concession made to the Confederate government in its military character was shown in the treatment of captives as prisoners of war, the exchange of prisoners, the recognition of flags of truce, the release of officers on parole, and other

arrangements having a tendency to mitigate the evils of the contest. The concession placed its soldiers and military officers in its service on the footing of those engaged in lawful war, and exempted them from liability for acts of legitimate warfare. But it conferred no further immunity or any other rights. It in no respect condoned acts against the government not committed by armed force in the military service of the rebellious organization; it sanctioned no hostile legislation; it gave validity to no contracts for military stores; and it impaired in no respect the rights of loyal citizens as they had existed at the commencement of hostilities. Parties residing in the insurrectionary territory, having property in their possession, as trustees or bailees of loyal citizens, may in some instances have had such property taken from them by force; and in that event they may perhaps be released from liability. Their release will depend upon the same principles which control in ordinary cases of violence by an unlawful combination too powerful to be successfully resisted.

But, debts not being tangible things subject to physical seizure and removal, the debtors cannot claim release from liability to their creditors by reason of the coerced payment of equivalent sums to an unlawful combination. The debts can only be satisfied when paid to the creditors to whom they are due, or to others by direction of lawful authority. Any sum which the unlawful combination may have compelled the debtors to pay to its agents on account of debts to loyal citizens cannot have any effect upon their obligations; they remain subsisting and unimpaired. The concession of belligerent rights to the rebellious organization yielded nothing to its pretensions of legality. If it had succeeded in its contest, it would have protected the debtor from further claim for the debt; but, as it failed, the creditor may have recourse to the courts of the country as prior to the rebellion. It would be a strange thing if the nation, after succeeding in suppressing the rebellion and re-establishing its authority over the insurrectionary district, should, by any of its tribunals, recognize as valid the attempt of the rebellious organization to confiscate a debt due to a loyal citizen as a penalty for his loyalty. Such a thing would be unprecedented in the history of unsuccessful rebellions, and would rest upon no just principle.

The immense power exercised by the government of the Confederate States for nearly four years, the territory over which it extended, the vast resources it wielded, and the millions who acknowledged its authority, present an imposing spectacle well fitted to mislead the mind in considering the legal character of that organization. It claimed to represent an independent nation and to possess sovereign powers; and as such to displace the jurisdiction and authority of the United States from nearly half of their territory, and, instead of their laws, to substitute and enforce those of its own enactment. Its pretensions being resisted, they were submitted to the arbitrament of war. In that contest the Confederacy failed; and in its failure its pretensions were dis-

sipated, its armies scattered, and the whole fabric of its government broken in pieces. The very property it had amassed passed to the nation. The United States during the whole contest, never for one moment renounced their claim to supreme jurisdiction over the whole country, and to the allegiance of every citizen of the republic. They never acknowledged in any form, or through any of their departments, the lawfulness of the rebellious organization or the validity of any of its acts, except so far as such acknowledgment may have arisen from conceding to its armed forces in the conduct of the war the standing and rights of those engaged in lawful warfare. They never recognized its asserted power of rightful legislation.

There is nothing in the language used in *Thorington v. Smith*, 8 Wall. 1, 19 L. Ed. 361, which conflicts with these views. In that case, the Confederate government is characterized as one of paramount force, and classed among the governments of which the one maintained by Great Britain in Castine, from September, 1814, to the treaty of peace in 1815, and the one maintained by the United States in Tampico, during our war with Mexico, are examples. Whilst the British retained possession of Castine, the inhabitants were held to be subject to such laws as the British government chose to recognize and impose. Whilst the United States retained possession of Tampico, it was held that it must be regarded and respected as their territory. The Confederate government, the court observed, differed from these temporary governments in the circumstance that its authority did not originate in lawful acts of regular war: but it was not, on that account, less actual or less supreme; and its supremacy, while not justifying acts of hostility to the United States, "made obedience to its authority in civil and local matters, not only a necessity, but a duty." All that was meant by this language was, that as the actual supremacy of the Confederate government existed over certain territory, individual resistance to its authority then would have been futile, and, therefore, unjustifiable. In the face of an overwhelming force, obedience in such matters may often be a necessity, and, in the interests of order, a duty. No concession is thus made to the rightfulness of the authority exercised.

Nor is there anything in the decision of this court in the Prize Cases which militates against the views expressed. It was there simply held, that when parties in rebellion had occupied and held in a hostile manner a portion of the territory of the country, declared their independence, cast off their allegiance, organized armies, and commenced hostilities against the government of the United States, war existed; that the President was bound to recognize the fact, and meet it without waiting for the action of Congress; that it was for him to determine what degree of force the crisis demanded, and whether the hostile forces were of such magnitude as to require him to accord to them the character of belligerents; and that he had the right to institute a blockade of ports in their possession, which neutrals were bound to recognize.

It was also held that as the rebellious parties had formed a confederacy, and thus become an organized body, and the territory dominated by them was defined, and the President had conceded to this organization in its military character belligerent rights, all the territory must be regarded as enemy's territory, and its inhabitants as enemies, whose property on the high seas would be lawful subjects of capture. There is nothing in these doctrines which justified the Confederate States in claiming the status of foreign states during the war, or in treating the inhabitants of the loyal states as alien enemies.

Nor is there anything in the citations so often made from Wheaton and Vattel, as to the rights of contending parties in a civil war, which, if properly applied, militates against these views. After stating that, according to Grotius, a civil war is public on the side of the established government, and private on the part of the people resisting its authority, Wheaton says: "But the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations." Wheaton, *Int. Law*, sect. 296. The writer is here referring to the consideration with which foreign nations treat a civil war in another country. So far as they are concerned, the contending parties to such a war, once recognized as belligerents, are regarded as entitled to all the rights of war. As between the belligerent parties, foreign nations, from general usage, are expected to observe a strict neutrality. The language used has no reference to the rights which a sovereign must concede, or is expected to concede, to insurgents in armed rebellion against his authority. Upon the doctrine stated in the citation the United States acted towards the contending parties in the civil war in South America. In speaking on this subject, in the case of *The Santissima Trinidad*, 7 Wheat. 283, 5 L. Ed. 454, this court said: "The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties, and to allow to each the same rights of asylum and hospitality and intercourse. Each party is, therefore, deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights. We cannot interfere to the prejudice of either belligerent, without making ourselves a party to the contest, and departing from the position of neutrality."

Vattel says: "A civil war breaks the bands of society and government, or, at least, suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as thenceforward constituting at least for a time, two separate bodies, two distinct societies. \* \* \* On earth they have no common superior. They stand, therefore, in precisely the same predicament as two nations who engage in a contest,

and, being unable to come to an agreement, have recourse to arms. This being the case, it is very evident that the common laws of war—those maxims of humanity, moderation, and honor, which we have already detailed in the course of this work—ought to be observed by both parties in every civil war. For the same reasons which render the observance of those maxims a matter of obligation between state and state, it becomes equally and even more necessary in the unhappy circumstance of two incensed parties lacerating their common country.” Vattel, *Law of Nations*, p. 425. All that Vattel means by this language is, that in a civil war the contending parties have a right to claim enforcement of the same rules which govern the conduct of armies in wars between independent nations—rules intended to mitigate the cruelties which would attend mutual reprisals and retaliations. He has no reference to the exercise of legislative power by either belligerent in furtherance of its cause. The validity of such legislation depends not upon the existence of hostilities, but upon the ultimate success of the party by which it is adopted.

It is unnecessary to pursue the subject further. Whatever *de facto* character may be ascribed to the Confederate government consists solely in the fact, that it maintained a contest with the United States for nearly four years, and dominated for that period over a large extent of territory. When its military forces were overthrown, it utterly perished, and with it all its enactments. Whilst it existed, it was regarded, as said in *Thorington v. Smith*, “as simply the military representative of the insurrection against the authority of the United States.” 8 Wall. 1, 19 L. Ed. 361; *Keppel’s Adm’rs v. Petersburg Railroad Co.*, Chase, 167, Fed. Cas. No. 7722.

Whilst thus holding that there was no validity in any legislation of the Confederate States which this court can recognize, it is proper to observe that the legislation of the states stands on very different grounds. The same general form of government, the same general laws for the administration of justice and the protection of private rights, which had existed in the states prior to the rebellion, remained during its continuance and afterwards. As far as the acts of the states did not impair, or tend to impair, the supremacy of the national authority, or the just rights of citizens under the Constitution, they are, in general, to be treated as valid and binding. As we said in *Horn v. Lockhart*, 17 Wall. 570, 21 L. Ed. 657: “The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated, precisely as in time of peace. No one, that we are aware of, seriously questions the validity of judicial or legislative acts in the insurrectionary states touching these and kindred subjects, where they were not hostile in their

purpose or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the Constitution." The same doctrine has been asserted in numerous other cases.

It follows from the views expressed that the state court erred in overruling the demurrers to the special pleas. Those demurrers should have been sustained, and the plaintiffs should have had judgment upon the agreed statement of facts for the amount of their claim, with interest from its maturity, deducting in the computation of time the period between the 27th of April, 1861, at which date the war is considered to have commenced in Virginia, and the 2d of April, 1866, when it is deemed to have closed in that state. *The Protector*, 12 Wall. 700, 20 L. Ed. 463; *Brown v. Hiatts*, 15 Wall. 177, 21 L. Ed. 128.

The action of the Court of Appeals of Virginia in refusing a supersedeas of the judgment of the circuit court must, therefore, be reversed, and the cause remanded for further proceedings in accordance with this opinion and it is

So ordered.<sup>18</sup>

<sup>18</sup> See *Keith v. Clark*, 97 U. S. 454, 24 L. Ed. 1071 (1878), holding that the state of Tennessee, notwithstanding its attempt to secede, remained a state of the Union, and that its legislation during the period of secession was valid, in so far as it was not contrary to the Constitution of the United States.

In *Baldy v. Hunter*, 171 U. S. 388, 18 Sup. Ct. 890, 43 L. Ed. 208 (1897), Mr. Justice Harlan says (after an elaborate enumeration and discussion of the leading cases dealing with the status of Confederate States): "From these cases it may be deduced that the transactions between persons actually residing within the territory dominated by the government of the Confederate States were not invalid for the reason only that they occurred under the sanction of the laws of that government or of any local government recognizing its authority; that, within such territory, the preservation of order, the maintenance of police regulations, the prosecution of crimes, the protection of property, the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer and descent of property, and similar or kindred subjects were, during the war, under the control of the local governments constituting the so-called Confederate States; that what occurred or was done in respect of such matters under the authority of the laws of these local de facto governments should not be disregarded or held to be invalid merely because those governments were organized in hostility to the Union established by the national Constitution; this, because the existence of war between the United States and the Confederate States did not relieve those who were within the insurrectionary lines from the necessity of civil obedience, nor destroy the bonds of society, nor do away with civil government or the regular administration of the laws, and because transactions in the ordinary course of civil society as organized within the enemy's territory, although they may have indirectly or remotely promoted the ends of the de facto or unlawful government organized to effect a dissolution of the Union, were without blame 'except when proved to have been entered into with actual intent to further invasion or insurrection'; and that judicial and legislative acts in the respective states composing the so-called Confederate States should be respected by the courts if they were not hostile in their purpose or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the Constitution."

Generally de facto judgments are valid, as in the case of a Spanish judgment made in Louisiana after the cession, but before delivery of possession to the United States; for it was the judgment of a competent Spanish tribunal, having jurisdiction of the case, and rendered whilst the country, though ceded, was, de facto, in the possession of Spain, and subject to Spanish laws,

## GUSTAVE GAULTIER et al.

(Court of Cassation of France, 1911. 116 Bulletin des Arrêts de la Cour de Cassation Rendus en Matière Criminelle, 453.)

The question of the status of the Papacy was finally presented in a juridical way in the following manner:

On July 4, 1909, upon the occasion of the beatification of Jeanne d'Arc, flags of white and yellow, the Pontifical colors, were flown in certain localities from windows of various buildings which faced the street. In the town of Mans, prosecutions were begun for the violation of a decree of the prefect of La Sarthe, of February 16, 1894. The persons accused of infringement of this decree were prosecuted before the Police Court of Mans. They were acquitted by a judgment of this Court under date of July 26, 1909.<sup>17</sup>

THE COURT. Whereas, M. X. has been prosecuted for having displayed, on July 4 last, from the window of his house overlooking the public street, flags of the Holy See, and for having thus violated the Prefectoral Decree of February 16, 1894, reading as follows:

"Article 1. The displaying and the bearing of flags, either on public streets or in buildings, grounds and places, freely open to the public are interdicted in the Department of La Sarthe.

"Article 2. The flags of French or foreign national colors and those serving as insignia for authorized or approved societies are excepted from this measure;"

Whereas, all the citizens, without exception, are subject to the laws regularly promulgated, as well as to the regulations legally issued by the administrative authorities;

Whereas, the application of these regulations should be restricted to the cases for which they provide, and, whereas, the present case is concerned solely with determining whether the Pontifical flag should be included or not in the category of flags exceptionally authorized;

Whereas, the personal flag of a sovereign enjoys the same privilege as that of a State;

Whereas, until the law of December 9, 1905, was passed, the quality of the sovereign was, without dispute, accorded to the Pope by all foreign Powers, with all the prerogatives attached to sovereignty, among them that of having a special flag with colors distinctive of

and such judgments, so far as they affect the private rights of the parties thereto, must be deemed valid. *Keene v. McDonough*, 8 Pet. 308, 8 L. Ed. 955 (1834); *Trevino v. Fernandez*, 13 Tex. 630, 662, 666 (1855); *Daniel v. Hutcheson*, 86 Tex. 51, 22 S. W. 938 (1898), affirming the validity of judgments of military courts established in Texas during the reconstruction period.

<sup>17</sup> Statement taken from an article by Gilbert Gidel, "Quelques Idées sur la Condition Internationale de la papauté," in *Revue Générale de Droit International Public*, tome XVIII, p. 589 (1911).

The text of the judgment is likewise taken from this article. *Id.* 595, 596, note.

this sovereignty, and whereas, up to the same period it is just as certain that this flag enjoyed the exception provided for by the aforementioned decree;

Whereas, the law of December 9, 1905, which regulates a question of internal politics, has not had and could not have the effect of modifying the status previously acquired by the Holy See, and still less the effect of suppressing ipso facto the papacy and the character of sovereign attached to its representative;

Whereas, the latter, moreover, has not lost this character with regard to persons who have continued to be officially represented before it, and before whom it has not ceased to be officially represented;

Whereas, the suppression of diplomatic relations between France and the Papacy, which intervened after this law, cannot have any other consequences than those which would result from the suppression and interruption of such relations between France and any other foreign Power, a suppression or interruption which would not suffice to cause this Power to disappear from among the nations and to cause the colors which belong to it to be considered in future as non-existent, and, in consequence, interdicted;

Whereas, consequently, the Pontifical flag should continue to be included among the foreign flags enjoying the exception provided for by Article 2 of the Prefectoral Decree of February 16, 1894, and whereas, in displaying it the accused could not be guilty of violating the said decree;

For these reasons:

Dismisses the complaint against X. and acquits him without costs.

From this judgment an appeal was taken to the Court of Cassation, which tribunal, on May 5, 1911, delivered the following judgment:

THE COURT, having heard Maitre La Borde, councillor, in his report, Maitre Félix Bonnet, practicing attorney, in his statements, and M. Baudouin, attorney general, in his motions:

In view of the eighteen appeals made by the office of the public prosecutor before the Police Court of Mans from eighteen judgments, dated July 26, 1909, by virtue of which this Court pronounced the release of: \* \* \*

Whereas, the judgments, rendered on the same day, are conceived in the same terms and impugned for the same reasons;

Joining the appeals and rendering judgment by one sole decree;

In view of the petition of the office of the public prosecutor before the Police Court of Mans;

In view of the Decree of the Prefect of La Sarthe of February 16, 1894, reading as follows:

"Article 1. The displaying and the bearing of flags, either on public streets or in buildings, grounds and places, freely open to the public, are interdicted in the Department of La Sarthe.



"Article 2. The flags of France or foreign national colors and those serving as insignia for authorized or approved societies are excepted from this measure;"

In view also of Article 471, No. 15, of the Penal Code:

Whereas, the Pontifical flag of white and yellow, is no longer a flag of foreign national colors; whereas, in fact, the sovereignty of which it was formerly the symbol, has ceased to exist as a result of the re-union of the Pontifical states with the Kingdom of Italy;

Whereas, on the other hand, the Pope does not represent a society in the sense of Article 2 of the aforementioned decree; whereas, his flag cannot, therefore, be considered as the insignia of an authorized or approved society;

Whereas, it is established by the impugned judgments that the accused displayed upon a public street flags of white and yellow; whereas, their release is based on the fact that these flags were included in the exception pronounced by Article 2 of the Decree which served as a basis of the prosecutions;

Whereas, in deciding thus, the police judge has falsely applied this decree and violated Article 471, No. 15, of the Penal Code;

For these reasons,

Quashes and annuls the eighteen judgments of the Police Court of Mans, mentioned at the beginning of the present decree; and refers the cases and the accused for a new decision to the Police Court of La Flèche, designated for this purpose by special deliberation held in the Council Chamber.

Orders, et cetera.

Thus judged and pronounced, et cetera. Criminal Chamber.<sup>18</sup>

<sup>18</sup> The Court of Appeal of La Flèche, to which the case was sent for decision by the Court of Cassation, in accordance with its opinion reversed the decision. It did not, however, decide the question upon its merits. It found as a fact, that the prefect's decree had not been published, as was required by law, and that because of the lack of publication, the defendants were not guilty of its violation.

For the text of this decision see Professor Gidel's article in *Revue Générale de Droit International Public*, Tome XVIII (1911) pp. 597, 598, note.

The international status of the Papacy has given rise to much discussion and controversy. For literature on the subject see also Donnedieu de Vabres, "La Souveraineté du Pape et la Séparation des Eglises et de l'Etat," *ibid.*, Tome XXI (1914) p. 339; "Saint-Siège—Guerre de 1914—Emploi international du drapeau de la Papauté. Transport des représentants diplomatiques du Saint-Siège sur un navire battant pavillon pontifical," *Chronique des faits internationaux*, *ibid.*, Tome XXIII (1916) p. 606.

## APPEAL OF CHESNELONG.

(Court of Cassation of France, 1913. 118 Bulletin des Arrêts de la Cour de Cassation Rendus en Matière Criminelle, 557.)

On a similar statement of facts,

The Police Court of Sens, sitting in appeal, has rendered at the public hearing of December 18, 1912, the judgment, the tenor of which is as follows:

On the matter of publicity: Whereas, the Prefectoral Decree of February 17, 1894, could be executory at Sens only on condition that it was published there;

Whereas, since this decree does not contain the injunction that it be published, and since the fact of its publication is formally denied, it was incumbent upon the office of the public prosecutor to present proof to that effect;

Whereas, its insertion in the collection of the Administrative Records of the Prefecture of Yonne, its entry at its date upon the Register of the Prefectoral Decrees preserved in the office of the Mayor of Sens, the production of a poster printed at Auxerre, in February, 1894, and the certificate of posting issued by the Mayor of Sens, prove that the said decree was published in the customary form;

Whereas, the line of reasoning which consists of maintaining that the insertion of a decree in the Collection of Administrative Records of the Department could not be considered as peremptory, the entry in the Mayor's office upon the Register of Prefectoral Decrees, and its printing in the form of posters tend only to prove that the decree was brought to the knowledge of the Mayor;

Whereas, since this result was attained by the execution of the first of these formalities, the two others have no other purpose than that of bringing the provisions of the decree to the knowledge of all;

Whereas, the insertion of the Decree of February 17, 1894, into the Register of Decrees, both at the Prefecture and at the office of the Mayor of Sens, is not disputed;

Whereas, it was not incumbent upon the office of the public prosecutor to prove that the poster produced at the pleadings is taken from the archives of the Mayor's office, its production having for sole object the establishment of the fact that posters were indeed printed in the principal town of the Department in February 1894, for the purpose of publishing the Prefectoral Decree;

Whereas, it would be inadmissible to consider that posters printed by the direction of the Prefectoral Administration did not reach their ordinary destination, that is to say, were not transmitted to all the Mayors of the Department and that the latter, conformable to the established customs, did not cause them to be posted in the places intended for that purpose;

Whereas, the certificate of posting is based not upon the personal recollection of the Mayor of Sens, but upon the administrative customs regarding the publication of Prefectoral Decrees at Sens;

Whereas, finally, no material proof of the posting of a poster of eighteen years ago can be demanded, lest all decrees posted a number of years ago should be considered as inexecutable and bereft of sanction;

Whereas, M. Chesnelong maintains, to no avail, that "all of these alleged presumptions could not countervail the decisive proof to the contrary resulting from the fact that the Decree of February 17, 1894, is not mentioned upon the posting Register of the office of the Mayor of Sens";

Whereas, in fact no such posting Register exists at Sens, but only a register mentioning "all publications made either with the accompaniment of a drum or with that of a trumpet," which, consequently, cannot mention a decree intended to be published by means of posting;

Whereas, this intention results incontestably from the fact that the decree was printed in the form of posters.

On the Application of the Decree of February 17, 1894, to the facts of the Arraignment:

Whereas in penal matters restrictive interpretation is necessary;

Whereas, the Decree of February 17, 1894, interdicts in a general way the displaying and the bearing of flags; whereas, no provision of this decree deals especially, as is asserted by the appellant, with the exhibition of the red flag, or indicates that it constitutes a momentary measure intended to terminate with the circumstances that motivated it;

Whereas, the said decree excepts from the interdiction only "the flags of the French or foreign national colors and those serving as the insignia of authorized or approved societies";

Whereas, the flag of white and yellow, the national emblem of the former Pontifical States, cannot be included in this exception; whereas, in fact, these States have ceased to exist as a result of their annexation to the Kingdom of Italy; whereas, even if, contrary to the principles of international law, an extensive interpretation, placing the personal colors of a sovereign upon the same basis as those of foreign countries, were admitted, it would still be necessary, contrary to historical truth, to regard the white and yellow emblem as the personal flag of the Pope, and to attribute to the latter the character of a sovereign;

Whereas, there is no doubt that since the disappearance of the Pontifical States in September, 1870, the Pope has lost the usual attributes of sovereignty, and whereas, a Pontifical State no longer exists;

Whereas, the Papacy does in fact no longer possess either territory, an army or subjects; whereas, it no longer possesses the right of civil

jurisdiction, and whereas, all matters pertaining to the civil status of the inhabitants of the Vatican come within the province of the civil authorities of the Kingdom of Italy;

Whereas, the Law of Guarantees has not conferred upon the Pope the sovereign right of international law, which alone confers upon those invested therewith the quality which this right attributes to the real sovereigns;

Whereas, according to the terms of the Decree of October 9, 1870, and of the Law of Guarantees of May 13, 1871, the Pope has only the usufruct of the Pontifical residences which, save certain restrictions relative to the "dignity, inviolability, and personal prerogatives" of the Pope in his capacity as Chief of the Catholic Church, remain subject to the Italian laws;

Whereas, the Law of Guarantees does not even admit the extraterritoriality of the places occupied by the Pope;

Whereas, if the internal legislation of the Italian States confers upon the Pope certain personal privileges which ordinarily form the appenage of sovereignty, particularly the right of negative and passive legation, which he exercises under quite exceptional conditions, his representatives not being real diplomatic agents and concordats not being comparable to the treaties between nations, it remains none the less true that from the international point of view the Pope must no longer be considered as a Chief of State;

Whereas, under these circumstances, the Pontifical flag, in so far as it would be the symbol of a State or the insignia of a Chief of State, has ceased to exist, and whereas, any element which might remove the said emblem from the interdiction formulated by the Prefectoral Decree, which alone might make it either a national flag or the insignia of an authorized or recognized society, is totally lacking;

For these reasons,

Adhering for the rest to the reasons of the first judge,

Confirms the judgment of the Police Court of Sens, under date of July 4, 1912, from which appeal has been made, declares that this judgment shall be given its full and complete execution, and condemns the appellant to all the costs of the action.

From this judgment an appeal was taken to the Court of Cassation, which tribunal, on June 12, 1913, delivered the following judgment:

THE COURT, having heard the councillor Georges Lecherbonnier, in his report, Maitre Mihura, attorney, in his statements, and the attorney general Rambaud, in his motions;

On the first plea, based upon the violation of Articles 471, § 15, of the Penal Code, and 7 of the Law of April 20, 1810, to the effect that the impugned judgment declared executory a prefectoral decree, the publication of which was disputed, without the adduction of the proof

of the said publication on the part of the office of the public prosecutor.

Whereas, since the prefectoral decrees become binding only after they have been published or posted in the customary form, this publication can be established by any means of proof;

- Whereas, in the present case, the impugned judgment deduced the proof of publication from the existence of the draft of a poster produced by the office of the public prosecutor, as coming from the archives of the commune of Sens, and, on the other hand, from the certificate of the Mayor of this commune, attesting that the said decree was there posted;

Whereas, in applying thus to presumptions which it has considered precise and harmonious, the proof of the disputed publication, the Court has only made legitimate use of a sovereign power of evaluation, which is beyond the control of the Court of Cassation.

On the second plea, based upon the violation of Articles 153, 154, 155, 176 and 189, of the Code of Criminal Examination, to the effect that the impugned judgment is based upon information which it did not draw from the examination and the pleadings, and which could not be discussed in the presence of both parties:

Whereas, the plea is deficient in fact; whereas, if the judgment retained, for the purpose of establishing the publication of the decree, certain statements which would have been the subject of a report drawn up by the police commissioner subsequent to the judgment of the Police Court, these statements were already included in the judgment of this Court and were discussed in the presence of both parties.

On a third plea, based upon the violation and the false interpretation of the principles of international law, to the effect that the impugned judgment condemned the petitioner for having flown the Pontifical flag in contravention of the Prefectoral Decree of February 17, 1894, while, on the one hand, the exception provided by this decree evidently included the flags of international persons, Article 2 which provided for this exception being not a penal provision, but a provision derogatory to a penal provision, the restrictive interpretation of which did not appear and the expression "flags of foreign national colors" having on the contrary to be interpreted with the breadth recognized to it by international courtesy and demanded by the good relations between persons of international law; while, on the other hand, the flag flown by the petitioner is the Pontifical flag; while the Pope continues to be a moral person of international law and while neither the rupture of diplomatic relations which occurred on July 29, 1904, nor the Law of Separation of December 19, 1905, have deprived him of this capacity with regard to the French Republic:

Whereas, the Decree of the Prefect of Yonne of February 17, 1894, of which it has made application, interdicts the displaying and the bearing of flags on a public street; whereas, it excepts from this measure

only the flags of French or foreign national colors and those serving as the insignia of authorized or approved societies; whereas, this precise provision does not admit of any interpretation;

Whereas, the Pontifical flag of white and yellow is no longer a flag of foreign national colors; whereas, in fact the sovereignty of which it was formerly the symbol has ceased to exist as a result of the reunion of the Pontifical States with the Kingdom of Italy; whereas, on the other hand, the Pope does not represent a society in the sense of the aforementioned decree: whereas, his flag can not, therefore, be considered as the insignia of an authorized or approved society;

Whereas, under these circumstances, since the contravention is characterized, it is not incumbent upon the Court to determine whether the Pope continues to be a person of international law or whether he has been deprived of this capacity, either by the rupture of diplomatic relations or by the Law of Separation of Churches and State.<sup>19</sup>

Wherefrom it follows that the plea could not be supported:

For these reasons,

Rejects the appeal from the judgment of the Police Court of Sens of December 18, 1912;

<sup>19</sup> For a careful statement of the legal status of the Papacy, see *Municipality of Ponce v. Roman Catholic Apostolic Church in Porto Rico*, 210 U. S. 296, 28 Sup. Ct. 737, 52 L. Ed. 1068 (1908). Whether the Holy See is or is not a state in international law, the Pope is still recognized as a sovereign by many of the powers of the world, which receive from him diplomatic representatives in the person of either a nuncio or a legate, or possibly in some other capacity, and which powers also accredit to him certain diplomatic representatives.

"With all such arrangements this government abstains from interference or criticism. It is the right of those powers to determine such questions for themselves; and when one of them, at whose court this government has a representative, receives a representative from the Pope, of higher rank than that of the representative of the United States, it becomes the duty of the latter to observe toward the Pope's representative the same courtesies and formality of the first visit, prescribed by the conventional rules of intercourse and ceremonial, and of the precedence of diplomatic agents, which have been adopted, and almost invariably acted upon, for the last sixty years." Mr. Fish, Secretary of State, to Mr. Cushing, Minister to Spain, June 4, 1875. *Foreign Relations of the United States, 1875*, pp. 1119, 1120 (John Bassett Moore, *A Digest of International Law*, vol. 1, p. 39 [1906]).

It appears that in the spring of 1916, after Germany had extended its submarine operations to the Mediterranean, the Pope (Benedict XV) appointed new Apostolic Nuncios to Belgium, Colombia and the Argentine Republic. In order that they might arrive safely at their respective posts, the Holy See opened negotiations with Germany. The imperial authorities declared it to be impossible to guarantee security to the diplomatic agents of the Vatican if they traveled on neutral ships, as these were for one reason or other exposed to the same danger as enemy vessels. The only way was, in their opinion, to display the papal flag from the ship transporting the papal diplomats, and on this condition the German government engaged to respect the ship. Thereupon the Pope secured the consent of Spain, the most Catholic of the then neutral countries, to convey the Nuncios on one of its ships, which should fly the papal flag. In June, 1916, the Holy See notified the powers that the papal flag, white and yellow, which had not appeared on the seas since 1870, would fly from the masthead of the steamship *Nuncius*, bound from Cadiz to Buenos Aires. *Revue générale de droit internationale public*, vol. 23 (1916) 606-608.

Condemns the plaintiff to the fine and to the costs, under penalty of imprisonment;

Fixes at the minimum the extent of the duration of imprisonment in default of payment.

Thus judged and pronounced, et cetera. Criminal Chamber.

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## SECTION 2.—RECOGNITION OF STATES AND OF GOVERNMENTS

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### CITY OF BERNE (in Switzerland) v. BANK OF ENGLAND.

(High Court of Chancery, 1804. 9 Ves. Jr. 347.)

Mr. Romilly, for the Plaintiff, on behalf of himself and the other members of the Common Council Chamber of the city of Berne in Switzerland, and the Burghers and Citizens of that city, moved, that the Governor and Company of the Bank of England and the South Sea Company may be restrained from permitting a transfer of, and the trustees from transferring, certain funds, standing in their names under a purchase by the old Government of Berne before the Revolution.

Mr. Pigott and Mr. Wooddenson, for the Bank of England, and Mr. Mansfield and Mr. Steele, for the Trustees, opposed the motion; on the ground, that the existing Government of Switzerland, not being acknowledged by the Government of this Country could not be noticed by the Court.

The LORD CHANCELLOR [Lord ELDON] would not make the Order; observing, that he was much struck with the objection; and it was extremely difficult to say, a judicial Court can take notice of a Government, never authorized by the Government of the Country, in which that court sits; and, whether the Foreign Government is recognized, or not, is matter of public notoriety.

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### JONES v. GARCIA DEL RIO.

(High Court of Chancery, 1823. Turn. & R. 206.)

This was a bill filed by three persons, on behalf of themselves and all other the holders of scrip or shares of the Peruvian loan, against John Garcia del Rio and James Paroissien, who were stated by the bill to have come over from South America in the character of envoys and ministers, from a government styling itself the Peruvian government, to this country, and to have represented themselves to be empowered to contract for a loan for the use of the said government, and against Thomas Kinder, the younger, the contractor for the loan, and William Everett and others, the bankers to whom the subscriptions for

the loan were paid. The bill prayed, that an account might be taken of the monies which had been advanced and paid by the plaintiffs and the other holders of scrip or shares of the loan who should come in and claim the benefit of the suit, and that the plaintiffs and such other holders as aforesaid might be declared entitled to have what they had so paid returned to them, and to have the monies paid to and remaining in the hands of the defendants the bankers applied for that purpose, and that an account of such monies might be taken, and that the same might be applied accordingly, and that in the meantime the defendants the bankers might be restrained from parting with such monies, and the other defendants from receiving or disposing of the same. \* \* \*

The defendant Kinder by his answer admitted, that the Peruvian government had not been acknowledged as an independent state by the government of Great Britain; but he stated that there was in fact such a government in South America, and that it was an assumed government in opposition to the former government of Spain in that country, and had been formed by a revolution of the people in Peru, who had driven out the Spanish viceroy and established a government of their own; and he therefore denied that Peru still remained a province or dependency of the kingdom of Spain, and insisted that it was independent of Spain. The defendant further stated, that he was a holder of scrip on his own private account, and that he believed that the plaintiffs were not authorized by any of the other holders of scrip to institute the suit on their behalf, and that many of the other holders, if not all of them, were content to abide by their contracts to purchase such shares of the loan as they had respectively contracted to purchase, and were either ignorant of or disapproved the suit. \* \* \*

[The LORD CHANCELLOR [ELDON].<sup>20</sup> We all know that Peru was part of the dominions of Spain, and that Spain and this country are at peace, and that this country has not acknowledged the government of Peru; I want to know, whether, supposing Peru to be so far absolved from the government of Spain that it never can be attached to it again, the King's Courts will interfere at all while the Peruvian government is not acknowledged by the government of this country. What right have I, as the King's Judge, to interfere upon the subject of a contract with a country which he does not recognize? Another question is, whether, if individuals in this country choose to advance their money for the purpose of assisting a colony opposed to its parent state, that parent state being at peace with this country, the Courts of Justice here will assist them to recover their money, and will not leave them to get it as they can? Practically speaking great inconvenience may result from these transactions, for if at any future time the government of this country shall be disposed to say, Peru shall still continue annexed to Spain, these creditors will immediately come

<sup>20</sup> The statement of facts is abridged and part of the opinion is omitted.



to the government and say, do not accede to the arrangement unless Spain will pay us what we have advanced to the colony. The cases where one party files a bill on behalf of himself and others are cases where the others have a choice between that and nothing, but how can it be managed where some parties are not dissatisfied, and are disposed to abide by the contract? \* \* \*

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TAYLOR v. BARCLAY.

(High Court of Chancery, 1828. 2 Sim. 213.)

Bill for a discovery. The plaintiffs purchased certain certificates of obligations, of the Government of the Federal Republic of Central America from Powles & Co., who directed him to pay over the installments to a banking house for the account and to the credit of the defendants, who publicly announced themselves as agents of said Republic of Central America. Later the plaintiff discovered a secret partnership existing between Powles & Co. and the defendants. It was charged that the purchasers of the certificates were induced to take them at a higher price than if they had known the real nature of the relationship existing between Powles & Co. and the defendants. To prevent a demurrer to the bill it was falsely alleged that the Government of Central America, which was a revolted colony of Spain, was a sovereign and independent state recognized and treated as such by Great Britain.<sup>21</sup>

The VICE CHANCELLOR [SIR L. SHADWELL]. In consequence of the arguments in this case I have had communication with the Foreign Office, and I am authorized to state that the Federal Republic of Central America has not been recognized as an independent Government by the Government of this country. It appears to me that, when it is stated, in the bill, that this Republic was, and still is a sovereign and independent State, recognized and treated as such by His Majesty the King of these realms, it must have been meant that it has been recognized by the Government of this country as an independent State altogether; and, inasmuch as I conceive it is the duty of the Judge in every Court to take notice of public matters which affect the Government of the country, I conceive that, notwithstanding there is this averment in the bill, I am bound to take the fact as it really exists, and not as it is averred to be; and then it does not seem to me that there is any substantial distinction between the present case and the case in which I formerly gave judgment, that is, the case of *Thompson v. Powles*.

I observe that, in this case, the bill is filed for discovery only; but it does not appear to me that the circumstance that, in one case, discovery alone is sought, at all tends to introduce a distinction in the

<sup>21</sup> The statement of facts is rewritten.

judgment that has been given in a case where the bill was filed for discovery and relief. The judgment proceeded, not on the question whether the Court should give relief or not, or give a discovery or not, or give discovery and withhold relief; but upon the question whether the King's Court should attend to the case of a party who founded his case on the representation that certain persons did form an independent Government, recognized by this country, when the Government of this country did not so recognize them. It appears to me that sound policy requires that the Courts of the King should act in unison with the Government of the King. Now I apprehend that what Lord Eldon proceeded upon was a general doctrine of policy, that is, that he would not allow a person to sue, at least as a plaintiff, in the Court of Chancery, who founded his case upon the representation that there was that existing as an independent Government acknowledged by this country, which, in fact, was not so. It is impossible for me to suppose that any other than some such general principle as that influenced him, when I observe what his Lordship did in the case of *Biré v. Thompson*. The case was mentioned as an unreported case, but I have got the very brief, which I, as counsel, held on an application to Lord Eldon in that case. It was represented by the plaintiffs that, in August 1823, the defendant entered into an agreement with the Government of the Republic of Columbia to take a lease of certain salt mines; and then certain circumstances are stated regarding that lease. It is stated that the defendant had not himself funds sufficient to complete the contract; but, as the contract with these parties was a very advantageous contract, the defendant was desirous of completing the same; and that, about the month of April, the defendant came over to this country to provide funds to enable him to complete the advances to the Republic of Columbia, and entered into a treaty, with certain persons, for the purpose of raising a portion of the money for completing this contract. It was then represented that there was an agreement signed, which had been prepared and approved of between the parties; and it was represented that the plaintiff was willing to perform the agreement; and it was asked, by the bill, that the defendant might be restrained, by the order and injunction of the Court, from transferring or assigning, or agreeing to transfer or assign, the part of the contract so entered into between him and the Republic of Columbia for that purpose; and this statement of the case was verified by affidavits. And, on this case, as it appears to me, as a matter of course, the Court would have granted the injunction, unless there had been this objection, founded upon the representation that the original contract was made with the Government of the Republic of Columbia. Lord Eldon thought it right to refuse the application; and the note I have is that the Lord Chancellor refused the application because he could not take notice of the Republic of Columbia.

Now, in this case, I am asked to compel the defendant to make a discovery, to the plaintiff, of certain proceedings, all of which are bot-

tomed on the original representation that certain persons were the agents of the Government of the Federal Republic of Central America, which then was and is an independent State, the fact being that it was not then, has not been, nor is now, an independent State acknowledged by the Government of this country. It appears to me that, without saying how far the plaintiff might have had the discovery which he asks, provided he had represented his case otherwise, yet, if he makes this fact the foundation of his case, that this is an independent Government, recognized by the Government of this country, when it is not so, I must judicially take notice of what is the truth of the fact, notwithstanding the averment on the record, because nothing is taken to be true except that which is properly pleaded; and I am of opinion that, when you plead that which is historically false, and which the judges are bound to take notice of as being false, it cannot be said you have properly pleaded, merely because it is averred, in plain terms; and that I must take it just as if there was no such averment on the record. My opinion is, without making any new law, which I entirely disclaim, but merely meaning to follow the precedents which Lord Eldon laid down as bottomed on sound policy, that I must allow the demurrer.<sup>22</sup>

#### AKSIONAIRNOYE OBSHESTVO.

A. M. LUTHER v. JAMES SAGOR & CO.

(Court of Appeal, 1921. 87 Times Law Rep. 777.)

This appeal from the judgment of Mr. Justice Roche (37 The Times L. R. 282; [1921] 1 K. B. 456) raised a question as to the title of the plaintiffs (the respondents) to quantities of veneer or plywood which had been sold by the Russian Government to the defendants (the appellants) under a contract made with the defendants in August, 1920, by M. Krassin on behalf of the Russian Commercial Delegation. The determination of that question depended on the questions (1) whether

<sup>22</sup> In the slightly earlier case of *Thompson v. Powles* (High Court of Chancery) 2 Sim. 194, 212, 213 (1828), Vice Chancellor Shadwell said:

"But there is this further consideration: that this is represented to have been a contract, by the plaintiff, to purchase the obligations of persons who were stated to be the Government of the Federal Republic of Central America. I confess that, after all I have heard fall, from the mouth of Lord Eldon, on the subject of persons representing themselves to be Governments of foreign countries, which this country had not acknowledged to be Governments, and which the Courts cannot acknowledge them to be, till the Government of the country has recognized them to be so, it does appear to me that this is a contract entered into by the plaintiff for the purpose of purchasing that which, by the law of the land, he could not purchase. I think that the contract, being to purchase securities from these persons, who, as the plaintiff says, were the Government of Guatemala, cannot be considered as being a contract which this Court ought to sanction. The whole case being founded on that, I do not think that I could give relief to the party who builds his case for relief entirely on a transaction originating in such a manner; and it appears to me that, on that ground, I must allow this demurrer."

or not his Majesty's Government had at all material times recognized the Russian Federal Soviet Republic as the de facto Government of Russia, and (2) whether the confiscation of the timber by the Russian Government was not contrary to the principles of justice administered in English Courts. The plaintiff company was incorporated in Russia in 1899, and it opened a factory and mill at Staraya Russa, in the government of Novgorod, to manufacture veneer or plywood. This wood was marked with the trade-mark or trade name "Venesta" or "V. L.," which was the property in England of Venesta, Limited, a company which before the war imported into this country large quantities of veneer or plywood under that trade-mark or trade name. The goods imported were manufactured at the factory or mill of the plaintiff company for Venesta, Limited.

In 1919 the plaintiff company had at Staraya Russa, a large stock of boards, marked with this trade-mark, amounting to about 1,500 cubic metres. In January of that year the Russian Government Commissaries took possession of the factory at Staraya Russa, and took and expropriated the stock of boards without making any payment to the plaintiff company. By a contract made on August 14, 1920, the defendants in this country agreed to buy from the Russian Government 1,800 cubic metres of these boards, and they obtained possession and imported into this country a quantity of the boards. The plaintiff company claimed against the defendants a declaration of the plaintiff company's title to the goods and damages for their conversion and detention.

Mr. Justice Roche found on the facts and correspondence before him that his Majesty's Government had not recognized the Soviet Government as the Government of a Russian Federative Republic or of any Sovereign State or Power, and he held, therefore, that the Court could not recognize it or hold that it had sovereignty or was able by decree to deprive the plaintiff company of its property in Russia. He accordingly gave judgment for the plaintiff company.

The defendants appealed. \* \* \*

The following considered judgments were delivered:

Lord Justice BANKES.<sup>22</sup> The action was brought to establish the plaintiff company's right to a quantity of veneer or plywood which had been imported by the defendants from Russia. The plaintiffs' case was that they are a Russian company having a factory or mill at Staraya Russa, in Russia, for the manufacture of veneer or plywood, that in the year 1919 the so-called Republican Government of Russia, without any right or title to do so, seized all the stock as their mill and subsequently purported to sell the quantity in dispute in this action to the defendants. The plaintiffs contended that the so-called Republican Government had no existence as a Government, that it had never been recognized by his

<sup>22</sup> A portion of the judgment of Lord Justice Bankes is omitted, as are the concurring opinions of Lords Justices Warrington and Scrutton.

Majesty's Government, and that the seizure of their goods was pure robbery. As an alternative they contended that the decree of the so-called Government nationalizing all factories, as a result of which their goods were seized, is not a decree which the Courts of this country would recognize. The answer of the defendants was twofold. In the first place, they contended that the Republican Government, which had passed the decree nationalizing all factories, was the *de facto* Government of Russia at the time, and had been recognized by his Majesty's Government as such, and that the decree was one to which the Courts of this country could not refuse recognition. Secondly, they contended that the plaintiff company was an Estonian and not a Russian company, and that as a result of the provisions of the Treaty of Peace between Russia and Estonia the plaintiffs' complaint must be dealt with by a commission set up in pursuance of Article 14 of that Treaty. Mr. Justice Roche decided the two main points in the plaintiffs' favour. Upon the evidence which was before the learned Judge I think that his decision was quite right. As the case was presented in the Court below the appellants relied on a certain letter from the Foreign Office as establishing that his Majesty's Government had recognized the Soviet Government as the *de facto* Government of Russia. The principal letters are referred to by the learned Judge in his judgment. He took the view that the letters relied on did not establish the appellants' contention. In this view I entirely agree.

In this Court the appellants asked leave to adduce further evidence, and as the respondents raised no objection, the evidence was given. It consisted of two letters from the Foreign Office dated respectively April 20 and 22, 1921. The first is in reply to a letter dated April 12, which the appellants' solicitors wrote to the Under-Secretary of State for Foreign Affairs asking for a "certificate to the Court of Appeal that the Government of the Russian Socialist Federal Soviet Republic is recognized by His Majesty's Government as the *de facto* Government of Russia." To this request a reply was received dated April 20, 1921, in these terms: "I am directed by Earl Curzon of Kedleston to refer to your letter of April 12, asking for information as to the relations between His Majesty's Government and the Soviet Government of Russia. I am to inform you that His Majesty's Government recognize the Soviet Government as the *de facto* Government of Russia." The letter of April 22 is in reply to a request for information whether His Majesty's Government recognized the Provisional Government of Russia, and as to the period of its duration, and the extent of its jurisdiction. The answer contains (*inter alia*), the statement that the Provisional Government came into power on March 14, 1917, that it was recognized by his Majesty's Government as the then existing Government of Russia, and that the Constituent Assembly remained in Session until December 13, 1917, when it was dispersed by the Soviet authorities. The statement contained in the letter of April 20 is ac-

cepted by the respondents' counsel as the proper and sufficient proof of the recognition of the Soviet Government as the *de facto* Government of Russia.

Under these circumstances the whole aspect of the case is changed, and it becomes necessary to consider the matters which were not material in the Court below. The first is a question of law of very considerable importance—namely, what is the effect of the recognition by his Majesty's Government in April, 1921, of the Soviet Government as the *de facto* Government of Russia upon the past acts of that Government, and how far back, if at all, does that recognition extend. The second is a question of fact as to whether sufficient evidence was given to establish the identity of the Soviet Government now recognized by his Majesty's Government with the Government which seized and confiscated and sold the appellants' goods.

On the first point counsel have been unable to refer the Court to any English authority. Attention has been called to three cases decided in the Supreme Court of the United States: *Williams v. Bruffy*, 96 U. S. 176, 24 L. Ed. 716; *Underhill v. Hernandez*, 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456; *Oetjen v. Central Leather Co.*, 246 U. S. 297, 38 Sup. Ct. 309, 62 L. Ed. 726. In none of these cases is any distinction attempted to be drawn in argument between the effect of a recognition of a Government as a *de facto* Government and a recognition of a Government as a Government *de jure*, nor is any decision given upon that point; nor, except incidentally, is any mention made as to the effect of the recognition of a Government upon its past acts. The mention occurs in two passages, one in Mr. Justice Field's judgment in *Williams v. Bruffy*, *supra*, 96 U. S. at page 186, 24 L. Ed. 716, where, after discussing the essential differences between the Government of the Confederate States and the two kinds of *de facto* governments which he says may exist, he explains that the second of the two kinds exist where a portion of the inhabitants of the country have separated themselves from the parent State and established an independent government. The validity of its acts, he says, both against the parent State and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed and become recognized, its acts from the commencement of its existence are upheld as those of an independent nation. The second mention of the point occurs in the judgment of Chief Justice Fuller in *Underhill v. Hernandez*, *supra*, 168 U. S. at page 253, 18 Sup. Ct. 83, 42 L. Ed. 456. He says, in speaking of civil wars: "If the party seeking to dislodge the existing government succeeds, and the independence of the government it has set up is recognized, then the acts of such government from the commencement of its existence are regarded as those of an independent nation."

These are weighty expressions of opinion on a question of International Law. Neither learned Judge cites any authority for his prop-

osition. Each appears to treat the matter as one resting on principle. On principle the views put forward by these learned Judges appear to me to be sound, though there may be cases in which the Courts of a country whose government has recognized the government of some other country as the *de facto* government of that country may have to consider at what stage in its development the government so recognized can, to use the language to which I have already referred of those learned Judges, be said to have "commenced its existence." No difficulty of that kind arises in the present case, because upon the construction which I place upon the communication of the Foreign Office, to which I have referred, this Court must, I consider, treat the Soviet Government, which the Government of this country has now recognized as the *de facto* Government of Russia, as having commenced its existence at a date anterior to any date material to the dispute between the parties to this appeal.

An attempt was made by the respondents' counsel to draw a distinction between the effect of a recognition of a government as a *de facto* government and the effect of a recognition of a government as a government *de jure*, and to say that the latter form of recognition might relate back to acts of State of a date earlier than the date of recognition, whereas the former could not. Wheaton (5th Ed., at p. 36), quoting from Montague Bernard, states the distinction between a *de jure* and a *de facto* government thus: "A *de jure* government is one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them. A *de facto* government is one which is really in possession of them, although the possession may be wrongful or precarious." For some purposes no doubt a distinction can be drawn between the effect of the recognition by a sovereign State of the one form of government or of the other, but for the present purpose, in my opinion, no distinction can be drawn. The government of this country having, to use the language just quoted, recognized the Soviet Government as the government really in possession of the powers of sovereignty in Russia, the acts of that government must be treated by the Courts of this country with all the respect due to the acts of a duly recognized foreign sovereign State.

It becomes material now to consider whether the respondents have given sufficient evidence to establish that the confiscation and subsequent sale of the respondents' property were the acts of the government which his Majesty's Government have now recognized as the *de facto* government of Russia. In my opinion they have. The decree of confiscation as set out on page 283 of Mr. Justice Roche's judgment as reported in *The Times Law Reports*, purports to be "A decree of Council of Commissars for the People." The contract of sale of the goods to the respondents, dated August 14, 1920, purports to be made by L. B. Krassin on behalf of the Russian Commercial Delegation. The

trade agreement between this country and Russia of March 16, 1921, is made between his Majesty's Government and the government of the Russian Socialist Federal Soviet Republic, thereafter referred to as the Russian Soviet Government, and is signed by M. Krassin as the representative of that government. From the letter from the Foreign Office addressed to Messrs. Linklaters of April 22, 1921, it appears that the Soviet authorities dispersed the then Constituent Assembly on December 13, 1917, from which date I think it must be accepted that the Soviet Government assumed the position of the sovereign government and purported to act as such.

The witness Rastorgoueff explained that the Council of Commissars for the People is the executive body of the Soviet Republic. The witness Schotter deposed to the seizure of the plaintiffs' goods at the factory being made by persons holding official documents from the Soviet Government, and to the fact that, at that time and up to the date of the trial, the power (as he expressed it) was in the hands of the Bolsheviks. The witness Muller, who described himself as confidential clerk to the Russian Trade Delegation of the Russian Socialist Federal Soviet Republic, of which M. Krassin was the head, deposed to the fact that, since the end of 1917, the Russian Socialist Federal Soviet Republic had in fact been ruling over that part of Russia in which the plaintiffs' factory at Staraya Russa is situate. Upon these materials I consider that it is established that the decree of confiscation of June 20, 1918, the seizure of the plaintiffs' goods in January, 1919, and the subsequent sale of them to the defendants in August, 1920, were all acts of the Soviet Government which has now been recognized by his Majesty's Government as the *de facto* Government of Russia, and must be accepted by the Courts of this country as such.

It is necessary now to deal with the point made by the appellants that the decree of confiscation of June 20, 1918, even if made by the Government which is now recognized by his Majesty's Government, as the *de facto* Government of Russia is, in its nature, so immoral and so contrary to the principles of justice as recognized by this country, that the Courts of this country ought not to pay any attention to it. This is a bold proposition. The question before the Court is not one in which the assistance of the Court is asked to enforce the law of some foreign country to which legitimate objection might be taken, as in *Hope v. Hope*, 8 De Gex, Mac. & G. 731, and *Kaufman v. Gerson*, 20 The Times, L. R. 277; [1904] 1 K. B. 591. The question before the Court is as to the title to goods lying in a foreign country which a subject of that country, being the owner of them by the law of that country, has sold under a *f. o. b.* contract for export to this country. The Court is asked to ignore the law of the foreign country under which the vendor acquired his title, and to lend its assistance to prevent the purchaser from dealing with the goods. I do not think that any authority



can be produced to support the contention. Authority appears to negative it—see per Mr. Justice Blackburn in *Santos v. Illidge*, 8 C. B. N. S. at page 876, where he says:

“Assuming the taking to have been prohibited by a British Act, still the taking having been of property locally situated in a foreign country in a manner lawful according to the laws of that country, I apprehend that the property actually passed by the sale, and vested in the purchasers, though they committed a felony according to our law by taking it. It would be otherwise if the transfer were by a British subject of personal property situated within the British dominions; for, the contract passing the property, being prohibited, would be held void, and so the property would not vest; and it would be questionable how the case would have been, if it had been shown that the vendor was a domiciled British subject, though the property was locally situated in Brazil. But, where, as we must take it to be here, a Brazilian vendor, in Brazil, transferred property locally situated in Brazil, I apprehend that, though the vendees were British subjects, the validity of the transfer must on every principle of law depend upon the local law of Brazil, and not upon that of the country of the purchaser—see *Story on the Conflict of Laws*, c. ix. p. 308 (Ed. 1835).”

The respondents' position is rendered all the more difficult from the fact that the vendor in the present case is a duly recognized sovereign State whose law it was which conferred the title which is challenged. Even if it was open to the Courts of this country to consider the morality or justice of the decree of June 20, 1918, I do not see how the Courts could treat this particular decree otherwise than as the expression by the *de facto* Government of a civilized country of a policy which it considered to be in the best interest of that country. It must be quite immaterial for present purposes that the same views are not entertained by the Government of this country, are repudiated by the vast majority of its citizens, and are not recognized by our laws. Taking the view I do of the point, I do not consider it necessary to discuss the authorities to which our attention has been called.<sup>24</sup> \* \* \*

<sup>24</sup> If a foreign government has recognized the existence of a state or a *de facto* government its subjects and citizens are bound by such act of recognition, *Republic of Peru v. Dreyfus*, [1888] L. R. 38 Ch. D. 348; and if the *de facto* government thus recognized is displaced by the *de jure* government, an act of the latter repealing and declaring void the legislative and executive acts of its *de facto* predecessor will not be binding upon the foreign state which had recognized the *de facto* government, *Republic of Peru v. Peruvian Guano Co.*, [1887] L. R. 38 Ch. D. 489.

For an interesting discussion of the nature of a *de facto* government, and the process by which a *de facto* government has been recognized as the government of a state with which foreign nations have intercourse, see the award of the Franco-Chilian Tribunal of Arbitration of July 5, 1901, in the case of *Dreyfus Frères & Cie*, *Tribunal Arbitral Franco-Chilien*, Sentence du 5 juillet, 1901 (Lausanne, 1901), pp. 288–298.

See the award of the Permanent Court of Arbitration at The Hague of October 11, 1921, in the French Claims against Peru, confirming the above cases.

### THE SAPPHIRE.

(Supreme Court of the United States, 1870. 11 Wall. 164, 20 L. Ed. 127.)

This was an appeal from the Circuit Court of the United States for the District of California.

The case was one of collision between the American ship *Sapphire* and the French transport *Euryale*, which took place in the harbor of San Francisco on the morning of December 22, 1867, by which the *Euryale* was considerably damaged. A libel was filed in the District Court two days afterwards, in the name of the Emperor Napoleon III, then Emperor of the French, as owner of the *Euryale*, against the *Sapphire*. The claimants filed an answer, alleging, among other things, that the damage was occasioned by the fault of the *Euryale*. Depositions were taken, and the court decreed in favor of the libellant, and awarded him \$15,000, the total amount claimed. The claimants appealed to the Circuit Court, which affirmed the decree. They then, in July, 1869, appealed to this court. In the summer of 1870, Napoleon III was deposed. The case came on to be argued here February 16, 1871. Three questions were raised:

1. The right of the Emperor of France to have brought suit in our courts.
2. Whether, if rightly brought, the suit had not become abated by the deposition of the Emperor Napoleon III.
3. The question of merits.

Mr. Justice BRADLEY delivered the opinion of the court.

The first question raised is as to the right of the French Emperor to sue in our courts. On this point not the slightest difficulty exists. A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling. Such a suit was sustained in behalf of the king of Spain in the third circuit, by Justice Washington and Judge Peters in 1810.<sup>25</sup> The Constitution expressly extends the judicial power to controversies between a State, or citizens thereof, and foreign states, citizens, or subjects, without reference to the subject-matter of the controversy. Our own Government has largely availed itself of the like privilege to bring suits in the English courts in cases growing out of our late civil war. Twelve or more of such suits are enumerated in the brief of the appellees, brought within the last five years in the English law, chancery, and admiralty courts. There are numerous cases in the English reports in which suits of foreign sovereigns have been sustained, though it is held that a sovereign cannot be forced into court by suit.<sup>26</sup>

<sup>25</sup> *King of Spain v. Oliver*, 2 Wash. C. C. 431, Fed. Cas. No. 7,814 (1810).

<sup>26</sup> *Hullet & Co. v. King of Spain*, 1 Dow & Clark, 169 (1828); s. c., 1 Clark & Finnelly, 333 (1833); s. c., 2 Bligh, N. S. 31 (1828); *Emperor of*

The next question is, whether the suit has become abated by the recent deposition of the Emperor Napoleon. We think it has not. The reigning sovereign represents the national sovereignty, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being. Napoleon was the owner of the *Euryale*, not as an individual, but as sovereign of France. This is substantially averred in the libel. On his deposition the sovereignty does not change, but merely the person or persons in whom it resides. The foreign state is the true and real owner of its public vessels of war. The reigning Emperor, or National Assembly, or other actual person or party in power, is but the agent and representative of the national sovereignty. A change in such representative works no change in the national sovereignty or its rights. The next successor recognized by our Government is competent to carry on a suit already commenced and receive the fruits of it. A deed to or treaty with a sovereign as such inures to his successor in the government of the country. If a substitution of names is necessary or proper it is a formal matter, and can be made by the court under its general power to preserve due symmetry in its forms of proceeding. No allegation has been made that any change in the real and substantial ownership of the *Euryale* has occurred by the recent devolution of the sovereign power. The vessel has always belonged and still belongs to the French nation.

If a special case should arise in which it could be shown that injustice to the other party would ensue from a continuance of the proceedings after the death or deposition of a sovereign, the court, in the exercise of its discretionary power, would take such order as the exigency might require to prevent such a result.

The remaining question relates to the merits of the case. And on the merits of the case, as presented by the record, we think that the court below erred in imposing the whole damage upon the *Sapphire*. We think that the *Euryale* was equally in fault, and that the damage ought to be divided between them. \* \* \*

We cannot avoid the conviction that there was a want of proper care and vigilance on the part of the officers of the *Euryale*, and that this contributed to produce the collision which ensued. Both parties being in fault, the damages ought to be equally divided between them.

Decree of the Circuit Court reversed, and the cause remitted to that court with directions to enter a decree in conformity with this opinion.

*Brazil v. Robinson*, 6 *Adolphus & Ellis*, 801 (1868); *Queen of Portugal v. Glyn*, 7 *Clark & Finnelly*, 466 (1837, 1840); *King of Spain v. Machado*, 4 *Russ.* 225 (1827); *Emperor of Austria v. Day*, 3 *De Gex, Fisher & Jones*, 217 (1861); *King of Greece v. Wright*, 6 *Dowling's Practice Cases*, 12 (1837); *s. c.*, 1 *Jurist*, 944; *Prigoleau v. U. S.*, *L. R. 2 Equity Cases*, 659 (1866); *U. S. v. Wagner*, *L. R. 2 Ch. App.* 582 (1867); *Duke of Brunswick v. King of Hanover*, 6 *Beavan*, 1 (1844); *s. c.*, 2 *H. L. Cas.* 1 (1843); *De Haber v. Queen of Portugal*, 17 *Q. B.* 171 (1851); also 2 *Phillimore's International Law*, part vi, ch. 1; 1 *Daniell's Chancery Practice*, ch. ii, § 2.

## OETJEN v. CENTRAL LEATHER CO.

(Supreme Court of the United States, 1918. 246 U. S. 297, 38 Sup. Ct. 309, 62 L. Ed. 728.)

The cases are stated in the opinion. \* \* \*

Mr. Justice CLARKE delivered the opinion of the court.

These two cases involving the same question, were argued and will be decided together. They are suits in replevin and involve the title to two large consignments of hides, which the plaintiff in error claims to own as assignee of Martinez & Co., a partnership engaged in business in the city of Torreon, Mexico, but which the defendant in error claims to own by purchase from the Finnegan-Brown Company, a Texas corporation, which it is alleged purchased the hides in Mexico from General Francisco Villa, on January 3, 1914.

The cases were commenced in a Circuit Court of New Jersey, in which judgments were rendered for the defendants, which were affirmed by the Court of Errors and Appeals (87 N. J. Law, 552, 94 Atl. 789, L. R. A. 1917A, 276; 87 N. J. Law, 704, 96 Atl. 1102), and they are brought to this court on the theory that the claim of title to the hides by the defendant in error is invalid because based upon a purchase from General Villa, who, it is urged, confiscated them contrary to the provisions of the Hague Convention of 1907 respecting the laws and customs of war on land; that the judgment of the state court denied to the plaintiff in error this right which he "set up and claimed" under the Hague Convention or treaty; and that this denial gives him the right of review in this court.

A somewhat detailed description will be necessary of the political conditions in Mexico prior to and at the time of the seizure of the property in controversy by the military authorities. It appears in the record, and is a matter of general history, that on February 23, 1913, Madero, President of the Republic of Mexico, was assassinated; that immediately thereafter General Huerta declared himself Provisional President of the Republic and took the oath of office as such; that on the twenty-sixth day of March following General Carranza, who was then Governor of the State of Coahuila, inaugurated a revolution against the claimed authority of Huerta and in a "Manifesto addressed to the Mexican Nation" proclaimed the organization of a constitutional government under "The Plan of Guadalupe," and that civil war was at once entered upon between the followers and forces of the two leaders. When General Carranza assumed the leadership of what were called the Constitutionalist forces he commissioned General Villa his representative, as "Commander of the North," and assigned him to an independent command in that part of the country. Such progress was made by the Carranza forces that in the autumn of 1913 they were in military possession, as the record shows, of approximately two-thirds of the area of the entire country, with the exception of a few scattered towns

and cities, and after a battle lasting several days the City of Torreon in the State of Coahuila was captured by General Villa on October 1 of that year. Immediately after the capture of Torreon, Villa proposed levying a military contribution on the inhabitants, for the support of his army, and thereupon influential citizens, preferring to provide the required money by an assessment upon the community to having their property forcibly seized, called together a largely attended meeting and, after negotiations with General Villa as to the amount to be paid, an assessment was made on the men of property of the city, which was in large part, promptly paid. Martinez, the owner from whom the plaintiff in error claims title to the property involved in this case, was a wealthy resident of Torreon and was a dealer in hides in a large way. Being an adherent of Huerta, when Torreon was captured Martinez fled the city and failed to pay the assessment imposed upon him, and it was to satisfy this assessment that, by order of General Villa, the hides in controversy were seized and on January 3, 1914, were sold in Mexico to the Finnegan-Brown Company. They were paid for in Mexico, and were thereafter shipped into the United States and were replevied, as stated.

This court will take judicial notice of the fact that, since the transactions thus detailed and since the trial of this case in the lower courts, the Government of the United States recognized the Government of Carranza as the de facto government of the Republic of Mexico, on October 19, 1915, and as the de jure government on August 31, 1917. *Jones v. United States*, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691; *Underhill v. Hernandez*, 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456.

On this state of fact the plaintiff in error argues that the "Regulations" annexed to the Hague Convention of 1907 "Respecting the Laws and Customs of War on Land" constitute a treaty between the United States and Mexico; that these "Regulations" forbid such seizure and sale of property as we are considering in this case; and that, therefore, somewhat vaguely, no title passed by the sale made by General Villa and the property may be recovered by the Mexican owner or his assignees when found in this country.

It would, perhaps, be sufficient answer to this contention to say that the Hague Conventions are international in character, designed and adapted to regulate international warfare, and that they do not, in terms or in purpose, apply to a civil war. Were it otherwise, however, it might be effectively argued that the declaration relied upon that "private property cannot be confiscated" contained in Article 46 of the Regulations does not have the scope claimed for it, since Article 49 provides that "money contributions \* \* \* for the needs of the army" may be levied upon occupied territory, and Article 52 provides that "requisitions in kind and services shall not be demanded \* \* \* except for the needs of the army of occupation," and that contributions in kind shall, as far as possible, be paid for in cash, and when not so paid for a receipt shall be given and payment of the amount due shall

be made as soon as possible. And also for the reason that the "Convention" to which the "Regulations" are annexed, recognizing the incomplete character of the results arrived at, expressly provides that until a more complete code is agreed upon, cases not provided for in the "Regulations" shall be governed by the principles of the law of nations.

But, since claims similar to the one before us are being made in many cases in this and in other courts, we prefer to place our decision upon the application of three clearly settled principles of law to the facts of this case as we have stated them.

The conduct of the foreign relations of our Government is committed by the Constitution to the executive and legislative—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision. *United States v. Palmer*, 3 Wheat. 610, 4 L. Ed. 471; *Foster v. Neilson*, 2 Pet. 253, 307, 309, 7 L. Ed. 415; *Garcia v. Lee*, 12 Pet. 511, 517, 520, 9 L. Ed. 1176; *Williams v. Suffolk Ins. Co.*, 13 Pet. 415, 420, 10 L. Ed. 226; *In re Cooper*, 143 U. S. 472, 499, 12 Sup. Ct. 453, 36 L. Ed. 232. It has been specifically decided that "who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances." *Jones v. United States*, 137 U. S. 202, 212, 11 Sup. Ct. 80, 34 L. Ed. 691.

It is also the result of the interpretation by this court of the principles of international law that when a government which originates in revolution or revolt is recognized by the political department of our government as the *de jure* government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence. *Williams v. Bruffy*, 96 U. S. 176, 186, 24 L. Ed. 716; *Underhill v. Hernandez*, 168 U. S. 250, 253, 18 Sup. Ct. 83, 42 L. Ed. 456. See *s. c.*, 65 Fed. 577, 13 C. C. A. 51, 38 L. R. A. 405.

To these principles we must add that: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." *Underhill v. Hernandez*, 168 U. S. 250, 253, 18 Sup. Ct. 83, 42 L. Ed. 456; *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047.

Applying these principles of law to the case at bar, we have a duly commissioned military commander of what must be accepted as the legitimate government of Mexico, in the progress of a revolution, and

when conducting active independent operations, seizing and selling in Mexico, as a military contribution, the property in controversy, at the time owned and in the possession of a citizen of Mexico, the assignor of the plaintiff in error. Plainly this was the action, in Mexico, of the legitimate Mexican government when dealing with a Mexican citizen, and, as we have seen, for the soundest reasons, and upon repeated decisions of this court such action is not subject to re-examination and modification by the courts of this country.

The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be re-examined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations."

It is not necessary to consider, as the New Jersey court did, the validity of the levy of the contribution made by the Mexican commanding general, under rules of international law applicable to the situation, since the subject is not open to re-examination by this or any other American court.

The remedy of the former owner, or of the purchaser from him, of the property in controversy, if either has any remedy, must be found in the courts of Mexico or through the diplomatic agencies of the political department of our Government. The judgments of the Court of Errors and Appeals of New Jersey must be affirmed.<sup>27</sup>

<sup>27</sup> In *Williams v. Suffolk Insurance Co.*, 13 Pet. 415, 420, 10 L. Ed. 226 (1839), McLean, Justice, said for the Supreme Court:

"And can there be any doubt that, when the executive branch of the government, which is charged with our foreign relations shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view, it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know that, in the exercise of his constitutional functions, he had decided the question. Having done this, under the responsibilities which belong to him, it is obligatory on the people and government of the Union. If this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments."

For a very recent restatement of the practice in recognition, see *Russian Socialist Federated Republic v. Cibrario*, 198 App. Div. 869, 191 N. Y. Supp. 543, decided December 16, 1921.

In *Tartar Chemical Co. v. United States* (C. C.) 116 Fed. 726, 727 (1902), it was held, according to the headnote, that:

"The question whether Algeria is a part of France and within the scope of the President's proclamation of May 30, 1898, putting in force a reciprocal commercial agreement between France and the United States, as authorized by section 5 of the tariff act of 1897, or is merely a colony, and not affected by such agreement, is one which must be determined solely by the laws of France, and when the French minister of foreign affairs and the diplomatic

## SECTION 3.—SUCCESSION OF STATES

## I. EFFECT ON PUBLIC RIGHTS

## WEST RAND CENTRAL GOLD MINING CO., Limited, v. The KING.

(King's Bench Division. [1905] 2 K. B. 391.)

Lord ALVERSTONE, C. J.<sup>28</sup> \* \* \* We pass now to consider the third proposition upon which the success of the suppliants in this case must depend—namely, that the claims of the suppliants based upon the alleged principle that the conquering State is bound by the obligations of the conquered can be enforced by petition of right. It is the consideration of this part of the case which brings out in the strongest relief the difficulties which exist in the way of the suppliants. It is not denied on the suppliants' behalf that the conquering State can make whatever bargain it pleases with the vanquished; and a further concession was made that there may be classes of obligations that it could not be reasonably contended that the conquering State would by annexation take upon itself, as, for instance, obligations to repay money

and consular representatives of that country in the United States unite in stating that since the decree of October, 1870, abolishing the colonial government of Algeria, dividing it into departments, and adding them to the departments of European France, it has been an integral part of the republic of France, their statement should be accepted as conclusive by a court of this country in the administration of its customs laws, and in giving effect to the agreement between the two nations, entered into in a spirit of amity, with desire to improve their commercial relations."

The following passage shows that the policy of our government in the matter of recognition has been judicious if non-judicial:

"There is a stage in such (revolutionary) contests when the party struggling for independence has, as I conceive, a right to demand its acknowledgment by neutral parties, and when the acknowledgment may be granted without departure from the obligations of neutrality. It is the stage when the independence is established as matter of fact, so as to leave the chance of the opposite party to recover their dominion utterly desperate. The neutral nation must, of course, judge for itself when this period has arrived; and as the belligerent nation has the same right to judge for itself, it is very likely to judge differently from the neutral and to make it a cause or pretext for war, as Great Britain did expressly against France in our Revolution, and substantially against Holland.

"If war thus results, in point of fact, from the measure of recognizing a contested independence, the moral right or wrong of the war depends upon the justice and sincerity and prudence with which the recognizing nation took the step. I am satisfied that the cause of the South Americans, so far as it consists in the assertion of independence against Spain, is just. But the justice of a cause, however it may enlist individual feelings in its favor, is not sufficient to justify third parties in siding with it. The fact and the right combined can alone authorize a neutral to acknowledge a new and disputed sovereignty." J. Q. Adams to President Monroe, Aug. 24, 1818 (1 Wharton's Digest, 521).

<sup>28</sup> For the facts of the case and the decision upon another point, see ante, p. 5.



used for the purposes of the war. We asked more than once during the course of the argument by what rule, either of law or equity, which could be applied in municipal Courts could those Courts decide as to the obligations which ought or ought not to be discharged by the conquering State. To refer again to the instance given in the commencement of this judgment—the obligation incurred by the conquered State by which their credit has been ruined may have been contracted for insufficient consideration or under circumstances which would make it perfectly right from every point of view for the conquering State to repudiate it in whole or in part. No answer was, or could be, given. Upon this part of the case there is a series of authorities from the year 1793 down to the present time holding that matters which fall properly to be determined by the Crown by treaty or as an act of State are not subject to the jurisdiction of the municipal Courts, and that rights supposed to be acquired thereunder cannot be enforced by such courts. It is quite unnecessary to refer in detail to them all. They extend from *Nabob of the Carnatic v. East India Co.*, 1 Ves. Jr. 371, 2 Ves. Jr. 56, down to *Cook v. Sprigg*, [1899] A. C. 574. As a great deal of argument was addressed to us upon the latter case, we think it right to say that, although it was contended that the actual decision was not in harmony with the views of the American Courts upon analogous matters, no authority was cited, or, as far as we know, exists, which throws any doubt upon that part of the judgment which is in the following words: "The taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State and treating Sigcau as an independent Sovereign, which the appellants are compelled to do in deriving title from him. It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal Courts administer. It is no answer to say that by the ordinary principles of international law private property is respected by the Sovereign which accepts the cession and assumes the duties and legal obligations of the former Sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that, according to the well-understood rules of international law, a change of Sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation." We do not repeat the citations of *Secretary of State for India v. Kamachee*, 13 Moo. P. C. 22, and *Doss v. Secretary of State for India*, L. R. 19 Eq. 509, referred to in the judgment in *Cook v. Sprigg*, [1899] A. C. 574. They form part of the chain of authorities to which we have referred, and we observe in passing that we are not to be considered as throwing any doubt upon the correctness of the decision itself in *Cook v. Sprigg*, [1899] A. C. 574. The case of *Rustomjee v. Reg.*, 1 Q. B. Div. 487, 2 Q. B. Div. 69, affirmed in the Court of Appeal, deserves, however, one word of comment. There the British Government had received from the Chinese Govern-

ment a sum of money in respect of certain claims made upon that Government by persons, of whom the petitioner was one. A petition of right was brought in order to enforce payment by our Government of those claims out of the sum so received by the British Government. From some points of view that case may be considered much stronger in favour of the suppliant than the present, the money having been received by the Crown under a treaty specifically on account of the debts due to British subjects. In delivering the judgment of the Court of Appeal, Lord Coleridge used language which has a strong bearing on the present case. He said 2 Q. B. Div. at page 73: "The Queen might or not, as she thought fit, have made peace at all; she might or not, as she thought fit, have insisted on this money being paid her. She acted throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own Courts." It was contended by Lord Robert Cecil that the view we are taking was inconsistent with certain American decisions and with certain decisions of our own Court of Chancery, to which we think it right to refer. A careful examination of these cases satisfies us that rightly understood no such inconsistency exists. The American cases were a series of decisions of the Supreme Court of the United States respecting the rights of the owners to landed property in territories formerly forming part of independent countries which had been ceded to or annexed by the United States. The particular cases cited were *United States v. Percheman*, 7 Pet. 51, 8 L. Ed. 604, *Mitchel v. United States*, 9 Pet. 711, 9 L. Ed. 283, *Smith v. United States*, 10 Pet. 326, 9 L. Ed. 442, and *Strother v. Lucas*, 12 Pet. 410, 9 L. Ed. 1137. These cases arose respecting the rights of landed property in Florida, Louisiana, and Missouri. They were all cases of cession, and in all of them the treaties of cession and subsequent legislation of the United States protected the rights of owners of private property as they existed at the time of cession, and the sole question was whether, under the circumstances of each individual case, private rights of property existed and could be enforced as against the United States. No question of duty of the country, to whom the territory passed, of fulfilling the obligations of the original country in any other respect arose; and the language of Marshall, C. J., 7 Pet. at page 86, 8 L. Ed. 604, and of Baldwin, J., 9 Pet. at page 733, 9 L. Ed. 283, 10 Pet. at page 329, 9 L. Ed. 442, all of which is to the same effect, must be construed solely with reference to the rights of private property in individuals, such property being locally situated in a country annexed by another country. We asked Lord Robert Cecil and Mr. Hamilton whether they had been able to find any case in which a similar principle had been applied to personal contracts or obligations of a contractual character entered into between a ceding or conquered State and private individuals. They informed us that they had not been able to

do so, nor do we know of any such case. It must not be forgotten that the obligations of conquering States with regard to private property of private individuals, particularly land as to which the title had already been perfected before the conquest or annexation, are altogether different from the obligations which arrive in respect of personal rights by contract. As is said in more cases than one, cession of territory does not mean the confiscation of the property of individuals in that territory. If a particular piece of property has been conveyed to a private owner or has been pledged, or a lien has been created upon it, considerations arise which are different from those which have to be considered when the question is whether the contractual obligation of the conquered State towards individuals is to be undertaken by the conquering State. The English cases on which reliance was placed were *United States v. Prioleau*; 2 H. & M. 559, in which a claim was made by the United States Government to cotton which had been the property of the Confederate States; *United States v. Macrae*, L. R. 8 Eq. 69, which recognized the right of the Government suppressing rebellion to all moneys, goods, and treasures which were public property at the time of the outbreak; *Republic of Peru v. Peruvian Guano Co.*, 36 Ch. Div. 489, and *Republic of Peru v. Dreyfus*, 38 Ch. Div. 348. The only principle, however, which can be deduced from these cases is that a Government claiming rights of property and rights under a contract cannot enforce those rights in our Courts without fulfilling the terms of the contract as a whole. They have, in our judgment, no bearing upon the propositions which we have been discussing. We are aware that we have not commented upon all the cases which were cited before us—we have not failed to consider them; and any arguments which could be founded upon them seem to us to be covered by the observations already made. We are of opinion, for the reasons given, that no right on the part of the suppliants is disclosed by the petition which can be enforced as against His Majesty in this or in any municipal court; and we therefore allow the demurrer, with costs.

Judgment for the Crown.

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### TEXAS BONDS.

#### In re HOLFORD'S EX'RS.

(Anglo-American Commission of Claims under Convention of February 8, 1853. Report of Decisions, 382.)

On the 24th of October, 1838, a contract was entered into between James Holford, of London, now deceased, and Messrs. Williams and Burnley, commissioners of Texas, who were authorized to negotiate a loan, under the provisions of an act of the Congress of Texas of May 16, 1838. By this contract Holford was to purchase for the republic of Texas a steamer, then lying at Philadelphia, and provision and deliver her at Galveston, in Texas.

The contract was complied with, and was afterwards approved by an act of the Congress of Texas on the 10th of January, 1839, and bonds were issued to said Holford dated July 1, 1839, for the payment of which the faith and revenues of the republic were solemnly pledged by acts of Congress of November 18, 1836, and May 15, 1838. Provision was also made, by act of January 22, 1839, that a certain portion of the sales of the public lands should be annually reserved, as a permanent and sinking fund for the payment of this debt, until the whole loan should be paid off.

It is alleged that payment has not been made of either principal or interest on these bonds.

In 1845 Texas was admitted into the Union as one of the United States.

By the Constitution of the United States the general government has power "to regulate commerce, and to lay and collect taxes, duties, imposts, and excises," and no State has power, "without consent of Congress, to lay any imposts, or duties on imports or exports, or enter into any treaty, alliance, or confederation with any other State." United States Constitution, art. 1, §§ 8 and 10.

According to the terms agreed upon between the United States and the republic of Texas, whereby that republic became one of the United States of America, the vacant and unappropriated lands within its limits were to be retained by her, and "applied to the payment of the debts and liabilities of the republic of Texas; and the residue of the lands, after discharging the debts and liabilities, were to be disposed of as the State might direct, but in no event were said debts and liabilities to become a charge upon the government of the United States." United States Statutes at Large, vol. 5, p. 798.

Subsequently, in modifying the boundary of Texas, the United States, in 1850, on condition of the cession by Texas of certain large tracts of lands to the United States, agreed to pay Texas ten millions of dollars, but stipulated that "five millions of the same should remain unpaid until the creditors of the State holding bonds and other certificates of stock of Texas, for which duties on imports were specially pledged, should first file at the Treasury of the United States releases of all claims against the United States for or on account of such bonds or certificates, in the form prescribed by the Secretary of the Treasury, and approved by the President of the United States." \* \* \*

Up to 1854, when a claim against the United States for the payment of Holford's bonds was presented to the mixed commission organized under the convention between the United States and Great Britain of February 8, 1853, difficulties between the United States and Texas as to the manner of appropriating the sum in question had prevented its payment to Texas, and new measures in regard to it were then pending before Congress. The British Government had never treated any of

the claims of the holders of Texas bonds as a subject of interposition with the United States.<sup>29</sup>

Thomas, agent and counsel for the United States, filed a protest against the commissioners assuming jurisdiction of this claim, or of any other arising out of bonds or other evidences of debt issued by the republic of Texas as a claim against the United States, for the following reasons:

I. Because it is in no proper sense a claim on the government of the United States, embraced or contemplated by the convention of February 8, 1853, for the settlement of outstanding claims.

II. Because the second of the resolutions for the admission of the republic of Texas into the Union as a State, among other things, declares that "in no event are the debts and liabilities of Texas to become a charge upon the government of the United States."

III. Because the people of the said republic of Texas, by deputies in convention assembled, with the consent of the existing government, and by their authority, did ordain and declare that they assented to and accepted the proposals, conditions, and guaranties contained in the resolutions above referred to, and thereupon she was admitted into the Union as a State.

IV. Because it is not true, as is asserted in the statement of the claim presented to the commissioners, that Texas is incorporated into and subjected to the dominion of the United States government, so as to destroy her responsibility for debts contracted while an independent republic, or her ability to meet them; but, on the contrary, she is for the purpose of fulfilling these obligations as clearly responsible for their payment by the law of nations, by her separate and distinct organization, and by her solemn agreement with the United States, as she ever was, and is fully able to discharge them; and this commission is not authorized to interfere to shift any such obligation from Texas upon the United States.

V. Because this commission has nothing to do with any law or act of the United States addressed to the government or people of Texas, designed or tending to induce that State to perform her obligations entered into while an independent republic; and hence, to take jurisdiction of this claim would be a palpable and unwarrantable violation of the spirit and intention of the convention establishing this commission, to which the United States would have a just and perfect right to take exception, as much so as if this commission were to pass laws for the government of the United States, or do any other thing wholly without the limits of its authority. \* \* \*

Under date of November 29, 1854, Bates, Umpire, delivered the following award:

<sup>29</sup> The above paragraph has been taken from John Bassett Moore's *History and Digest of the International Arbitrations to which the United States has been a party*, vol. IV, 1898, p. 3592.

"The umpire appointed agreeably to the provisions of the convention entered into between Great Britain and the United States on the 8th of February, 1853, for the adjustment of claims by a mixed commission, having been duly notified by the commissioners under the said convention that they had been unable to agree upon the decision to be given with reference to the claims of the heirs of James Holford against the United States in relation to Texan bonds; and having carefully examined and considered the papers and evidence produced on the hearing of the said claim, and having conferred with the said commissioners thereon, hereby reports that this commission can not entertain the claim, it being for transactions with the Independent Republic of Texas prior to its admission as a State of the United States."<sup>30</sup>

<sup>30</sup> The above paragraph has been taken from John Bassett Moore's *History and Digest of the International Arbitrations to which the United States has been a party*, vol. IV, 1898, p. 3594.

In his edition of *Wheaton's Elements of International Law* (1866), Richard Henry Dana criticizes the principal case and expresses the opinion that by the annexation the United States changed the nature of the thing pledged, and was bound generally to do equity to the creditor, since by taking over a large control of the material resources of Texas in the way of internal revenues, excise or direct taxation, in its demands on the services of the people, and in the debts it could impose, the state of things to which the creditor had looked no longer existed.

The following passage states briefly the general doctrine of publicists:

"It is well to be understood, at a period when alterations in the constitutions of governments, and revolutions in states, are familiar, that it is a clear position of the law of nations, that treaties are not affected, nor positive obligations of any kind with other powers, or with creditors, weakened, by any such mutations. A state neither loses any of its rights, nor is discharged from any of its duties, by a change in the form of its civil government. The body politic is still the same, though it may have a different organ of communication. So, if a state should be divided in respect to territory, its rights and obligations are not impaired, and if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations fulfilled, by all the parts in common." 1 Kent's Com. (1st Ed., 1826) p. 25.

When Lombardy and Venice were respectively acquired by Italy at the close of the wars of 1859 and 1866 with Austria, the Italian government assumed no part of the general debt of Austria, but only the local debts of the ceded provinces. So, in the case of the cession of Alsace and Lorraine to Germany in 1871, no part of the French national debt was assumed by Germany on their account. Bluntschli, *Droit International*, Article 48.

On the other hand, on the seizure of Schleswig-Holstein by Prussia, in 1866, the debt of Denmark was divided between that country and Schleswig-Holstein; "and in the same year, Italy, by convention with France, took upon itself so much of the Papal debt as was proportionate to the revenues of the Papal provinces which it had appropriated." Hall's *Int. Law* (3d Ed. 1890) 102, note; Freeman Snow's *Cases and Opinions on International Law* (1898), p. 20, note.

On this interesting and important subject, see Arthur Berriedale Keith's *Theory of State Succession with Special Reference to English and Colonial Law* (1907); Henri Appleton's *Des effets des annexions de territoires sur les dettes de l'Etat démembré ou annexé* (1895); Guido Fusinato's *Le mutazioni territoriali, il loro fondamento giuridico e le loro conseguenze* (1885); Arrigo Cavaglieri's *La dottrina della successione di stato a stato e il suo valore giuridico* (1910); Max Huber's *Die staatsuccession. Völkerrechtliche und staatsrechtliche praxis im 19. Jahrhundert* (1898).

## COMMONWEALTH OF VIRGINIA v. STATE OF WEST VIRGINIA.

(Supreme Court of the United States, 1911. 220 U. S. 1, 31 Sup. Ct. 380, 55 L. Ed. 353.)

The Commonwealth of Virginia brought an original bill in this court to have the State of West Virginia's proportion of the public debt of Virginia as it stood before 1861 ascertained and satisfied.

Certain of the western counties of Virginia were loyal to the Union during the Civil War, notwithstanding the secession of Virginia in 1861, and these counties under the name of West Virginia were admitted as a state of the United States on June 20, 1863, by proclamation of President Lincoln.

At the constitutional convention of West Virginia held at Wheeling in 1862, there was an ordinance adopted (Wheeling Ordinance, par. 9) that "the new state shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861, to be ascertained by charging to it all State expenditures within the limits thereof, and a just proportion of the ordinary expenses of the State government, since any part of said debt was contracted; and deducting therefrom the moneys paid into the treasury of the Commonwealth from the counties included within the said new State during the same period."

Mr. Justice HOLMES. \* \* \* It was held in 1870 that the foregoing constituted an agreement between the old state and the new, *Virginia v. West Virginia*, 11 Wall. 39, 20 L. Ed. 67, and so much may be taken practically to have been decided again upon the demurrer in this case, although the demurrer was overruled without prejudice to any question. Indeed, so much is almost if not quite admitted in the answer. After the answer had been filed the cause was referred to a master by decree made on May 4, 1908, 209 U. S. 514, 534, 28 Sup. Ct. 614, 52 L. Ed. 914, which provided for the ascertainment of the facts made the basis of apportionment by the original Wheeling ordinance, and also of other facts that would furnish an alternative method if that prescribed in the Wheeling ordinance should not be followed; this again without prejudice to any question in the cause. The master has reported, the case has been heard upon the merits, and now is submitted to the decision of the court.

The case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter, and that this court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State alone. *Missouri v. Illinois*, 200 U. S. 496, 519, 520, 26 Sup. Ct. 268, 50 L. Ed. 572; *Kansas v. Colorado*, 206 U. S. 46, 82-84, 27 Sup. Ct. 655, 51 L. Ed. 956. There-

fore we shall spend no time on objections as to multifariousness, laches and the like, except so far as they affect the merits, with which we proceed to deal. See *Rhode Island v. Massachusetts*, 14 Pet. 210, 257, 10 L. Ed. 423; *United States v. Beebe*, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121.

The amount of the debt January 1, 1861, that we have to apportion no longer is in dispute. The master's finding was accepted by West Virginia and at the argument we understood Virginia not to press her exception that it should be enlarged by a disputed item. It was \$33,-897,073.82, the sum being represented mainly by interest-bearing bonds. The first thing to be decided is what the final agreement was that was made between the two States. Here again we are not to be bound by technical form. A State is superior to the forms that it may require of its citizens. But there would be no technical difficulty in making a contract by a constitutive ordinance if followed by the creation of the contemplated State. *Wedding v. Meyler*, 192 U. S. 573, 583, 24 Sup. Ct. 322, 48 L. Ed. 570, 66 L. R. A. 833. And, on the other hand, there is equally little difficulty in making a contract by the constitution of the new State, if it be apparent that the instrument is not addressed solely to those who are to be subject to its provisions, but is intended to be understood by the parent State and by Congress as embodying a just term which conditions the parent's consent. There can be no question that such was the case with West Virginia. As has been shown, the consent of the Legislature of the restored State was a consent to the admission of West Virginia under the provisions set forth in the constitution for the would-be State, and Congress gave its sanction only on the footing of the same constitution and the consent of Virginia in the last mentioned act. These three documents would establish a contract without more. We may add, with reference to an argument to which we attach little weight, that they establish a contract of West Virginia with Virginia. There is no reference to the form of the debt or to its holders, and it is obvious that Virginia had an interest that it was most important that she should be able to protect. Therefore West Virginia must be taken to have promised to Virginia to pay her share, whoever might be the persons to whom ultimately the payment was to be made.

We are of opinion that the contract established as we have said is not modified or affected in any practical way by the preliminary suggestions of the Wheeling ordinance. Neither the ordinance nor the special mode of ascertaining a just proportion of the debt that it puts forward is mentioned in the constitution of West Virginia, or in the act of Virginia giving her consent, or in the Act of Congress by which West Virginia became a State. The ordinance required that a copy of the new constitution should be laid before Congress, but said nothing about the ordinance itself. It is enough to refer to the circumstances



in which the separation took place to show that Virginia is entitled to the benefit of any doubt so far as the construction of the contract is concerned. See opinion of Attorney-General Bates to President Lincoln, 10 Op. Atty. Gen. 426. The mode of the Wheeling ordinance would not throw on West Virginia a proportion of the debt that would be just, as the ordinance requires, or equitable, according to the promise of the constitution, unless upon the assumption that interest on the public debt should be considered as part of the ordinary expenses referred to in its terms. That we believe would put upon West Virginia a larger obligation than the mode that we adopt, but we are of opinion that her share should be ascertained in a different way. All the modes, however, consistent with the plain contract of West Virginia, whether under the Wheeling ordinance or the constitution of that State, come out with surprisingly similar results.

It was argued, to be sure, that the debt of Virginia was incurred for local improvements and that in such a case, even apart from the ordinance, it should be divided according to the territory in which the money was expended. We see no sufficient reason for the application of such a principle to this case. In form the aid was an investment. It generally took the shape of a subscription for stock in a corporation. To make the investment a safe one the precaution was taken to require as a condition precedent that two- or three-fifths of the stock should have been subscribed for by solvent persons fully able to pay, and that one-fourth of the subscriptions should have been paid up into the hands of the treasurer. From this point of view the venture was on behalf of the whole State. The parties interested in the investment were the same, wherever the sphere of corporate action might be. The whole State would have got the gain and the whole State must bear the loss, as it does not appear that there are any stocks of value on hand. If we should attempt to look farther, many of the corporations concerned were engaged in improvements that had West Virginia for their objective point, and we should be lost in futile detail if we should try to unravel in each instance the ultimate scope of the scheme. It would be unjust, however, to stop with the place where the first steps were taken and not to consider the purpose with which the enterprise was begun. All the expenditures had the ultimate good of the whole State in view. Therefore we adhere to our conclusion that West Virginia's share of the debt must be ascertained in a different way. In coming to it we do but apply against West Virginia the argument pressed on her behalf to exclude her liability under the Wheeling ordinance in like cases. By the ordinance West Virginia was to be charged with all the State expenditures within the limits thereof. But she vigorously protested against being charged with any sum expended in the form of a purchase of stocks. \* \* \*

The liability of West Virginia is a deep-seated equity, not discharged by changes in the form of the debt, nor split up by the unilateral at-

tempt of Virginia to apportion specific parts to the two States. If one-third of the debt were discharged in fact, to all intents, we perceive no reason, in what has happened, why West Virginia should not contribute her proportion of the remaining two-thirds. But we are of opinion that no part of the debt is extinguished, and further, that nothing has happened to bring the rule of *New Hampshire v. Louisiana* into play. For even if Virginia is not liable she has the contract of West Virginia to bear an equitable share of the whole debt, a contract in the performance of which the honor and credit of Virginia is concerned, and which she does not lose her right to insist upon by her creditors accepting from necessity the performance of her estimated duty as confining their claims for the residue to the party equitably bound. Her creditors never could have sued her if the supposed discharge had not been granted, and the discharge does not diminish her interest and right to have the whole debt paid by the help of the defendant. The suit is in Virginia's own interest, none the less that she is to turn over the proceeds. See *United States v. Beebe*, 127 U. S. 338, 342, 8 Sup. Ct. 1083, 32 L. Ed. 121; *United States v. Nashville, Chattanooga & St. Louis Ry. Co.*, 118 U. S. 120, 125, 126, 6 Sup. Ct. 1006, 30 L. Ed. 81. Moreover, even in private litigation it has been held that a trustee may recover to the extent of the interest of his cestui que trust. *Lloyd's v. Harper*, 16 Ch. D. 290, 309, 315; *Lamb v. Vice*, 6 M. & W. 467, 472. We may add that in all its aspects it is a suit on the contract, and it is most proper that the whole matter should be disposed of at once.

It remains true then, notwithstanding all the transactions between the old Commonwealth and her bondholders, that West Virginia must bear her equitable proportion of the whole debt. With a qualification which we shall mention in a moment, we are of opinion that the nearest approach to justice that we can make is to adopt a ratio determined by the master's estimated valuation of the real and personal property of the two States on the date of the separation, June 20, 1863. A ratio determined by population or land area would throw a larger share on West Virginia, but the relative resources of the debtor populations are generally recognized, we think, as affording a proper measure.

It seems to us plain that slaves should be excluded from the valuation. The master's figures without them are, for Virginia \$300,887,367.74, and for West Virginia \$92,416,021.65. These figures are criticised by Virginia, but we see no sufficient reason for going behind them, or ground for thinking that we can get nearer to justice in any other way. It seems to us that Virginia can not complain of the result. They would give the proportion in which the \$33,897,073.82 was to be divided, but for a correction which Virginia has made necessary. Virginia with the consent of her creditors has cut down her liability to not more than two-thirds of the debt, whereas at the ratio shown by the figures per share, subject to mathematical correction, is about .7651. If our figures are correct, the difference between Virginia's

share, say \$25,931,261.47, and the amount that the creditors were content to accept from her, say \$22,598,049.21, is \$3,333,212.26; subtracting the last sum from the debt leaves \$30,563,861.56 as the sum to be apportioned. Taking .235 as representing the proportion of West Virginia we have \$7,182,507.46 as her share of the principal debt.

We have given our decision with respect to the basis of liability and the share of the principal of the debt of Virginia that West Virginia assumed. In any event, before we could put our judgment in the form of a final decree there would be figures to be agreed upon or to be ascertained by reference to a master. Among other things there still remains the question of interest. Whether any interest is due, and if due from what time it should be allowed and at what rate it should be computed, are matters as to which there is a serious controversy in the record, and concerning which there is room for a wide divergence of opinion. There are many elements to be taken into account on the one side and on the other. The circumstances of the asserted default and the conditions surrounding the failure earlier to procure a determination of the principal sum payable, including the question of laches as to either party, would require to be considered. A long time has elapsed. Wherever the responsibility for the delay might ultimately be placed, or however it might be shared, it would be a severe result to capitalize charges for half a century—such a thing hardly could happen in a private case analogous to this. Statutes of limitation, if nothing else, would be likely to interpose a bar. As this is no ordinary commercial suit, but, as we have said, a quasi-international difference referred to this court in reliance upon the honor and constitutional obligations of the States concerned rather than upon ordinary remedies, we think it best at this stage to go no farther, but to await the effect of a conference between the parties, which, whatever the outcome, must take place. If the cause should be pressed contentiously to the end, it would be referred to a master to go over the figures that we have given provisionally, and to make such calculations as might become necessary. But this case is one that calls for forbearance upon both sides. Great States have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration to bring it to an end.<sup>21</sup>

<sup>21</sup> The case of *Virginia v. West Virginia* has been many times before the Supreme Court of the United States, but the final adjustment between the two States was reached in 1915, Mr. Justice Hughes delivering the opinion of the Court. *Commonwealth of Virginia v. State of West Virginia*, 238 U. S. 202, 35 Sup. Ct. 795, 59 L. Ed. 1272 (1915).

The state of West Virginia complied with the judgment of 1915 and on March 1, 1920, a decree of satisfaction of the judgment was entered in the Supreme Court of the United States.

For the most recent practice of nations in the assumption of debts of territory annexed, or which has become independent, see the Treaty of Versailles, of June 28, 1919, articles 39, 55, 86, 92, 108, 144, 254-257, 13 *American Journal of International Law Supplement* (1919) 151-380, the Treaty of St. Ger-

## VILAS v. CITY OF MANILA.

TRIGAS v. SAME.

AGUADO v. SAME.

(Supreme Court of the United States, 1911. 220 U. S. 345, 31 Sup. Ct. 416, 55 L. Ed. 491.)

The facts, which involve the liability of the present city of Manila in the Philippine Islands for claims against the city of Manila as it existed prior to the cession under the treaty of 1898, are stated in the opinion.

Mr. Justice LURTON delivered the opinion of the court.<sup>22</sup>

The plaintiffs in error, who were plaintiffs below, are creditors of the city of Manila as it existed before the cession of the Philippine Islands to the United States by the treaty of Paris, December 10, 1898. Upon the theory that the city under its present charter from the government of the Philippine Islands is the same juristic person and liable upon the obligations of the old city, these actions were brought against it. The Supreme Court of the Philippine Islands denied relief, holding that the present municipality is a totally different corporate entity, and in no way liable for the debts of the Spanish municipality.

The fundamental question is whether, notwithstanding the cession of the Philippine Islands to the United States, followed by a reincorporation of the city, the present municipality is liable for the obligations of the city incurred prior to the cession to the United States. \* \* \*

The city as now incorporated has succeeded to all of the property rights of the old city and to the right to enforce all of its causes of action. There is identity of purpose between the Spanish and American charters and substantial identity of municipal powers. The area and the inhabitants incorporated are substantially the same. But for the change of sovereignty which has occurred under the treaty of Paris, the question of the liability of the city under its new charter for the debts of the old city would seem to be of easy solution. The principal

main of September 10, 1919, articles 52, 58, 61, 203, 204, and 14 American Journal of International Law Supplement (1920) 1-183.

See, also, the agreement with regard to the contributions to the cost of liberation of the territories of the former Austro-Hungarian monarchy, signed at Saint-Germain-en-Laye, September 10, 1919; the declaration modifying this agreement, signed at Paris, December 8, 1919; the agreement with regard to the Italian Reparation Payments, signed at Saint-Germain-en-Laye, September 10, 1919; the declaration modifying this agreement, signed at Paris, December 8, 1919; the Declaration of Accession by the Serb-Croat-Slovene State to the Treaty of Peace with Austria, of September 10, 1919, signed at Paris, December 5, 1919; 14 American Journal of International Law Supplement (1920) 344-355.

<sup>22</sup> Parts of the opinion are omitted.

question would therefore seem to be the legal consequence of the cession referred to upon the property rights and civil obligations of the city incurred before the cession. And so the question was made to turn in the court below upon the consequence of a change in sovereignty and a reincorporation of the city by the substituted sovereignty. \* \* \*

The historical continuity of a municipality embracing the inhabitants of the territory now occupied by the city of Manila is impressive. Before the conquest of the Philippine Islands by Spain, Manila existed. The Spaniards found on the spot now occupied a populous and fortified community of Moros. In 1571 they occupied what was then and is now known as Manila, and established it as a municipal corporation. In 1574 there was conferred upon it the title of "illustrious and ever loyal city of Manila." From time to time there occurred amendments, and, on January 19, 1894, there was a reorganization of the city government under a royal decree of that date. Under that charter there was power to incur debts for municipal purposes and power to sue and be sued. The obligations here in suit were incurred under the charter referred to, and are obviously obligations strictly within the provision of the municipal power. To pay judgments upon such debts it was the duty of the Ayuntamiento of Manila, which was the corporate name of the old city, to make provision in its budget.

The contention that the liability of the city upon such obligations was destroyed by a mere change of sovereignty is obviously one which is without a shadow of moral force, and, if true, must result from settled principles of rigid law. While the contracts from which the claims in suit resulted were in progress, war between the United States and Spain ensued. On August 13, 1898, the city was occupied by the forces of this Government and its affairs conducted by military authority. On July 31, 1901, the present incorporating act was passed, and the city since that time has been an autonomous municipality. The charter in force is act 183 of the Philippine Commission and now may be found as chapters 68 to 75 of the Compiled Acts of the Philippine Commission. \* \* \*

The charter contains no reference to the obligations or contracts of the old city.

If we understand the argument against the liability here asserted, it proceeds mainly upon the theory that inasmuch as the predecessor of the present city, the Ayuntamiento of Manila, was a corporate entity created by the Spanish government, when the sovereignty of Spain in the islands was terminated by the treaty of cession, if not by the capitulation of August 13, 1908, the municipality ipso facto disappeared for all purposes. This conclusion is reached upon the supposed analogy to the doctrine of principal and agent, the death of the principal ending the agency. So complete is the supposed death and annihilation of a municipal entity by extinction of sovereignty of the creating State that it was said in one of the opinions below that all of the pub-

lic property of Manila passed to the United States, "for a consideration, which was paid," and that the United States was therefore justified in creating an absolutely new municipality and endowing it with all of the assets of the defunct city, free from any obligation to the creditors of that city. And so the matter was dismissed in the Trigas Case by the Court of First Instance, by the suggestion that "the plaintiff may have a claim against the crown of Spain, which has received from the United States payment for that done by the plaintiff."

We are unable to agree with the argument. It loses sight of the dual character of municipal corporations. They exercise powers which are governmental and powers which are of a private or business character. In the one character a municipal corporation is a governmental subdivision, and for that purpose exercises by delegation a part of the sovereignty of the State. In the other character it is a mere legal entity or juristic person. In the latter character it stands for the community in the administration of local affairs wholly beyond the sphere of the public purposes for which its governmental powers are conferred.

The distinction is observed in *South Carolina v. United States*, 199 U. S. 437, 461, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737, where *Lloyd v. Mayor of New York*, 5 N. Y. 369, 374, 55 Am. Dec. 347, and *Western Savings Society v. Philadelphia*, 31 Pa. 175, 72 Am. Dec. 730, are cited and approved. In *Lloyd v. Mayor of New York*, *supra*, it is said:

"The corporation of the city of New York possesses two kinds of power, one governmental and public, and, to the extent they are held and exercised, is clothed with sovereignty, the other private, and to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the former, the corporation is a municipal government, and while in the exercise of the latter, is a corporate legal individual." \* \* \*

In view of the dual character of municipal corporations there is no public reason for presuming their total dissolution as a mere consequence of military occupation or territorial cession. The suspension of such governmental functions as are obviously incompatible with the new political relations thus brought about may be presumed. But no such implication may be reasonably indulged beyond that result.

Such a conclusion is in harmony with the settled principles of public law as declared by this and other courts and expounded by the text books upon the laws of war and international law. *Taylor, International Public Law*, § 578.

That there is a total abrogation of the former political relations of the inhabitants of the ceded region is obvious: That all laws theretofore in force which are in conflict with the political character, constitution or institutions of the substituted sovereign lose their force, is also plain.

*Alvarez y Sanchez v. United States*, 216 U. S. 167, 30 Sup. Ct. 361, 54 L. Ed. 432. But it is equally settled in the same public law that that great body of municipal law which regulates private and domestic rights continues in force until abrogated or changed by the new ruler. In *Chicago, Rock Island & Pacific Railway Co. v. McGlinn*, 114 U. S. 542, 546, 5 Sup. Ct. 1005, 29 L. Ed. 270, it was said:

"It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed."

The above language was quoted with approval in *Downes v. Bidwell*, 182 U. S. 244, 298, 21 Sup. Ct. 770, 45 L. Ed. 1088.

That the United States might, by virtue of its situation under a treaty ceding full title, have utterly extinguished every municipality which it found in existence in the Philippine Islands may be conceded. That it did so in view of the practice of nations to the contrary is not to be presumed and can only be established by cogent evidence. \* \* \*

The conclusion we reach that the legal entity survived both the military occupation and the cession which followed finds support in the cases which hold that the Pueblos of San Francisco and Los Angeles, which existed as municipal organizations prior to the cession of California by Mexico, continued to exist with their community and property rights intact. *Cohas v. Raisin*, 3 Cal. 443; *Hart v. Burnett*, 15 Cal. 530; *Townsend v. Greeley*, 5 Wall. 326, 18 L. Ed. 547; *Merryman v. Bourne*, 9 Wall. 592, 602, 19 L. Ed. 683; *More v. Steinbach*,

127 U. S. 70, 8 Sup. Ct. 1067, 32 L. Ed. 51; Los Angeles Milling Co. v. Los Angeles, 217 U. S. 217, 30 Sup. Ct. 452, 54 L. Ed. 736. \* \* \*

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## II. EFFECT ON PRIVATE RIGHTS OF PROPERTY

### UNITED STATES v. PRIOLEAU.

(High Court of Chancery, 1865. 2 Hem. & M. 559.)

Certain of the component States of the United States of America having seceded, and established a de facto government under the style of the Confederate States of America, the Confederate government raised funds by voluntary contributions and taxes, and thereby became possessed, as public property of their Government, of certain cotton.

By an agreement dated the 7th of July, 1864, between the defendant, Prioleau, one of the members of a firm of Fraser, Trenholm & Co., carrying on business in Liverpool, of the one part, and McCrae, who was an agent of the Confederate Government, of the other part, it was agreed as follows: Prioleau was to build eight steam-vessels, to be let out to hire to McCrae, and to be employed in the transport of cotton from the Confederate States. The cargoes were to be consigned to Prioleau, to be sold by him according to instructions. Out of the proceeds all expenses of sailing the ships and otherwise in respect thereof were to be recouped and commission paid, and of the balance one-half was to be applied as McCrae should direct, and the other half to be retained by Prioleau until the gross purchase-money of the vessels should be made up, and the vessels were then to be transferred to McCrae as purchaser. The purchase-money was to be 20 per cent. in addition to the cost of building. McCrae was to guarantee the safety of the ships, and pay damages for any that might be lost. The members of Fraser, Trenholm & Co., were Americans, but Prioleau was naturalized as a British subject.

Certain of the cotton before mentioned was shipped at Galveston in Texas, one of the Confederate States, by the agent of the Confederate Government, and taken to Havana, where the cotton was delivered to an agent of Prioleau's firm. He caused it to be reshipped in the Aline, one of the eight ships the subject of the agreement, and consigned to Fraser & Co. in Liverpool, where the ship had recently arrived, and was lying in the Mersey Docks. The ship Aline was consigned to the defendants, Malcolmson and others. The Aline had left Havana before the submission of the Confederate armies in Texas, but after the conquest of other portions of the Confederate States.

The plaintiffs by their bill claimed to have the cotton delivered up to them, and prayed an injunction to restrain the defendants from dealing with it, and a receiver.

The case now came on upon motion for a receiver and injunction.



It appeared in the evidence that the cotton was worth about £40,000, and that Fraser & Co. had incurred expenses in sailing the ships of about £20,000, which remained unsatisfied, independently of the cost of building. Some of the ships had not gone to sea, and had not been taken from the builders' yard at the time of the subjection of the Confederate Government.

Vice Chancellor Sir W. PAGE WOOD. The first point raised as to the rights of the United States Government was whether they could take the cotton, except subject to the agreement between the defendants and the Confederate Government. The title of the United States to what was once the property of the de facto Government, of the so-called Confederate States is scarcely disputed. That Government raised funds (it scarcely matters whether by voluntary contribution or by taxation, though it is not denied that compulsory means were used), and this cotton is the produce of the funds so raised.

The de facto Government has been displaced, and the authority of the Government of the United States has been restored. This cotton was clearly acquired by the de facto Government, including several States, and not by the State of Texas alone. It is therefore public property of the people of the United States, and belongs as such to the plaintiffs. The case of the King of the Two Sicilies and other authorities establish the principle that, where a de facto Government has, as such, obtained possession of property, the Government which displaces it succeeds to all its rights.

Then upon the second point, as to the claim of the defendants under the agreement: I confess I do not see much room to doubt that the United States must take subject to the agreement. That was the result of a negotiation between the de facto Government and certain persons in England (one of them, as it appears, being naturalized), who had a perfect right to deal with the de facto Government. It is not, as was said, a taking of the plaintiffs' property with notice of their rights. If the transactions were regarded in that light, the result would be that no dealing with a de facto Government would ever be possible. That Government exercised the power of levying taxes, and enjoyed belligerent rights against what, the plaintiffs say, was the only lawful Government. Other nations cannot enter into that question, but must protect their subjects, and cannot allow a Government which succeeds to the property of a de facto Government to displace rights acquired by their people. If this were otherwise, the plaintiffs might equally have insisted that Confederate vessels lying in our ports during the war should have been handed over by the authority of English tribunals to the Government of the United States, as being their property.

If the case had been that of a body of mere robbers devastating and plundering the territories of the United States, our Courts might have interfered to restore property so acquired; but then the rightful claimants would have been not the United States Government, but the per-

sons who had been robbed. It is only because the money was raised by a *de facto* Government that the United States can come here to claim at all. Had the money been obtained by mere robbery it would never have become public property. It only acquired that character because it was levied by an authority exercising rights of government.

I have so little doubt upon this point that I cannot put the defendants upon any terms which would abridge their rights under the contract. It may be contended that the measure of damages should be ascertained on this principle: the defendants to take out of the gross proceeds the expenses of sailing the ships, and then to divide the balance and carry one-half to the account of the purchase-money of the eight ships, and upon that the plaintiffs to be entitled to the eight ships (other than those lost within the meaning of the last clause of the agreement). The only liability sworn to by the defendants is a sum of £20,000 for expenses, and subject to the results of an account. I must treat them at this stage of the cause as entitled to that. Of the remaining £20,000, the plaintiffs seem to be entitled to one-half and the defendants to retain the other half, but only on the terms of giving up the ships. I do not now decide any of these questions; but, under the circumstances, the proper course will be to appoint the defendant, Prioleau, receiver, he either giving security for £20,000, or else paying that amount into Court on or before the 1st of November.<sup>22</sup>

<sup>22</sup> In the case of the *United States of America v. McRae*, L. R. 8 Eq. 69 (1869), James, V. C., held "that upon the suppression of a rebellion, the restored legitimate government is entitled, as of right, to all moneys, goods, and treasure which were public property of the government at the time of the outbreak, such right being in no way affected by the wrongful seizure of the property by the usurping government. But with respect to property which has been voluntarily contributed to, or acquired by, the insurrectionary government in the exercise of its usurped authority, and has been impressed in its hands with the character of public property, the legitimate government is not, on its restoration, entitled by title paramount, but as successor only (and to that extent recognizing the authority) of the displaced usurping government; and in seeking to recover such property from an agent of the displaced government can only do so to the same extent, and subject to the same rights and obligations, as if that government had not been displaced and was itself proceeding against the agent."

"Therefore, a bill by the United States government, after the suppression of the rebellion, against an agent of the late Confederate government, for an account of his dealings in respect of the Confederate loan, which he was employed to raise in this country [England], was dismissed with costs, in the absence of proof that any property to which the plaintiffs were entitled in their own right, as distinguished from their right as successors of the Confederate government, ever reached the hands of the defendant, and on the plaintiff declining to have the account taken on the same footing as if taken between the Confederate government and the defendant as the agent of such government, and to pay what, on the footing of such account might be found due from them." 2 Phillimore's *International Law* (3d Ed., 1882) p. 154.

"In war, the public property of an enemy captured on land becomes, for the time being at least, the property of the conqueror. No judicial proceeding is necessary to pass the title. Usually the ultimate ownership of real property is settled by the treaty of peace, but so long as it is held and not surrendered by a treaty or otherwise it remains the property of the conqueror.

"This well-settled principle in the law of war was recognized by this court

**SOCIETY FOR THE PROPAGATION OF THE GOSPEL IN  
FOREIGN PARTS v. TOWN OF NEW HAVEN et al.**

(Supreme Court of the United States, 1823. 8 Wheat. 404, 5 L. Ed. 662.)

This case came before the court upon a certificate of a division in opinion of the judge of the Circuit Court for the District for Vermont. It was an action of ejectment, brought by the plaintiffs against the defendants, in that court. The material facts, upon which the question of law arose, were stated in a special verdict, and are as follows:

By a charter granted by William III, in the 13th year of his reign, a number of persons, subjects of England, and there residing, were incorporated by the name of "The Society for the Propagation of the Gospel in Foreign Parts," in order that a better provision might be made for the preaching of the Gospel, and the maintenance of an orthodox clergy in the colonies of Great Britain. The usual corporate powers were bestowed upon this society, and, amongst others, it was authorized to purchase estates of inheritance to the value of £2000. per annum, and estates for lives or years, and goods and chattels, of any value. This charter of incorporation was duly accepted by the persons therein named; and the corporation has ever since existed, and now exists, as an organized body politic and corporate, in England, all the members thereof being subjects of the king of Great Britain.

On the 2d of November, 1761, a grant was made by the governor of the province of New Hampshire, in the name of the king, by which a certain tract of land, in that province, was granted to the inhabitants of the said province, and of the king's other governments, and to their heirs and assigns, whose names were entered on the grant. The tract so granted was to be incorporated into a town, by the name of New Haven, and to be divided into sixty-eight shares, one of which was granted to "The Society for the Propagation of the Gospel in Foreign Parts." The tract of land, thus granted, was divided among the grantees by sundry votes and proceedings of a majority of them; which, by the law and usage of Vermont, render such partition legal. The premises demanded by the plaintiffs, in this ejectment, were set off to them in the above partition, but they had no agency in the division, nor was it necessary, by the law and usage of Vermont, in order to render the same valid.

On the 30th of October, 1794, the legislature of Vermont passed an act, declaring, that the rights to land in that state, granted under the authority of the British government, previous to the revolution, to

in *United States v. Huckabee*, 16 Wall. 434, 21 L. Ed. 457 (1872), as applicable to the late civil war. At the close of that war there was no treaty. When the insurrection was put down the government of the insurgents was broken up and there was no power to treat with. Hence the title to all captured property of the confederate government then became absolute in the United States." Chase, C. J., in *Titus v. U. S.*, 20 Wall. 475, 481, 482, 22 L. Ed. 400 (1874). See, also, *Whitfield v. U. S.*, 92 U. S. 165, 23 L. Ed. 705 (1875).

"The Society for the Propagation of the Gospel in Foreign Parts," were thereby granted severally to the respective towns in which such lands lay, and to their use forever. The act then proceeds to authorize the selectmen of each town, to sue for and recover such lands, if necessary, and to lease them out, reserving an annual rent, to be appropriated to the support of schools. Under this law, the selectmen of the town of New Haven executed a perpetual lease of a part of the demanded premises, to the defendant, William Wheeler, on the 10th of February, 1800, reserving an annual rent of \$5.50; immediately after which, the said Wheeler entered upon the land so leased, and has ever since held the possession thereof. Similar donations were made, about the same time with the above grant, to the plaintiffs, of lands lying within the limits of Vermont, by the governor of New Hampshire, in the name of the king; but the plaintiffs never entered upon such lands, nor upon the demanded premises, nor in any manner asserted a claim or title thereto, until the commencement of this suit.

The verdict found a number of acts of the state of Vermont respecting improvements or settlements, and also the limitation of actions; but as the discussions at the bar did not involve any questions connected with those acts, those parts of the special verdict need not be more particularly noticed.

Upon this special verdict, the judges of the court below were divided in opinion upon the question, whether judgment should be rendered for the plaintiffs or defendants, and the question was thereupon certified to this court. \* \* \*

February 15, 1822. Hopkinson, for the plaintiffs. \* \* \*

Webster, contra. \* \* \* (Arguments of counsel in this case are elaborate and of permanent value. Unfortunately they are too long to print.)

Mr. Justice WASHINGTON<sup>34</sup> delivered the opinion of the court, and, after stating the case, proceeded as follows:

It has been contended by the counsel for the defendants: 1st. That the capacity of the plaintiffs, as a corporation, to hold lands in Vermont, ceased by, and as a consequence of, the Revolution;

2dly. That the society being, in its politic capacity, a foreign corporation, it is incapable of holding land in Vermont, on the ground of alienage; and that its rights are not protected by the treaty of peace;

3dly. That if they were so protected, still the effect of the last war between the United States and Great Britain was to put an end to that treaty, and, consequently, to rights derived under it, unless they had been revived by the treaty of peace, which was not done.

1. Before entering upon an examination of the first objection, it may be proper to premise, that this society is to be considered as a private eleemosynary corporation, although it was created by a charter from

<sup>34</sup> The statement of facts is abridged.

the crown, for the administration of a public charity. The endowment of the corporation was to be derived solely from the benefactions of those who might think proper to bestow them, and to this end, the society was made capable to purchase and receive real estates, in fee, to a certain annual value, and also estates for life, and for years, and all manner of goods and chattels, to any amount.

When the defendants' counsel contends, that the incapacity of this corporation to hold lands in Vermont, is a consequence of the revolution, he is not understood to mean, that the destruction of civil rights, existing at the close of the revolution, was, generally speaking, a consequence of the dismemberment of the empire. If that could ever have been made a serious question, it has long since been settled in this and others courts of the United States. \* \* \*

The counsel, then, intended, no doubt, to confine this objection to a corporation consisting of British subjects, and existing in its corporate capacity in England which is the very case under consideration. But if it be true, that there is no difference between a corporation and a natural person, in respect to their capacity to hold real property; if the civil rights of both are the same, and are equally unaffected by the dismemberment of the empire, it is difficult to perceive, upon what ground, the civil rights of a British corporation should be lost, as a consequence of the revolution, when it is admitted, that those of an individual would remain unaffected by the same circumstance. \* \* \*

2. The next question is, was this property protected against forfeiture, for the cause of alienage, or otherwise, by the treaty of peace? This question, as to real estates belonging to British subjects, was finally settled in this court, in the case of *Orr v. Hodgson*, 4 Wheat. 453, 4 L. Ed. 613, in which it was decided, that the sixth article of the treaty protected the titles of such persons, to lands in the United States, which would have been liable to forfeiture, by escheat, for the cause of alienage, or to confiscation, *jure belli*.

The counsel for the defendants did not controvert this doctrine, so far as it applies to natural persons; but he contends, that the treaty does not, in its terms, embrace corporations existing in England, and that it ought not to be so construed. The words of the sixth article are, "there shall be no future confiscations made, nor any prosecutions commenced, against any person or persons, for or by reason of the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future loss or damage, either in his person, liberty or property," etc.

The terms in which this article is expressed are general and unqualified, and we are aware of no rule of interpretation applicable to treaties, or to private contracts, which would authorize the court to make exceptions by construction, where the parties to the contract have not thought proper to make them. Where the language of the parties is clear of all ambiguity, there is no room for construction.

Now, the parties to this treaty have agreed, that there shall be no future confiscations in any case, for the cause stated. How can this court say, that this is a case where, for the cause stated; or for some other, confiscation may lawfully be decreed? We can discover no sound reason why a corporation existing in England may not as well hold real property in the United States, as ordinary trustees for charitable, or other purposes; or as natural persons for their own use. We have seen that the exemption of either or all of those persons, from the jurisdiction of the courts of the State where the property lies, affords no such reason.

It is said that a corporation cannot hold lands, except by permission of the sovereign authority. But this corporation did hold the land in question, by permission of the sovereign authority, before, during, and subsequent to the revolution, up to the year 1794, when the Legislature of Vermont granted it to the town of New Haven; and the only question is, whether this grant was not void by force of the sixth article of the above treaty? We think it was.

Was it meant to be contended, that the plaintiffs are not within the protection of this article, because they are not persons who could take part in the war, or who can be considered by the court as British subjects? If this were to be admitted, it would seem to follow, that a corporation cannot lose its title to real estate, upon the ground of alienage, since, in its civil capacity, it cannot be said to be born under the allegiance of any sovereign. But this would be to take a very incorrect view of the subject. In the case of the Bank of the United States v. Deveaux, 5 Cranch, 86, 3 L. Ed. 38, it was stated by the court, that a corporation, considered as a mere legal entity, is not a citizen, and, therefore, could not, as such, sue in the courts of the United States, unless the rights of the members of it, in this respect, could be exercised in their corporate name. It was added, that the name of the corporation could not be an alien or a citizen; but the corporation may be the one or the other, and the controversy is, in fact, between those persons and the opposing party.

But even if it were admitted that the plaintiffs are not within the protection of the treaty, it would not follow that their right to hold the land in question was divested by the act of 1794, and became vested in the town of New Haven. At the time when this law was enacted, the plaintiffs, though aliens, had a complete, though defeasible, title to the land, of which they could not be deprived for the cause of alienage, but by an inquest of office; and no grant of the State could, upon the principles of the common law, be valid, until the title of the State was so established. *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 603, 3 L. Ed. 453. Nor is it pretended by the counsel for the defendants, that this doctrine of the common law was changed by any statute law of the State of Vermont, at the time when this land was granted to the town of New Haven. This case is altogether unlike

that of *Smith v. State of Maryland*, 6 Cranch, 286, 3 L. Ed. 225, which turned upon an act of that State, passed in the year 1780, during the revolutionary war, which declared that all property within the State, belonging to British subjects, should be seized, and was thereby confiscated to the use of the State; and that the commissioners of confiscated estates should be taken as being in the actual seisin and possession of the estates so confiscated, without any office found, entry, or other act to be done. The law in question passed long after the treaty of 1783, and without confiscating or forfeiting this land (even if that could be legally done), grants the same to the town of New Haven.

3. The last question respects the effect of the late war, between Great Britain and the United States, upon rights existing under the treaty of peace. Under this head, it is contended by the defendants' counsel that although the plaintiffs were protected by the treaty of peace, still, the effect of the last war was to put an end to that treaty, and, consequently, to civil rights derived under it, unless they had been revived and preserved by the treaty of Ghent.

If this argument were to be admitted in all its parts, it nevertheless would not follow, that the plaintiffs are not entitled to a judgment on this special verdict. The defendants claim title to the land in controversy solely under the act of 1794, stated in the verdict, and contend, that by force of that law, the title of the plaintiffs was devested. But if the court has been correct in its opinion upon the two first points, it will follow, that the above act was utterly void, being passed in contravention of the treaty of peace, which, in this respect, is to be considered as the supreme law. Remove that law, then, out of the case, and the title of the plaintiffs, confirmed by the treaty of 1794, remains unaffected by the last war, it not appearing from the verdict, that the land was confiscated, or the plaintiffs' title in any way devested, during the war, or since, by office found, or even by any legislative act.

But there is a still more decisive answer to this objection, which is, that the termination of a treaty cannot divest rights of property already vested under it.

If real estate be purchased or secured under a treaty, it would be most mischievous to admit, that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more affects such rights, than the repeal of a municipal law affects rights acquired under it. If, for example, a statute of descents be repealed, it has never been supposed, that rights of property already vested during its existence, were gone by such repeal. Such a construction would overturn the best established doctrines of law, and sap the very foundation on which property rests.

But we are not inclined to admit the doctrine urged at the bar, that

treaties become extinguished, ipso facto, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.

We think, therefore, that treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.

A majority of the court is of opinion, that judgment upon this special verdict ought to be given for the plaintiffs, which opinion is to be certified to the Circuit Court.

Certificate for the plaintiffs.<sup>35</sup>

<sup>35</sup> "The passage cited by counsel from the language of Mr. Justice Washington in *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 493, 5 L. Ed. 662 (1823), also illustrates this doctrine. There the learned justice observes that 'if real estate be purchased or secured under a treaty, it would be most mischievous to admit that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more affects such rights than the repeal of a municipal law affects rights acquired under it.' Of this doctrine there can be no question in this court." *The Chinese Exclusion Case*, 130 U. S. 581, 610, 9 Sup. Ct. 623, 32 L. Ed. 1068 (1889).

To the same effect *Flott et als. v. Commonwealth*, 12 Grat. (Va.) 564, 577 (1855), where it is said: "But it has been determined by the Supreme Court that the termination of a treaty by war does not divest rights of property already vested under it. *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662 (1823); *Fox v. Southack*, 12 Mass. 143 (1815)."

The practice of nations and the opinions of publicists seem to be divided upon the effect of war upon treaties. Great Britain appears to hold that treaties in general are abrogated, whereas the United States maintains that they are only suspended, by war. The consensus of opinion seems to incline toward their abrogation by war, unless it is provided otherwise in the treaty of peace. On this subject, see Samuel B. Crandall's *Treaties, Their Making and Enforcement* (2d Ed. 1916) 442-456.



## UNITED STATES v. PERCHEMAN.

(Supreme Court of the United States, 1833. 7 Pet. 51, 8 L. Ed. 604.)

MARSHALL, Chief Justice.<sup>\*\*</sup> This is an appeal from a decree pronounced by the judge of the superior court for the district of East Florida, confirming the title of the appellee to 2,000 acres of land lying in that territory, which he claimed by virtue of a grant from the Spanish governor, made in December, 1815. \* \* \* Florida was a colony of Spain, the acquisition of which by the United States was extremely desirable. It was ceded by a treaty concluded between the two powers at Washington, on the 22d day of February, 1819. The second article contains the cession, and enumerates its objects. The eighth contains stipulations respecting the titles to lands in the ceded territory.

It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change; it would have remained the same as under the ancient sovereign. The language of the second article conforms to this general principle: "His Catholic Majesty cedes to the United States in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, by the name of East and West Florida."

A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him; lands he had previously granted, were not his to cede. Neither party could so understand the cession; neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world. The cession of a territory, by its name, from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sover-

<sup>\*\*</sup> The statement of facts is omitted and only the opinion of the court is given on the question of principle.

eignty only, and not to interfere with private property. If this could be doubted, the doubt would be removed by the particular enumeration which follows: "The adjacent islands, dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks and other buildings which are not private property, archives and documents which relate directly to the property and sovereignty of the said provinces, are included in this article." This special enumeration could not have been made, had the first clause of the article been supposed to pass not only the objects thus enumerated, but private property also. The grant of buildings could not have been limited by the words "which are not private property," had private property been included in the cession of the territory.

This state of things ought to be kept in view, when we construe the eighth article of the treaty, and the acts which have been passed by congress for the ascertainment and adjustment of titles acquired under the Spanish government. That article, in the English part of it, is in these words: "All the grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty."

This article is apparently introduced on the part of Spain; and must be intended to stipulate expressly for that security to private property which the laws and usages of nations would, without express stipulation, have conferred. No construction which would impair that security further than its positive words require, would seem to be admissible. Without it, the titles of individuals would remain as valid under the new government as they were under the old; and those titles, so far at least as they were consummate might be asserted in the courts of the United States, independently of this article.

The treaty was drawn up in the Spanish as well as in the English language; both are originals, and were unquestionably intended by the parties to be identical. The Spanish has been translated, and we now understand, that the article as expressed in that language, is, that the grants "shall remain ratified and confirmed to the person in possession of them, to the same extent," etc., thus conforming exactly to the universally received doctrine of the law of nations. If the English and the Spanish parts can, without violence, be made to agree, that construction which establishes this conformity ought to prevail. If, as we think must be admitted, the security of private property was intended by the parties; if this security would have been complete without the article, the United States could have no motive for insisting on the interposition of government in order to give validity to titles which, according to the usages of the civilized world, were already valid. No violence is done to the language of the treaty by a

construction which conforms the English and Spanish to each other. Although the words "shall be ratified and confirmed," are properly the words of contract, stipulating for some future legislative act; they are not necessarily so. They may import that they "shall be ratified and confirmed," by force of the instrument itself. When we observe, that in the counterpart of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable. In the case of *Foster v. Neilson*, 2 Pet. 253, 7 L. Ed. 415, this court considered these words as importing contract. The Spanish part of the treaty was not then brought to our view, and we then supposed, that there was no variance between them. We did not suppose, that there was even a formal difference of expression in the same instrument, drawn up in the language of each party. Had this circumstance been known, we believe it would have produced the construction which we now give to the article. \* \* \*

The decree is affirmed.<sup>87</sup>

### THE ROMAN CATHOLIC APOSTOLIC CHURCH v. THE PEOPLE IN PORTO RICO.

(Supreme Court of Porto Rico, 1906. 11 Porto Rico Rep. 466.)

Mr. Chief Justice QUIÑONES delivered the opinion of the court. Attorney Juan Hernández López, in the name and on behalf of the Right Reverend Catholic Bishop of this Diocese of Porto Rico, as such, and consequently with all the rights of representation and powers vested in him as the diocesan prelate of the Roman Catholic Apostolic Church in this Island, and in accordance with the authority under the provisions of the Act of the Legislative Assembly of March 10, 1904, filed the complaint which is the subject of this controversy in the Supreme Court against the People of Porto Rico, seeking a judgment directing said defendant to return to the Roman Catholic Apostolic Church the property it holds, emanating from the religious communities

<sup>87</sup> Followed in *Mutual Assur. Soc. v. Watts*, 1 Wheat. 279, 4 L. Ed. 91 (1816); *Mitchel et al. v. U. S.*, 9 Pet. 711, 734-736, 749, 9 L. Ed. 283 (1835); *Strother v. Lucas*, 12 Pet. 410, 9 L. Ed. 1137 (1838); *U. S. v. Clarke's Heirs*, 16 Pet. 228, 10 L. Ed. 946 (1842); *Airhart v. Massieu*, 98 U. S. 491, 25 L. Ed. 213 (1878); *Kinhead v. U. S.*, 150 U. S. 483, 14 Sup. Ct. 172, 37 L. Ed. 1152 (1903), to the effect that fixtures attached to land pass with cession of land.

Distinguished in *García v. Lee*, 12 Pet. 511, 9 L. Ed. 1176 (1838); *U. S. v. Wiggins*, 14 Pet. 334, 10 L. Ed. 481 (1840); *U. S. v. Miranda et al.*, 16 Pet. 153, 10 L. Ed. 920 (1842); *Chavez v. Chavez de Sanchez*, 7 N. M. 58, 32 Pac. 137 (1893).

See, especially, *Leitensdorfer v. Webb*, 20 How. 176, 15 L. Ed. 891 (1857). *U. S. v. De Repentigny*, 5 Wall. 211, 18 L. Ed. 827 (1866), is a leading case on the subject. It has had the good fortune to be repeatedly cited and approved by the Supreme Court, most forcibly and aptly, perhaps, in *New York Indians v. U. S.*, 170 U. S. 1, 25, 18 Sup. Ct. 531, 42 L. Ed. 927 (1897).

of Dominican and Franciscan Friars which existed in this city and were suppressed, and which property the Government of this Island seized in the year 1838 under the so-called laws of secularization of church property, published in Spain; and although it has subsequently been held to be the exclusive property of the Roman Apostolic Church, as all other property of the same origin in the possession of the Government of Spain, and the latter had contracted the solemn obligation of returning it to the Catholic Church, in accordance with the provisions of the Concordat concluded with the Holy See in the years 1851 and 1859, the Spanish Government in Porto Rico had never done so, but retained in its possession the property of the suppressed religious communities until the change of sovereignty in this Island, the same subsequently passing, under the Treaty of Paris, to the government of the United States, and from the latter to the People of Porto Rico, which now possesses and enjoys it. He likewise prayed, as a consequence of such return, that the People of Porto Rico be adjudged to pay to the Roman Catholic Apostolic Church the rents and products which the properties returned have produced or which they should have produced, from October 18, 1898, to the date of the return thereof, such rents and products to be fixed by this court upon a report of experts, in accordance with the law; and to pay, besides, the amount of annuities redeemed by the estates subject thereto between said date and the present date, or such as may be subsequently redeemed until the judgment is executed, as also legal interest on these sums at the rate of 6 per cent. per annum, with the costs of the action likewise against the defendants.

The principal ground of the complaint is based upon the fact that the church having become separated from the State as a consequence of the change of sovereignty, and being left without any means with which to meet its requirements, because on the very day on which this Island was occupied by the American army it ceased to receive the amount appropriated in the budget to provide for the expenses of worship and the clergy, in accordance with the provisions of the Concordats concluded with the Holy See, it was but reasonable and just that the property belonging to it now in the possession of the Government of Porto Rico should be returned to it, the rights of ownership to which it had not lost by the cession thereof to the United States under the Treaty of Paris because, according to article 8 of said treaty, the cession made by Spain of the property which under the law was of the public domain, and as such belonged to the Crown of Spain in this Island, should be understood, and was understood, to be without prejudice to the rights of ownership of civic or ecclesiastical corporations, or of any other bodies having legal capacity to acquire and to possess property in the territories ceded or relinquished or to private individuals of whatsoever nationality, this article applying precisely to the Catholic Church, whose capacity to acquire and possess property is absolutely indisputable.

The properties constituting the subject matter of the claim of the Catholic Church were described in the complaint, some of them individually, and others with reference to two certificates attached thereto. \* \* \*

The complaint of the Catholic Church has been contested by the People of Porto Rico on a number of grounds alleged in its amended answer and which we will take up later. For the present we will confine ourselves to an examination of the historical antecedents of this interesting matter in order then to determine whether or not the complaint of the Catholic Church is a just one.

It is actually a fact, as shown in an incontrovertible manner, by the evidence introduced in this action, that some time about 1837 and 1838, and for many years before, there were in this city of San Juan two religious communities of Dominican and Franciscan Friars, of which the former resided in a convent publicly considered to be their property, called Santo Domingo, situated in the northern part of the city, the same building now occupied by the offices of this Supreme Court and of the district court on the upper floor and by some military dependencies on the lower; and the latter—that is to say, the Franciscans—in another convent called San Francisco, situated on the plaza of the same name in this city, now occupied, so we understand, by the High School of San Juan. Both buildings are described in the bill of particulars submitted by counsel for the Catholic Church.

In addition to these convents and another convent which the Dominicans had in the city of San Germán, called Santo Domingo-Portacelli, said religious communities possessed many other properties, consisting of rural and urban estates of no little value, and a great number of annuity-earning endowments which produced large revenues, with which they met the expense of their maintenance and the requirements of Divine worship in the churches annexed to their respective convents.

Upon the extinction of religious communities in Spain and the seizure by the State of all their property under the so-called secularization laws, the communities of Dominicans and Franciscans established in this capital suffered the same fate, this taking place in this Island about the year 1838. Affairs continued in this state for a few years longer until, upon the termination of the Carlist War, which had exerted so much influence upon the hostile attitude of the Government toward the clergy because they were believed to be partisans of the Infante, Don Carlos, who was a pretender to the Crown of Spain and was said to receive great financial assistance from the religious communities, normal conditions having been restored the Cortes enacted and the Queen of Spain, Isabella II, sanctioned the law of May 8, 1849, by which the Government was authorized to enter into negotiations with the Holy See to settle the matter of the clergy and all questions pending between both powers. Through these negotiations the arrangement

sought was actually reached, the famous Concordat of March 16, 1851, being concluded between the Holy See—then occupied by His Holiness Pope Pius IX—and Her Majesty the Queen of Spain, Isabella II, through their respective high commissioners, which arrangement has since formed part of the public law of Spain, under which a multitude of questions pending between the Holy See and the Spanish Government were actually settled, the most important thereof being, for our purpose, those relating to the secularization of church property, which, in view of their importance in the decision of the questions at issue in this litigation, we will transcribe below in full. \* \* \*

The provisions of the convention supplemental to the Concordat of March 16, 1851, are still more interesting than the provisions transcribed. This convention was concluded between the Holy See and the Government of Spain on August 25, 1859, under the authority granted the latter by the law of November 4 of the same year to conclude and ratify a convention with the Holy See for the main purpose of exchanging all ecclesiastical property for nontransferable 3 per cent. consolidated bonds, and to represent by bonds of the same character the remainder of the allowance for worship and the clergy, if the respective dioceses should so agree, reserving to the church the right to acquire property vested in it by article 41 of the Concordat, and without reckoning in its allowance the amount of the income it might subsequently acquire.

The principal provisions of this convention with reference to our object are the following, which, owing to their great importance, we also transcribe. \* \* \*

Now, then, in view of the stipulations contained in the Concordat of March 16, 1851, and in the convention supplemental thereto of which we have just spoken, there can be no question as to the perfect right of ownership of the Roman Catholic Apostolic Church over the property seized from the religious communities by virtue of the so-called secularization mortmain laws, which property was in the possession of the Government at the time of the publication of the first of said Concordats, and which remained in the possession after the supplemental convention of 1859, pending the exchange thereof in the new form agreed with the Holy See, at the suggestion of the Spanish Government.

This exchange was effected in all or most of the dioceses of Spain, in pursuance of the provisions of the Government to carry it out, among others the Royal Decree of August 21, 1860, which contains the rules to be observed for the proper execution thereof; but this is not the case in the Islands of Cuba and Porto Rico, in which the provisions of the Concordat relating to the return to the Catholic Church of the property seized from the religious communities were never carried out, nor was the exchange made in the manner agreed with the Holy See nor in any other manner. \* \* \*

It is therefore evident, and there can be no doubt on the subject, that the property derived from the religious communities of Franciscans and Dominicans seized by the Government, and which was in its possession at the time of the change of sovereignty in this Island and included in the cession made by Spain to the United States of all real property of public ownership in Porto Rico, belonged to the Roman Catholic Apostolic Church, which has not lost its right of ownership, protected as it is by the Treaty of Paris, Article VIII, whereof left unimpaired acquired rights, as we have already observed.

Having thus established in principle the right of ownership of the Roman Catholic Apostolic Church in the property derived from the communities of Franciscans and Dominicans in the possession of the Government of this Island, at the time it was ceded by Spain to the United States, let us now enter upon an examination of the exceptions of the representatives of the People of Porto Rico to the complaint filed by the Catholic Church.

The first is that relating to the title of ownership of the church to the property, subject-matter of the claim in question. \* \* \*

But this objection of the People of Porto Rico is absolutely inefficient in this case; the Catholic Church bases its right of ownership upon the stipulations of the Concordat concluded between the Holy See and the Government of Spain on March 16, 1851, and upon the convention supplementary thereto concluded between the same high contracting parties on August 25, 1859, according to which the Government of Spain, which had seized all the property of the religious communities and which still had some of it in its possession, solemnly recognized the ownership of such property in favor of the Catholic Church and obligated itself to return such property immediately and without delay, although on account of the special circumstances surrounding such property and other considerations, both contracting parties agreed that it would be exchanged for nontransferable 3 per cent. bonds of the consolidated public debt of Spain, upon the basis of its value to be fixed by the bishops, in concurrence with their chapters in their respective dioceses, in order to provide the church with a source of income with which to meet the expenses of Catholic worship.

The title of ownership of the church cannot be more evident; it is constituted by the Concordats concluded between the Holy See and the Crown of Spain, which partake of the character of real international agreements, and which as diplomatic documents, have all the formalities necessary to make them authentic and form part of the Spanish public law contained in the legislative collection of Spain.

Therefore, the first objection of the People of Porto Rico to the complaint of the Catholic Church must be dismissed.

The same is to be said with respect to the capacity of the Catholic Bishop of Porto Rico to represent the Catholic Church in this litigation. \* \* \*

With regard to the title of ownership of the Franciscan and Dominican Friars to the property forming the subject-matter of the claim herein, which constitutes another objection made to the complaint by counsel for the People of Porto Rico, we believe that this is a point absolutely foreign to the question at issue, and consequently, that it should not be discussed. \* \* \*

The only question at issue here, as we have said, consists in determining whether or not the properties claimed in the complaint are of those seized by the Government from the Franciscan and Dominican Friars in connection with the suppression of said religious communities; and this question, which we might call the identification of the thing claimed, is so clear that there can be no doubt about it. \* \* \*

The fact is, as we have stated above, that the record contains a list of the properties claimed by the Catholic Church \* \* \* and it is a fact that in the inventory taken of the documents seized from the Dominicans, appears the title of ownership to the lots assigned to the community by Conqueror Juan Ponce de León, which document seems to have been lost, but of the existence whereof there can be no doubt because it is referred to not only in the inventory to which we have alluded, but also in other record of proceedings on file in the Government offices which have been brought to this trial as evidence by counsel for the Catholic Church.

Upon this point the identity of the properties claimed by the Catholic Church as a part of those taken from the religious communities of Dominicans and Franciscans, when the Government seized all their properties, neither can there be the slightest doubt. It is a very clear point upon which the official documents on file in the record throw a strong light. \* \* \*

Finally, there is still to be considered one more objection made by the People of Porto Rico to the complaint of the Catholic Church, namely, that relating to the Convent of Santo Domingo and the lands annexed thereto, and the lot upon which Ballajá Barracks is located, upon which points the defendant alleges in its answer to the complaint, that such property, not being in its possession inasmuch as the President of the United States had reserved it for military purposes, under the authority vested in him by an act of Congress, nothing can be definitely decided in this action upon said real property because the Government of the United States is not a party thereto.

On this point we have nothing to oppose to the statement of the representative of the People of Porto Rico. The objection is well taken; but we must say that the evidence heard in this action also shows that said Convent of Santo Domingo with the lands appurtenant thereto, as well as the lots upon which Ballajá Barracks is located, are the property of the Roman Catholic Apostolic Church, and that only upon a technical ground, strengthened by the respect we have for a decision of the President of the United States, we will not make the same pro-



nouncement with regard to said property—that is to say, that it be returned to the Catholic Church, together with the other property sought to be recovered in this action.

We understand, therefore, that with this single exception, the Catholic Church should be restored in the possession of all other properties belonging to it which the People of Porto Rico are improperly possessing and enjoying, and that judgment should be rendered to this effect in this action, this Supreme Court thus repairing the act of despoliation committed by the Government of Spain against the Roman Catholic Apostolic Church in ceding and conveying to the Government of the United States the property belonging to it to which this complaint refers without having previously acquired the same in the form agreed upon in the treaties concluded with the Holy See, conformably to the principles of international law once more proclaimed by the Treaty of Paris under Article VIII thereof. Nor is the doctrine announced by the Supreme Court of the United States in the case of *Castana v. United States*<sup>22</sup> an obstacle to the application of these principles in this case according to which “although it is the duty of a nation receiving the cession of territory to respect property rights as recognized by the nation making the cession, it is under no obligation whatever to correct the errors committed by the ceding nation against an individual prior to the cession, unless the act of dispossession or error committed by the ceding nation was so recent at the time of the making of the cession that the party dispossessed could not have resorted to the courts of the ceding nation to obtain relief, and in such case it might be the duty of the nation receiving the ceded territory;” which is precisely the case involved, because the act of despoliation committed against the Catholic Church is so recent, it having been consummated exactly when the American Government took possession of this Island in virtue of the cession thereof made by the Government of Spain, that the Catholic Church has not been able to obtain a remedy in any form other than by this action, and consequently, we have to deal with the same exception as the one to which the Supreme Court of the United States refers in the case cited above.

In view of all these considerations we believe that the complaint should be sustained, and, consequently, that the People of Porto Rico should be adjudged to return to the Roman Catholic Apostolic Church in this Island as properties seized by the Government of the Island from the religious communities of Dominicans and Franciscans suppressed

<sup>22</sup> A typographical error has apparently crept into this part of the opinion of the learned Chief Justice. The case referred to is *Cessna v. United States*, 169 U. S. 185, 186, 18 Sup. Ct. 304, 42 L. Ed. 702 (1897).

There is a further typographical error in this part of the opinion, inasmuch as the learned Chief Justice is made to quote a part of the *Cessna* Case, whereas in fact he correctly paraphrases, but does not quote.

The title of the case and the quotation are correctly given in the dissenting opinion of Mr. Justice MacLeary, pp. 507, 508, of the original report.

under the laws issued in Spain relating to the secularization of church property, \* \* \* and dismissing the complaint with respect to the Convent of Santo Domingo and appurtenant lands, and those occupied by the barracks of Ballajá, without any special taxation of costs.

Before finally closing this opinion we wish to state here, on account of the intimate relation it bears to the case under consideration, as a most interesting precedent, the fact that the claims of the Catholic Church in the Island of Cuba, identical to these formulated by the diocesan prelate of said church in this Island were settled in a most satisfactory manner by the American Government established in that island during the period of the military occupation thereof after the war with Spain. The Catholic Church has obtained the restitution of all of its property under an agreement or convention concluded with the Government of that island upon the basis of an option reserved by the latter to buy such property at the value agreed between both parties, within a period of five years, it being further agreed, that until the Government should effect the purchase, it would pay the Church an annual rental of 5 per cent. upon the value of such property as the Government should retain for its own use, allowing the Church in addition an indemnity in compensation of the rents or income not received by it between the date of the occupation and that of the signature of the agreement, and paying in ready money the amount of the annuities, with a reduction of a reasonable percentage from the value thereof.

It gives us pleasure to cite this precedent which is publicly known, and which shows the justice of the claims of the Catholic Church in this litigation, these claims, as we have said, being identical to the claims of said church in the Island of Cuba.

Decided for plaintiff.

Justices HERNÁNDEZ and FIGUERAS concurred.

Justices MACLEARY and WOLF dissented.\*\*

\*\* Parts of the opinion and the dissenting opinion of Mr. Justice MacLeary are omitted.

The United States recognized the validity of the claim of the Church to the Convent of Santo Domingo and the adjacent lands as declared by the Court in the principal case.

Therefore to adjust the difficulties with the Church growing out of the transfer of Porto Rico to the United States, President Roosevelt sent in 1908 Robert Bacon, Assistant Secretary of State, later Secretary of State, and Maj. Frank McIntyre, now Major General, U. S. Army, on special mission to Porto Rico "to meet with representatives of the insular government of Porto Rico and of the Roman Catholic Church in that island with a view to reaching some equitable settlement of the questions pending between that church on the one hand and the United States and the people of Porto Rico on the other."

Secretary Bacon and Major McIntyre met the representatives of the parties in interest and to the satisfaction of all agreed on behalf of the United States "to pay to the Roman Catholic Church in Porto Rico the sum of \$120,000 in full settlement of all claims of every nature whatsoever relative to the properties claimed by the Church which are now in the possession of the United States."

This agreement was accepted by the President, an act for the appropriation of the money in question was passed by the Congress and was paid to the

## III. EFFECT ON LAW

## BLANKARD v. GALDY.

(King's Bench, 1693. 2 Salk. 411.)

In debt on a bond, the defendant prayedoyer of the condition, and pleaded the statute Edw. VI, against buying offices concerning the administration of justice; and averred, That this bond was given for the purchase of the office of provost-marshal in Jamaica, and that it concerned the administration of justice, and that Jamaica is part of the revenue and possessions of the Crown of England: The plaintiff replied, that Jamaica is an island beyond the seas, which was conquered from the Indians and Spaniards in Queen Elizabeth's time, and the inhabitants are governed by their own laws, and not by the laws of England: The defendant rejoined, That before such conquest they were governed by their own laws; but since that, by the laws of England: Shower argued for the plaintiff, that on a judgment in Jamaica, no writ of error lies here, but only an appeal to the Council; and as they are not represented in our Parliament, so they are not bound by

Church in full satisfaction of its admittedly just claims. For the terms of the settlement, see H. R. Doc. No. 1413, 60th Cong., 2d Sess. (1909).

In *Alvarez y Sanchez v. United States*, 216 U. S. 167, 176, 30 Sup. Ct. 361, 54 L. Ed. 482 (1910), it was held that the abolition of the office of Solicitor (Procurador) gave no right to an action of damages.

"It is clear," said Mr. Justice Harlan, "that claimant is not entitled to be compensated for his office by the United States because of its exercise of an authority unquestionably possessed by it as the lawful sovereign of the Island [of Porto Rico] and its inhabitants. The abolition of the office was not, we think, in violation of any provision of the Constitution, nor did it infringe any right of property which the claimant could assert as against the United States."

In *O'Reilly de Camara v. Brooke*, 209 U. S. 45, 28 Sup. Ct. 439, 52 L. Ed. 676 (1908), the plaintiff was a Spanish subject, and alleged "a title by descent to the right to carry on the slaughter of cattle in the city of Havana and to receive compensation for the same. \* \* \* The office was abolished in 1878, subject to provisions that continued the emoluments until the incumbent should be paid."

On May 20, 1899, Cuba then being under the military jurisdiction of the United States, the American Governor of Havana issued "an order that the grant in connection with the service of the city slaughterhouse, of which the O'Reilly family and its grantees were the beneficiaries, was ended and declared void, and that thenceforth the city should make provision for such services."

The Supreme Court of the United States held that the emoluments which the plaintiff claimed "were merely the incident of an office," that "the right to the office was the foundation of the right to the emoluments," that "if the right to the office or to compensation for the loss of it was extinguished, all the plaintiff's rights were at an end," and that "no ground is disclosed in the bill for treating the right to slaughter cattle as having become a hereditament independent of its source."

See, also, on the general subject, *The Pious Fund Case*, United States and Mexican Claims Commission of 1868, Opinions, MS. Dept. of State, vol. 5, 84 (1875); *The Alsop Case*, United States v. Chile, 5 American Journal of International Law, 1079 (1911).

our statutes, unless specially named. Vide And. 115. Pemberton contra argued, that by the conquest of a nation, its liberties, rights and properties are quite lost; that by consequence their laws are lost too, for the law is but the rule and guard of the other; those that conquer cannot by their victory lose their laws, and become subject to others. Vide Vaugh. 405. That error lies here upon a judgment in Jamaica, which could not be if they were not under the same law. Et per HOLR, C. J. and Cur.—

First, in case of an uninhabited country newly found out by English subjects, all laws in force in England are in force there; so it seemed to be agreed.

Secondly, Jamaica being conquered, and not pleaded to be parcel of the kingdom of England, but part of the possessions and revenue of the Crown of England, the laws of England did not take place there, until declared so by the conqueror or his successors. The Isle of Man and Ireland are part of the possessions of the Crown of England; yet retain their ancient laws: That in Davis, 36, it is not pretended that the custom of tanistry was determined by the conquest of Ireland, but by the new settlement made there after the conquest: That it was impossible the laws of this nation, by mere conquest, without more, should take place in a conquered country; because, for a time, there must want officers, without which our laws can have no force: That if our law did take place, yet they in Jamaica having power to make new laws, our general laws may be altered by theirs in particulars; also they held, that in the case of an infidel country, their laws by conquest do not entirely cease, but only such as are against the law of God; and that in such cases where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity.

Judgment pro quer.<sup>40</sup>

#### ANONYMOUS.

(High Court of Chancery, 1722. 2 P. Wms. 75.)

Sir JOSEPH JEKYLL, Master of the Rolls. Memorandum, 9th of August, 1722, it was said by the Master of the Rolls to have been determined by the Lords of the privy council, upon an appeal to the King in council from the foreign plantations.

1st, That if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the laws of England; though, after such country is inhabited by the English, acts of parliament made in England, without naming the foreign plantations, will not bind them;

<sup>40</sup> Another report of the same case may be found in 4 Mod. 222. See *Cress v. Harrison*, 16 How. 164, 14 L. Ed. 889 (1853); *Airhart v. Massieu*, 98 U. S. 491, 25 L. Ed. 218 (1878).

for which reason, it has been determined that the statute of frauds and perjuries, which requires three witnesses, and that these should subscribe in the testator's presence, in the case of a devise of land, does not bind Barbadoes; but that,

2dly, Where the King of England conquers a country, it is a different consideration: for there the conqueror, by saving the lives of the people conquered, gains a right and property in such people; in consequence of which he may impose upon them what laws he pleases. But,

3dly, Until such laws given by the conquering prince, the laws and customs of the conquered country shall hold place; unless where these are contrary to our religion, or enact anything that is *malum in se*, or are silent; for in all such cases the laws of the conquering country shall prevail.

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#### COMMONWEALTH v. CHAPMAN et al.

(Supreme Judicial Court of Massachusetts, 1848. 13 Metc. 68.)

SHAW, C. J.<sup>41</sup> This was an indictment against the defendants for a false and malicious libel, tried before the court of common pleas, and, upon a conviction there, the case was brought before this court, upon an exception which has been most elaborately argued by the learned counsel for the defendants, and which, if sustained, must go to the foundation of the prosecution; namely, that there is no law of this Commonwealth by which the writing and publishing of a malicious libel can be prosecuted by indictment, and punished as an offence. The proposition struck us with great surprise, as a most startling one; but as it was seriously presented and earnestly urged in argument, we felt bound to listen, and give it the most careful consideration; but after the fullest deliberation, we are constrained to say, that we can entertain no more doubt upon the point than we did when it was first offered.

It is true that there is no statute of the Commonwealth declaring the writing or publishing of a written libel, or a malicious libel by signs and pictures, a punishable offence. But this goes little way towards settling the question. A great part of the municipal law of Massachusetts, both civil and criminal, is an unwritten and traditionary law. It has been common to denominate this "the common law of England," because it is no doubt true that a large portion of it has been derived from the laws of England, either the common law of England, or those English statutes passed before the emigration of our ancestors, and constituting a part of that law, by which, as English subjects, they were governed when they emigrated; or statutes made afterwards, of a general nature, in amendment or modification of the common law, which were adopted in the colony or province by general consent.

<sup>41</sup> Part of the opinion is omitted

In addition to these sources of unwritten law, some usages, growing out of the peculiar situation and exigencies of the earlier settlers of Massachusetts, not traceable to any written statute or ordinance, but adopted by general consent, have long had the force of law; as, for instance, the convenient practice, by which, if a married woman joined with her husband in a deed conveying land of which she is seized in her own right, and simply acknowledge it before a magistrate, it shall be valid to pass her land, without the more expensive process of a fine, required by the common law. Indeed, considering all these sources of unwritten and traditionary law, it is now more accurate, instead of the common law of England, which constitutes a part of it, to call it collectively the common law of Massachusetts.

To a very great extent, the unwritten law constitutes the basis of our jurisprudence, and furnishes the rules by which public and private rights are established and secured, the social relations of all persons regulated, their rights, duties, and obligations determined, and all violations of duty redressed and punished. Without its aid, the written law, embracing the constitution and statute laws, would constitute but a lame, partial, and impracticable system. Even in many cases, where statutes have been made in respect to particular subjects, they could not be carried into effect, and must remain a dead letter, without the aid of the common law. In cases of murder and manslaughter, the statute declares the punishment; but what acts shall constitute murder, what manslaughter, or what justifiable or excusable homicide, are left to be decided by the rules and principles of the common law. So, if an act is made criminal, but no mode of prosecution is directed, or no punishment provided, the common law furnishes its ready aid, prescribing the mode of prosecution by indictment, the common law punishment of fine and imprisonment. Indeed, it seems to be too obvious to require argument, that without the common law, our legislation and jurisprudence would be impotent, and wholly deficient in completeness and symmetry, as a system of municipal law.

It will not be necessary here to consider at large the sources of the unwritten law, its authority as a binding rule, derived from long and general acquiescence, its provisions, limits, qualifications, and exceptions, as established by well authenticated usage and tradition. It is sufficient to refer to 1 Bl. Com. 63 & seq.

If it be asked, "how are these customs or maxims, constituting the common law, to be known, and by whom is their validity to be determined?" Blackstone furnishes the answer; "by the judges in the several courts of justice. They are the depositaries of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study," "and from being long personally accustomed to the judicial decisions of their predecessors." 1 Bl. Com. 69.

Of course, in coming to any such decision, judges are bound to resort to the best sources of instruction, such as the records of courts of justice, well authenticated histories of trials, and books of reports, digests, and brief statements of such decisions, prepared by suitable persons, and the treatises of sages of the profession, whose works have an established reputation for correctness.

That there is such a thing as a common or unwritten law of Massachusetts, and that, when it can be authentically established and sustained, it is of equal authority and binding force with the statute law, seems not seriously contested in the argument before us. But it is urged that, in the range and scope of this unwritten law, there is no provision, which renders the writing or publishing of a malicious libel punishable as a criminal offence.

The stress of the argument of the learned counsel is derived from a supposed qualification of the general proposition in the constitution of Massachusetts, usually relied on in proof of the continuance in force of the rules and principles of the common law, as they existed before the adoption of the constitution. The clause is this: Chapter 6, art. 1, § 6: "All the laws which have been adopted, used and approved in the province, colony or state of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution."

It is then argued, that it is in virtue of this clause of the constitution, that the common law of England, and all other laws existing before the revolution, remain in force, and that this clause so far modifies the general proposition, that no laws are saved, but those which have been actually applied to cases in judgment in a court of legal proceeding; and unless it can be shown affirmatively that some judgment has been rendered, at some time before the adoption of the constitution, affirmative of any particular rule or principle of the common law, such rule is not brought within the saving power of this clause, and cannot therefore be shown to exist. We doubt the soundness of this proposition, and the correctness of the conclusion drawn from it.

We do not accede to the proposition, that the present existence and effect of the whole body of law, which existed before the constitution, depends solely upon this provision of it. We take it to be a well settled principle, acknowledged by all civilized states governed by law, that by means of a political revolution, by which the political organization is changed, the municipal laws, regulating their social relations, duties and rights, are not necessarily abrogated. They remain in force, except so far as they are repealed or modified by the new sovereign authority. Indeed, the existence of this body of laws, and the social and personal rights dependent upon them, from 1776, when the declaration of independence was made, and our political revolution took place,

to 1780, when this constitution was adopted, depend on this principle. The clause in the constitution, therefore, though highly proper and expedient to remove doubts, and give greater assurance to the cautious and timid, was not necessary to preserve all prior laws in force, and was rather declaratory of an existing rule, than the enactment of a new one. We think, therefore, it should have such a construction, as best to carry into effect the great principle it was intended to establish.

But further; we think the argument is unsound in assuming that no rule of the common law can be established under this clause of the constitution, without showing affirmatively, that in some judicial proceeding, such rule of law has been drawn in question and affirmed, previously to the adoption of the constitution. During that time there were no published reports of judicial proceedings. The records of courts were very imperfectly kept, and afford but little information in regard to the rules of law discussed and adopted in them. And who has examined all the records of all the criminal courts of Massachusetts, and can declare that no records of such prosecutions can be found? But so far as it regards libel, as a criminal offence, we think it does appear, from the very full and careful examination of the late Judge Thacher (*Commonwealth v. Whitmarsh*, Thacher, Cr. Cas. 441), that many prosecutions for libel were instituted in the criminal courts before the revolution, and none were ever quashed or otherwise disposed of on the ground that there was no law rendering libels punishable. In the case of the indictments returned against Governor Gage and others, very much against the will of the judges, those indictments were received and filed, and remained, until non prossed by the king's attorney general. This investigation of the history of the common law of Massachusetts is so thorough, complete and satisfactory, that it is sufficient to refer to it, as a clear elucidation of the subject.

But we think there is another species of evidence to prove the existence of the common law, making libel an offence punishable by law, clear, satisfactory and decisive; and that is, these rules of law, with some modification, caused by the provisions of the constitution; have been affirmed, declared, and ratified by the judiciary and the legislative departments of the existing government of Massachusetts, by those whose appropriate province and constitutional duty it was to act and decide upon them; so that they now stand upon a basis of authority which cannot be shaken, and must so stand until altered or modified by the legislature.

When our ancestors first settled this country, they came here as English subjects; they settled on the land as English territory, constituting part of the realm of England, and of course governed by its laws; they accepted charters from the English government, conferring both political powers and civil privileges; and they never ceased to acknowledge themselves English subjects, and never ceased to claim the rights and



privileges of English subjects, till the revolution. It is not therefore, perhaps, so accurate to say that they established the laws of England here, as to say, that they were subject to the laws of England. When they left one portion of its territory, they were alike subject, on their transit and when they arrived at another portion of the English territory; and therefore always, till the declaration of independence, they were governed and protected by the laws of England, so far as those laws were applicable to their state and condition. Under this category must come all municipal laws regulating and securing the rights of real and personal property, of person and personal liberty, of habitation, of reputation and character, and of peace. The laws designed for the protection of reputation and character, and to prevent private quarrels, affrays and breaches of peace, by punishing malicious libel, were as important and as applicable to the state and condition of the colonists as the law punishing violations of the rights of property, of person, or of habitation; that is, as laws for punishing larceny, assault and battery, or burglary. Being part of the common law of England, applicable to the state and condition of the colonists, they necessarily applied to all English subjects and territories, as well in America as in Great Britain, and so continued applicable till the declaration of independence.

This, therefore, would be evidence, *a priori*, that they were in force, and were adopted by the clause cited from the constitution, except so far as modified by the excepting clause.

That the law of libel existed, at the first migration of our ancestors, and during the whole period of the colonial and provincial governments, is proved by a series of unquestionable authorities; and we are now to inquire, whether by the acts done since the adoption of the constitution—acts of the judiciary and legislature—these laws, with some modification, have not been affirmed and declared in such a manner as to bring them within the provision of the constitution, and make them absolutely binding, until repealed by the legislature. \* \* \*

These declarations of the legislature, and the contemporary exposition of the constitution by the older judges, immediately after its adoption, together with an uninterrupted course of judicial practice to the present time, form a body of proof that the common law, making the publication of a malicious libel a criminal offence, has been adopted in this Commonwealth, entirely conclusive and irrefragable; and he must be a bold judge who should venture to decide that there is not now, and never has been, any such law, and that all the judgments which have been pronounced by the courts of this State, on convictions for this offence, have been erroneous.

Exceptions overruled.<sup>42</sup>

<sup>42</sup> See *Advocate-General v. Dossee*, 2 Moore, P. C. (N. S.) 22 (1863), for the effect of the settlement of India and the introduction of English law. In this case it was held that the English law, while applicable to English residents, did not, unless specifically extended to the natives, apply to them, and

SECTION 4.—RESPONSIBILITY <sup>43</sup>

## CITY OF NEW ORLEANS v. ABBAGNATO.

(Circuit Court of Appeals, Fifth Circuit, 1894. 62 Fed. 240, 10 C. C. A. 361, 26 L. R. A. 329.)

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

This was an action by the widow of Antonio Abbagnato against the city of New Orleans for damages for the death of said Abbagnato. At the trial, the jury found a verdict of five thousand dollars for plaintiff, and judgment for plaintiff was entered on the verdict. Defendant brought error.

The petition set forth that Antonio Abbagnato was born in Italy; that he emigrated to the United States about 1884, and settled in New Orleans, where he was arrested in 1891, with twenty other persons, charged with the murder of the chief of police of New Orleans, which had recently occurred; that the trial resulted in the acquittal, on March 13, 1891, of Abbagnato and five of the accused and a mistrial of three others; that Abbagnato and the others were immediately lodged in jail pending further legal proceedings; that on the day following a mass meeting was held, at which inflammatory speeches were made; that a mob of some forty or fifty armed men broke into the jail; and that Abbagnato and ten other prisoners were killed, and Abbagnato and two others hanged to trees or lamp posts and riddled with bullets.

It was alleged by the defendant that Abbagnato was a naturalized American citizen, but some of the others were undoubtedly Italian subjects.

that therefore, suicide not being forbidden by Hindoo law, was not a crime in the natives, although it would be if committed by English residents.

See, also, *First National Bank of Utah v. Kinner*, 1 Utah, 100 (1873), describing the law in force in the territory of Utah, and the process by which it was introduced and became binding; *McKennon v. Winn*, 1 Okl. 327, 33 Pac. 582, 22 L. R. A. 501 (1893), holding that the common law was in force in the territory, but not the statute of frauds, as the statute was not part of the common law of England; *Chappell v. Jardine*, 51 Conn. 64 (1884), for the effect of a mortgage upon property in Ram Island, after such island became a part of Connecticut.

Grants of land within a district made by a state exercising de facto sovereignty over the district, in the mistaken belief that the district is included within its boundaries as ascertained by compromise between the states are void. *Coffee v. Groover*, 123 U. S. 1, 8 Sup. Ct. 1, 31 L. Ed. 51 (1887), reversing same case as reported in 19 Fla. 61 (1882), and 20 Fla. 64 (1883).

<sup>43</sup> "It is an established principle of international law that a nation is responsible for wrongs done by its citizens to the citizens of a friendly power. Ordinarily this responsibility is discharged by a government rendering to a resident alien the same protection which it affords to its own citizens and bringing the perpetrators to trial and punishment. This responsibility of a nation for the acts of its individual members is so well established and regulated by international law that it falls little short of being a natural right." Per Nott, C. J., in *Jonathan Brown v. United States and the Brulé Sioux*, 32 Ct. Cl. 432, 433 (1897).

The petition charged that the city authorities, including the mayor and police, were informed in advance of the action contemplated against the prisoners, but that they neglected their duty and failed to protect them against impending danger.

The petition further stated that Abbagnato was at the time of his death without wife or children, and that therefore his mother, an Italian subject residing in Italy, presented the claim for damages for his death.<sup>44</sup>

PARDEE, Circuit Judge. The treaty between the kingdom of Italy and the United States proclaimed November 23, 1871, guarantees to the citizens of either nation in the territory of the other "the most constant protection and security for their persons and property," and further provides that "they shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives on their submitting themselves to the conditions imposed upon the natives." Treaty of 1871, art. 3 (17 Stat. 845). This treaty applies to this case only so far as to require that the rights of the plaintiff shall be adjudicated and determined exactly the same as if she were, and her deceased son had been, a native citizen of the United States.

The Constitution of the state of Louisiana provides as follows:

"The citizens of the city of New Orleans or any political corporation which may be created within its limits shall have the right of appointing the several public officers necessary for the administration of the police of said city, and pursuant to the mode of election which shall be provided by the General Assembly." Const. La. 1879, art. 253.

"The maintenance and support of persons confined in the parish of Orleans upon charges or conviction for criminal offences shall be under the control of the city of New Orleans." Id. art. 147.

The charter of the city of New Orleans "creates all the inhabitants of the parish of Orleans, as now bounded by \* \* \*, as a body corporate, and establishes them as a political corporation by the name of the 'City of New Orleans,' with the following powers, and no more: It shall have a seal and may sue and be sued. \* \* \* (Section 1.) The council shall have power, and it shall be their duty, to pass such ordinances, and to see to their faithful execution, as may be necessary and proper to preserve the peace and good order of the city; \* \* \* to organize and provide an efficient police. \* \* \* (Section 7.) The council shall also have power \* \* \* to establish jails, houses of refuge and reformation and correction, and make regulations for their government, and to exercise a general police power in the city of New Orleans. (Section 8.) The mayor shall keep his office at the city hall; \* \* \* shall see that the laws and ordinances within the limits of the city of New Orleans be properly executed; \* \* \*

<sup>44</sup> A shortened statement has been substituted for that of the original report.

shall be *ex officio* justice and conservator of the peace. \* \* \* (Section 19.)" Acts 1882, No. 20, p. 14.

The act of the Legislature of Louisiana (passed in 1888) creating the police board of the city of New Orleans preserves to the mayor of the city of New Orleans the power, as the commander in chief of the police force, to issue such orders as may be necessary and proper for the preservation of the peace in the city of New Orleans, and in said act it was declared that:

"It is hereby made the duty of the police force at all times of the day and night, and the members of such force are thereunto empowered, to especially preserve the public peace, to prevent crimes, detect and arrest offenders, suppress riots, mobs and insurrections, disperse unlawful or dangerous assemblages which obstruct the free passage of public streets, sidewalks, squares and places, protect the rights of persons and property," etc. Acts 1888, No. 63, p. 64.

The city of New Orleans, by her pleadings, admits the gross negligence charged in the petition in the performance of the duties devolving upon the municipality under the Constitution and laws of the state above referred to, whereby Abbagnato lost his life at the hands of a mob while in the custody of the law; and the question presented in this case is whether, on such admission of facts, the city can be held liable in damages. It is well settled that at common law no civil action lies for injury to a person which results in his death. *Insurance Co. v. Brame*, 95 U. S. 754-756, 24 L. Ed. 580; *Dennick v. Railroad Co.*, 103 U. S. 11, 21, 26 L. Ed. 439; *The Harrisburg*, 119 U. S. 199-214, 7 Sup. Ct. 140, 30 L. Ed. 358. The rule is the same under the civil law, according to the decisions of the Louisiana Supreme Court. *Hubgh v. Railroad Co.*, 6 La. Ann. 495; *Hermann v. Railroad Co.*, 11 La. Ann. 5. In the absence of a statute giving a remedy, public or municipal corporations are under no liability to pay for the property of individuals destroyed by mobs or riotous assemblages. *Add. Torts*, 1305; *Dill. Mun. Corp.* § 959.

In the case of *State v. Mayor, etc.*, of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936, the Supreme Court of the United States held that the right to demand reimbursement from a municipal corporation for damages caused by a mob is not founded on contract. It is a statutory right, and may be given or taken away at pleasure. In the same case, Mr. Justice Bradley, concurring, said:

"I concur in the judgment of this case, on the special ground that remedies against municipal bodies for damages caused by mobs or other violators of law, unconnected with the municipal government, are purely matters of legislative policy, depending on positive law, which may at any time be repealed or modified, either before or after the damage has occurred, and the repeal of which causes the remedy to cease. In giving or withholding remedies of this kind, it is simply a question whether the public shall or shall not indemnify those who

sustain losses from the unlawful acts or combinations of individuals; and whether it shall or shall not do so is a matter of legislative discretion, just as it is whether the public shall or shall not indemnify those who suffer losses at the hands of a public enemy, or from intestine commotions or rebellion."

If this be the rule with regard to the liability of municipal corporations for damages to property committed by mobs or riotous assemblages, a fortiori it must be the rule with regard to the liability of municipal corporations for damages resulting in the loss of life from the acts of mobs or riotous assemblages. The reason of the rule is obvious. Actions to recover from municipal corporations damages resulting from the acts of mobs and riotous assemblages are actions to hold such corporations liable in damages for a failure to preserve the public peace. The preservation of the public peace primarily devolves upon the sovereign. Under our system of government the State is that sovereign. *U. S. v. Cruikshank*, 92 U. S. 542-553, 23 L. Ed. 588; *Western College v. City of Cleveland*, 12 Ohio St. 377. When, by the action of the State, a municipal corporation is charged with the preservation of the peace, and empowered to appoint police boards and other agencies to that end, the corporation pro tanto is charged with governmental functions in the public interest and for public purposes, and is entitled to the same immunity as the sovereign granting the power for negligence in preserving the public peace, unless such liability is expressly declared by the sovereign. This proposition is so well recognized that not a well-considered, adjudicated case can be found in the books where, in the absence of an express statute, any municipality has been held liable for the neglect of its officers to preserve the peace. In the case of *Western College v. City of Cleveland*, supra, it was said:

"It is the duty of the state government to secure to the citizens of the state the peaceful enjoyment of their property and its protection from wrongful and violent acts. For the proper discharge of this duty, power is delegated in different modes. One of these is the establishment of municipal corporations. Powers and privileges are also conferred upon municipal corporations to be exercised for the benefit of the individuals of whom such corporations are composed, and, in connection with these powers and privileges, duties are sometimes specifically imposed. It is obvious that there is a distinction between those powers delegated to municipal corporations to preserve the peace and protect persons and property when they are to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the property comprised within the limits of the corporation and its adaptation for the purposes of residence and business. As to the first, the municipal corporation represents the state; as to the second, the municipal corporation represents the pecuniary and proprietary interest of the individuals. As to the first, responsibility for acts done or

omitted is governed by the same rule of responsibility which applies to like delegations of power; as to the second, the rules which govern the responsibility of individuals are properly applicable."

The exemption of municipalities from liability to suits for damages for the negligence of officers and agents in the execution of the governmental functions granted by the state, in the public interest, and in the absence of statutory liability, is recognized in Louisiana, as shown by the decisions of the Supreme Court of the state in *Egerton v. Third Municipality*, 1 La. Ann. 437; *Stewart v. City of New Orleans*, 9 La. Ann. 461, 61 Am. Dec. 218; *Lewis v. New Orleans*, 12 La. Ann. 190; *Bennett v. New Orleans*, 14 La. Ann. 120; *Howe v. New Orleans*, 12 La. Ann. 482; *New Orleans, etc., R. Co. v. New Orleans*, 26 La. Ann. 478—although *Johnson v. Municipality No. 1*, 5 La. Ann. 100, *Clague v. New Orleans*, 13 La. Ann. 275, and *Chase v. Mayor*, 9 La. 343, are apparently to the contrary. The Louisiana cases, as well as those of other states, are very ably reviewed, and the whole matter discussed, in a well-considered opinion of the learned judge of the Eastern district of Louisiana in the case of *Gianfortone v. City of New Orleans* (recently decided) 61 Fed. 64, 24 L. R. A. 592. It follows, therefore, that in order to recover damages against the city of New Orleans for the taking of human life by a mob in said city, no matter what the negligence of the city officials may have been, there must be a statute of the state of Louisiana expressly or by necessary implication giving a remedy in such cases.

Section 2453 of the Revised Statutes of Louisiana reads as follows:

"The different municipal corporations in this state shall be liable for the damages done to property by mobs or riotous assemblages in their respective limits."

And article 2315, Rev. Civ. Code, as last amended, reads as follows:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. The right of this action shall survive in case of death in favor of the minor children and widow of the deceased or either of them, and in default of these in favor of the surviving father or mother, or either of them for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife, as the case may be."

Article 2316, *Id.*, reads as follows:

"Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence or his want of skill."

And article 2317:

"We are responsible not only for the damage caused by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody."

It is not seriously contended in this case that article 2453 of the Revised Statutes of the state warrants the maintenance of the present

suit, or fixes any liability upon the city of New Orleans because of the death of Abbagnato at the hands of a mob, as recited in the petition. As we consider the statute and the fact of its existence on the statute book, it goes rather to deny the right to recover in this case than to support it, for it shows clearly that in the legislative mind the statute was necessary to fix liability upon municipal corporations for damages to property done by mobs; and the limitation of the right to recover damages to property only shows a clear legislative intent that beyond property, and for life or limb, municipal corporations should not be responsible. The entire right of the plaintiff in error to recover damages must then be based upon article 2315 and the subsequent articles of the Civil Code, above quoted. Article 2315, as originally adopted, was as follows:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

It was under this article that the decision in *Hubgh v. Railroad Co.*, supra, was rendered, holding that an action for damages caused by the homicide of a free human being cannot be maintained. In regard to the article the court says:

"The provisions of this article, however general and comprehensive its terms may be, are found more than once recited in terms equally general and comprehensive in the laws of the fifteenth title of the seventh Partida. The article was inserted in the Code of 1809, at a time when the Spanish laws were in force. It was put and retained to this time in the Code, not for the purpose of making any change in the law, but because it was a principle which was in its proper place in a Code; a principle which would be equally recognized as a necessary conservative element of society, and equally obligatory, whether it was formally enacted in a Code or not, \* \* \* Merlin, in giving his conclusions before the Court of Cassation, in the Case of Michel, Reynier et al., respecting the article 1382 of the Code Napoleon, which is identical with the article 2294 of our Code, says: 'The principle laid down in article 1382 is not new. It is drawn from the natural law; and, long before the Napoleon Code, the Roman laws had solemnly proclaimed it. Long before that Code, the French laws had recognized and assumed its existence.'"

We understand from this that the article of the Civil Code in question was not an innovation of the civil law, in force in the state, introducing new principles and establishing new duties and responsibilities which did not before exist. It is a part of a system of laws, and controlling only where, under general principles, it is applicable to the facts and liabilities of a particular case. We have shown that the article was not enforceable when the "act whatever of man" resulted in death, until the statute so declared, and this because of the intervention of other equally well-recognized principles of law. To make it applicable

in case of death through negligence, the Legislature of 1855 amended the article by adding thereto as follows:

"The right of this action shall survive in case of death in favor of the minor children and widow of the deceased or either of them, and in default of these in favor of the surviving father and mother or either of them for the space of one year from the death." Acts 1855, No. 223, p. 270.

As thus amended, the scope of the article was still too narrow to permit the recovery of other damages than such as the deceased himself would have had had he survived the injury (*Vredenburg v. Behan*, 33 La. Ann. 627); and therefore the article was again amended and re-enacted, adding thereto as follows:

"The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife, as the case may be." Acts 1884, p. 94.

Neither the amendment of 1855 nor that of 1884 enlarges the scope of the article as to the persons who may be held liable for negligence. The amendments go no further than to provide for a limited survival of the action and an enlarged rule of damages. The article is applicable now to the same persons, and to no others, as before amendment; and if, before amendment, it could not be applied so as to hold a municipal corporation liable for damages resulting from the acts of mobs and riotous assemblages, it cannot be so applied now. Before this amendment, it declared well-known principles of the civil law, but not all of them, and it controlled in cases where the application of other well-known rules and principles did not deny the action or defeat recovery. As amended, it should have the same construction and be given the same force. Before the act of 1855, it was not contended, nor could it have been successfully contended, that the article was applicable as against a municipal corporation to recover damages to either person, life, or property resulting from the acts of mobs and riotous assemblages. For these reasons, we are clear that neither expressly nor by implication does it now give a remedy in damages against a municipal corporation for negligence in preserving the public peace resulting in the loss of life by the acts of a mob. As we find no law of the state of Louisiana giving a remedy in damages against a municipal corporation for the acts done by a mob resulting in the loss of human life, we are compelled to reverse the judgment of the court below. \* \* \*

The judgment of the circuit court is reversed, and the case is remanded, with instructions to maintain the exception of non-liability, and dismiss the plaintiff's petition.<sup>45</sup>

<sup>45</sup> The President, by the Secretary of State, expressed regret for the occurrence and declared his purpose to lay the matter before Congress at its next session, and to recommend that an indemnity be granted to the families of the murdered men.

"The Italian government was not satisfied with this position of the United



## EL TRIUNFO CO. CASE.

(Special Arbitration Tribunal of United States and San Salvador, 1902. U. S. Foreign Relations, 1902, p. 859.)

Opinion of Sir HENRY STRONG and DON M. DICKINSON:

This controversy has its origin in schemes to establish and develop a new port on the Pacific coast of Central America, in the Republic of Salvador, on the Bay of Jiquilisco. \* \* \*

In the late summer or fall of 1894 contesting petitions were pre-

States but demanded further that the leaders of the mob be criminally prosecuted and punished according to law.

"With this demand the government of the United States could not comply, however willing it might be to do so. It is well known that the federal courts have no common-law jurisdiction in criminal matters; it was impossible, therefore, to institute a criminal suit against these persons in those courts; and as the states are wholly independent of the federal government in respect of such jurisdiction, it was equally impossible to compel the government of the state of Louisiana to institute such proceedings. The government of the United States was therefore quite helpless in this aspect of the case, and could only listen to the complaints of Italy, and try to explain to her statesmen the intricacies of the United States Constitution.

"It is undoubtedly within the competence of Congress to confer upon the federal courts jurisdiction in this class of cases; but as yet it has not been done.

"In regard to the merits of this case, it would seem that the United States should accept the responsibility, as in fact they have done, for the acts of the mob. In the first place, these persons were in the custody of the state government and, for the purposes of international law, in that of the national government, and therefore entitled to special protection. In the second place, there was no serious attempt on the part of the proper authorities to quell the riot; and it is generally understood that a government is liable internationally for injuries done to 'alien residents by a mob which by due diligence it could have suppressed.'

"The Italian government eventually withdrew the demand for the punishment of the actors in the affair, and accepted a money indemnity instead."

Freeman Snow's Cases and Opinions on International Law, p. 183, note (1893).

The foreign sojourner is entitled to an equal, not greater, protection than the native resident. When, therefore, through civil war or mob violence which the authorities cannot control, aliens suffer injury, the state is not responsible to the aliens for injuries thus received.

In the case of injuries to foreign officers, a liability is assumed which is ordinarily denied where private individuals are concerned. The leading case on this subject is the New Orleans Riot of 1851.

In 1851, Narciso Lopez, a Venezuelan by birth, and a former soldier in the Spanish army, set on foot an expedition from New Orleans against Cuba. Lopez was in favor of the annexation of Cuba to the United States, and the purpose of his expedition was to overthrow the Spanish government in the island by force of arms.

He was defeated, his expedition dispersed, he was tried for high treason, and executed. A number of Americans accompanying him were summarily executed.

When this news reached New Orleans and Key West, riots broke out against the Spanish residents of those cities. In New Orleans the Spanish consulate was attacked and much injury done to persons and property.

To the demand of the Spanish government for reparation, Daniel Webster, then Secretary of State, replied as follows:

"The assembling of mobs happens in all countries; popular violences oc-

sented to the Government of Salvador for a concession of the right, for a period of years, to establish steam navigation in the port of El Triunfo, setting forth the details of the proposed enterprise. One application was presented by Simon Sol, Luis Lopez, and Lorenzo Campos, and the other by Henry H. Burrell and George F. Thompson, citizens of the United States, and Gustavo Lozano and Emeterio S. Ruano, citizens of the Republic of Salvador. The proposals were published in the official journal of the Republic by the proper executive department of the Government, and bids were invited for the franchise so sought.

These proceedings resulted in the awarding of the franchise or concession to the Burrell party, and on October 6, 1894, the Republic of Salvador granted them, for the period of twenty-five years, the exclusive right of steam navigation of the port, together with certain valuable privileges and as valuable exemptions. The grant was in the form of a bilateral contract, signed by the executive officers in behalf of the Government of Salvador as party of the one part and by the grantees as party of the other part. \* \* \*

The concession also required that the grantees should form a corporation to take and operate the concession.

Thereupon, on October 25, 1894, that corporation was formed, and is called throughout the case El Triunfo Company, Limited. The capital stock of the corporation was divided into 1,000 shares.

casionaly break out everywhere, setting law at defiance, trampling on the rights of citizens and private men, and sometimes on those of public officers, and the agents of foreign governments, especially entitled to protection. In these cases the public faith and national honor require, not only that such outrages should be disavowed, but also that the perpetrators of them should be punished, wherever it is possible to bring them to justice, and, further, that full satisfaction should be made in cases in which a duty to that effect rests with the government, according to the general principles of law, public faith, and the obligations of treaties. \* \* \* While the government has manifested a willingness and determination to perform every duty which one friendly nation has a right to expect from another, in cases of this kind, it supposes that the rights of the Spanish consul, a public officer residing here under the protection of the United States government, are quite different from those of the Spanish subjects who have come into the country to mingle with our own citizens, and here to pursue their private business and objects. The former may claim special indemnity, the latter are entitled to such protection as is afforded to our own citizens. \* \* \* The President is of opinion, as already stated, that, for obvious reasons, the case of the consul is different, and that the government of the United States should provide for Mr. Laborde a just indemnity; and a recommendation to that effect will be laid before Congress, at an early period of its approaching session. This is all which it is in his power to do. The case may be a new one, but the President being of opinion that Mr. Laborde ought to be indemnified, has not thought it necessary to search for precedents." 6 Moore, *International Law Digest*, 812.

On the general subjects of mob violence and the international incidents to which it has given rise, see John Bassett Moore, 6 *International Law Digest*, 809-883.

On the relation of the states of the American Union to the federal government, and the constitutional difficulties in the way of securing redress from one or the other, see *Proceedings of the American Society of International Law*, 1907, p. 150 et seq.; *Id.*, 1908, p. 21 et seq.

This capital stock was acquired and distributed as follows: the Salvador Commercial Company, a corporation created and existing under the laws of the State of California, which, as clearly appears by the record, was the moving projector and spirit in the enterprise of developing the port of El Triunfo and in acquiring the concession, took a majority of the stock, that is to say, 501 shares. Henry H. Burrell, who was made the president of El Triunfo Company, and who was an American citizen, acquired and held 5 shares. Julius H. Ellis, who became the secretary of El Triunfo Company, and who was an American citizen, acquired and held 3 shares; J. B. Hays, an American citizen, 2 shares; Luis Maslin, an American citizen, 2 shares, and George F. Thompson, an American citizen, 15 shares, so that the total shares held by citizens of the United States in El Triunfo Company were 536 in number.

It is apparent that upon the execution of its contract with the Salvador Government, through which the concession was acquired, and upon the formation of the corporation required by the concession, El Triunfo Company entered upon the preparation and development of the port, and the performance of the requirements imposed upon it, with exceptional enterprise and vigor. \* \* \*

There can be no doubt that the record proves to a demonstration that the enterprise, which may properly have been considered an experiment up to the beginning of 1898, although it had shown an improving financial condition from the beginning of its business, was an assured financial success, equaling if not exceeding the most sanguine expectations of its promoters by this showing of profits on the steadily increasing business at the close of the first half of that year. A careful examination of the voluminous evidence in the case shows that from March 1, 1895, to the close of the first half of 1898 the percentage of gains on expenses and losses regularly increased at the rate of about  $33\frac{1}{3}$  per cent. per annum.

It is clear to our minds that as soon as the success of the enterprise was so demonstrated, and its future as an exceptionally paying enterprise was assured, an intrigue commenced within the company, whose object was to oust the management and control the American interests and to wrest the concession from their hands and to appropriate it and the entire investment of the American shareholders for the benefit of the conspirators. There can be no other reasonable explanation of the events that now rapidly followed the stage of its affairs where the showing of profits and the percentage of increase promised such large returns for the future.

At the annual meeting of the shareholders, held on June 10, 1898, a full board of directors was elected, including Burrell and Ellis and Simon Sol, who had been one of the competitors for the concession as against the Burrell interests when it was granted in 1894. On the same day the board of directors met and organized, re-electing Burrell

president, Sol as vice-president, and Ellis as treasurer. At the next general meeting of the shareholders, held on July 31, 1898, one of the Salvadorean directors resigned his office as director and secretary, and Luis Lopez was elected to fill the vacancy.

It may be of significance in passing that this is the same Luis Lopez who, joining with Sol, was a competitor for the franchise as aforesaid as against the American or Burrell party in 1894. At the meeting of directors held on this same day this same Luis Lopez was appointed secretary of the company.

In September, 1898, while the president of the company was at the city of San Salvador on its business, Sol assumed the office of president by clear usurpation and without any authority whatever, and without notice to Burrell or Ellis assumed to hold a meeting of directors at his own house in Santiago de Maria, at which the only attendants besides himself were the said Lopez and one Cochella. \* \* \*

On October 14, 1898, another so-called meeting of the board of directors was held, which was assumed to be an extraordinary or special meeting, according to the minutes. \* \* \*

Without detailing further the wholly illegal character of the meeting and of its proceedings, and the falsity of its minutes, the fact may be stated that under its proceedings a petition for adjudication of the bankruptcy of the company was authorized, and almost immediately filed in the court of first instance at Santiago de Maria, under the authority of the said alleged directors. Promptly following, on October 19, five days after the so-called meeting was held, a form of adjudication of bankruptcy was made by the court, and one Meardi was appointed receiver and custodian of the property and effects of the company.

This receiver at once possessed himself of all the books, papers, vouchers, and correspondence of the company and its officers, and these were withheld from the American investors and from their representatives. From that time free access to these papers was wholly denied them until after these proceedings were pending in Washington, and even then large quantities of such papers were never produced for their inspection. Immediately following this proceeding Ellis and Burrell, the sole representatives of the American capital invested in the company, were driven from Salvador in fear of their lives. \* \* \*

The bankruptcy proceedings were, in our opinion, the result of a fraudulent conspiracy, which successfully imposed upon the court in which the proceedings were taken. On February 12, 1899, in order to move in the only proper legal manner for the restoration of the company's rights and its rehabilitation by turning out the conspirators and installing a representative directorate to move in the matter, a meeting of the shareholders was called, to be held on February 28, to concert measures for these purposes. The call for the meeting was published in the official journal of the Republic on February 13, 1899.

On the day following the president of the Republic issued an edict

closing the port of El Triunfo against all importations. Thus was the first step for relief met, thus was the concession stricken down and practically canceled and destroyed, and thus every effort of its owners and the American shareholders to extricate it from the results of the fraudulent manipulation of the conspiracy was paralyzed.

The Salvador Commercial Company presented to the Government its solemn protest against this decree. Every effort was made by the representatives of the American shareholders to obtain its revocation. All were in vain, and on May 13 the executive granted a concession to others, citizens of Salvador, of everything that had been covered by the franchise and concession of October 6, 1894. The owners of the American interests presented their solemn protest to the executive against this grant, but no attention was paid to it or to them.

Then followed the appeal of the American citizens interested to their Government for its intervention for their protection and for reclamation.

In view of this history it need hardly be said that the evidence discloses that at the time the proceedings in bankruptcy were taken by the false and fraudulent representatives of this company no creditor had complained and no creditor had a just cause of complaint against it for nonpayment of its debts. On the contrary, its complete financial success and the certainty of its prosperous future had been but then completely assured.

It is claimed that the United States cannot in this case make reclamation for its nationals, the shareholders in El Triunfo Company who had thus been despoiled, for the reason that such citizens as so invested their money in the Republic of Salvador must abide by the laws of that country, and seek their remedy, if any they have, in the courts of Salvador; and, moreover, that before reclamation can be successfully urged against Salvador in their behalf it must be shown that such citizens of the United States, having appealed to the courts of the Republic, have been denied justice by those courts.

The general proposition of international law as thus stated is not denied.

If the Government of Salvador had not intervened to destroy the franchise and concession of El Triunfo Company, and thus despoiled the American shareholders of their interests in that enterprise, an appeal might have been, as it was evidently intended to be, made to the courts of Salvador for relief from the bankruptcy proceedings. The first step to that end would be the turning out of the conspiring directors and the installment of a proper directory by the supreme authority of the corporation, the shareholders' meeting.

But by the executive decrees, rather than by the bankruptcy proceedings, the property rights of the American citizens involved were irrevocably destroyed.

Seeking redress through a called meeting of the shareholders of the

company, the moment the call was issued, and it appeared that the proper remedy was to be sought by the corporation itself, showing that the proceedings by its alleged representative directors for bankruptcy were fraudulent, and that the bankruptcy court had been imposed upon by their conspiracy, in fraud of the incorporators, whom they falsely pretended to represent, that moment the Government of Salvador came to the aid of the conspirators and by executive act destroyed the only thing of value worth retrieving through the courts.

It is not the denial of justice by the courts alone which may form the basis for reclamation against a nation, according to the rules of international law.

There can be no doubt—

Says Halleck—

“that a state is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the government, so far as the acts are done in their official capacity.”

The law enacted by the Congress of Salvador in relation to foreigners provides (article 39) :

“Only in case of the denial of justice, or of a voluntary delay of its administration, can foreigners appeal to the diplomatic forum, but only after having exhausted in vain the ordinary remedies provided by the laws of the Republic.”

It is apparent in this case that an appeal to the courts for relief from the bankruptcy would have been in vain after the acts of the executive had destroyed the franchise, and that such a proceeding would have been a vain thing is the sufficient answer to the argument based upon this law of Salvador.

What would have profited these despoiled American citizens if they had successfully appealed to the courts for the setting aside of the bankruptcy proceedings, after the concession was destroyed by the closing of the port of El Triunfo and the grant of the franchise to strangers?

Said Mr. Fish to Minister Foster :

“Justice may as much be denied when it would be absurd to seek it by judicial process as if denied after being so sought.”

Again, this is not a case of the despoliation of an American citizen by a private citizen of Salvador, on which, on appeal to the courts of Salvador, justice has been denied the American national, nor is it a case where the rules applying to that class of reclamations, so numerous in international controversies, have to do. This is a case where the parties are the American nationals and the Government of Salvador itself as a party to the contract; and in this case, in dealing with the other party to the contract, the Government of Salvador is charged with having violated its promises and agreements by destroying what it agreed to give, what it did give, and what it was solemnly bound to protect.

Some one of the most respected authorities in international law, Lewis Cass, has laid down the undoubted rule and its exception, as broad as the rule, when he says that—

“When citizens of the United States go to a foreign country, they go with an implied understanding that they are to obey its laws and submit themselves in good faith to its established tribunals. When they do business with its citizens, or make private contracts there, it is not to be expected that either their own or the foreign government is to be made a party to this business or these contracts, or will undertake to determine any dispute to which they give rise. \* \* \*

“The case is widely different when the foreign government becomes itself a party to important contracts, and then not only fails to fulfill them, but capriciously annuls them, to the great loss of those who have invested their time, labor, and capital in their reliance upon its good faith and justice.”

In any case, by the rule of natural justice obtaining universally throughout the world wherever a legal system exists, the obligation of parties to a contract to appeal for judicial relief is reciprocal. If the Republic of Salvador, a party to the contract which involved the franchise to El Triunfo Company, had just grounds for complaint that under its organic law the grantees had, by misuser or nonuser of the franchise granted, brought upon themselves the penalty of forfeiture of their rights under it, then the course of that Government should have been to have itself appealed to the courts against the company and there, by the due process of judicial proceedings, involving notice, full opportunity to be heard, consideration, and solemn judgment, have invoked and secured the remedy sought.

It is abhorrent to the sense of justice to say that one party to a contract, whether such party be a private individual, a monarch, or a government of any kind, may arbitrarily, without hearing and without impartial procedure of any sort, arrogate the right to condemn the other party to the contract, to pass judgment upon him and his acts, and to impose upon him the extreme penalty of forfeiture of all his rights under it, including his property and his investment of capital made on the faith of that contract.

Before the arbitrament of natural justice all parties to a contract, as to their reciprocal rights and their reciprocal remedies, are of equal dignity and are equally entitled to invoke for their redress and for their defense the hearing and the judgment of an impartial and disinterested tribunal.

It follows that the Salvador Commercial Company and the other nationals of the United States who were shareholders in El Triunfo Company, as hereinbefore named, are entitled to compensation for the result of the destruction of the concession and for the appropriation of such property as belonged to that company, excepting such property as

was accumulated and constructed under the terms of the concession, to be vested in and owned by the Republic, to the extent of the interests of such American citizens in said concession and such property. \* \* \*

We have not discussed the question of the right of the United States under international law to make reclamation for these shareholders in El Triunfo Company, a domestic corporation of Salvador, for the reason that the question of such right is fully settled by the conclusions reached in the frequently cited and well-understood Delagoa Bay Railway Arbitration.<sup>46</sup>

The particulars and items of the damages found are definitely stated in the formal award and its schedule this day signed.

### THE NORTH SEA or DOGGER BANK CASE,<sup>47</sup>

between

### GREAT BRITAIN and RUSSIA.

(The Hague Commission of Inquiry, 1905. 99 British and Foreign State Papers, 921, English Translation, 2 American Journal of International Law, 929.)

In October, 1904, during the Russo-Japanese war, the Admiral of the Russian Baltic fleet, then coaling off the coast of Norway, received rumors from several sources of the presence of Japanese torpedo boats in the vicinity, and on this account the fleet set sail for the Far East twenty-four hours ahead of schedule. As the last division of the fleet, in immediate charge of the Admiral, was passing through the North Sea in the early hours of the morning of October 9, 1904, it came upon what afterwards proved to be an English fishing fleet from Hull, England. The Russians, under a misapprehension that the English vessels were the Japanese torpedo boats, opened fire, with the result that one fishing boat was sunk and others damaged, while two fishermen were killed and six injured.

In order to prevent serious results from this incident, France suggested resort to an international commission of inquiry, as provided for in the convention for the pacific settlement of international disputes, adopted by the Hague Conference of 1899. The suggestion was accepted by Great Britain and Russia, and an agreement was signed on November 25, 1904, which invested a commission composed of admirals from the British, Russian, United States, French and Austrian navies with authority to find the facts in dispute and to fix responsibility. The commission held sessions at Paris from December 22, 1904, to February 26, 1905, on which date its report was rendered.<sup>48</sup>

<sup>46</sup> 2 Moore, International Arbitrations, 1865-1899.

<sup>47</sup> This case is also known as "The Hull Incident."

<sup>48</sup> This statement of facts is taken from The Hague Court Reports (J. B. Scott, Ed., 1916) 403.



## Report of the Commission.

1. The commissioners, after a minute and prolonged examination of the whole of the facts brought to their knowledge in regard to the incident submitted to them for inquiry by the declaration of St. Petersburg of the 12th (25th) November, 1904, have proceeded to make, in this report, an analysis of these facts in their logical sequence.

By making known the prevailing opinion of the commission on each important or decisive point of this summary, they consider that they have made sufficiently clear the causes and the consequences of the incident in question, as well as the deductions which are to be drawn from them with regard to the question of responsibility. \* \* \*

9. Toward 1 o'clock in the morning of the 9th (22d) October, 1904, the night was rather dark, a slight, low fog partly clouding the air. The moon only showed intermittently between the clouds. A moderate wind blew from the southeast, raising a long swell, which gave the ships a roll of 5° on each side.

The course followed by the squadron toward the southwest would have taken the last two divisions, as the event proved, close past the usual fishing ground<sup>49</sup> of the fleet of Hull trawlers, which was composed of some thirty of these small steamboats, and was spread over an area of several miles.

It appears from the concordant testimony of the British witnesses that all these boats carried their proper lights, and were trawling in accordance with their usual rules, under the direction of their "admiral," and in obedience to the signals given by the conventional rockets.

10. Judging from the communications received by wireless telegraphy, the divisions which preceded that of Admiral Rojdestvensky across these waters had signaled nothing unusual.

It became known afterward, in particular, that Admiral Folkersam, having been led to pass round the fishing fleet on the north, threw his electric searchlight on the nearest trawlers at close quarters, and, having seen them to be harmless vessels, quietly continued his voyage.

11. A short time afterwards the last division of the squadron, led by the Souvoroff flying Admiral Rojdestvensky's flag, arrived in its turn close to the spot where the trawlers were fishing.

The direction in which this division was sailing led it nearly toward the main body of the fleet of trawlers, round which and to the south of which it would therefore be obliged to sail, when the attention of the officers of the watch on the bridges of the Souvoroff was attracted by a green rocket, which put them on their guard. This rocket, sent up by the "admiral" of the fishing fleet, indicated in reality, according to regulation, that the trawlers were to trawl on the starboard tack.

<sup>49</sup> Dogger Bank.

Almost immediately after this first alarm, and as shown by the evidence, the lookout men, who, from the bridges of the Souvoroff, were scanning the horizon with their night glasses, discovered "on the crest of the waves on the starboard bow, at an approximate distance of eighteen to twenty cables," a vessel which aroused their suspicions because they saw no light, and because she appeared to be bearing down upon them.

When the suspicious-looking vessel was shown up by the searchlight, the lookout men thought they recognized a torpedo boat proceeding at great speed.

It was on account of these appearances that Admiral Rojdestvensky ordered fire to be opened on this unknown vessel.

The majority of the commissioners express the opinion, on this subject, that the responsibility for this action and the results of the fire to which the fishing fleet was exposed are to be attributed to Admiral Rojdestvensky.

12. Almost immediately after fire was opened to starboard, the Souvoroff caught sight of a little boat on her bow barring the way, and was obliged to turn sharply to the left to avoid running it down. This boat, however, on being lit up by the searchlight, was seen to be a trawler.

To prevent the fire of the ships being directed against this harmless vessel, the searchlight was immediately thrown up at an angle of 45°.

The admiral then made the signal to the squadron "not to fire on the trawlers."

But at the same time that the searchlight had lit up this fishing vessel, according to the evidence of witnesses, the lookout men on board the Souvoroff perceived to port another vessel, which appeared suspicious from the fact of its presenting the same features as were presented by the object of their fire to starboard.

Fire was immediately opened on this second object, and was, therefore, being kept up on both sides of the ship, the line of ships having resumed their original course by a correcting movement without changing speed.

13. According to the standing orders of the fleet, the Admiral indicated the objects against which the fire should be directed by throwing his searchlight upon them; but as each vessel swept the horizon in every direction with her own searchlights to avoid being taken by surprise, it was difficult to prevent confusion.

The fire, which lasted from ten to twelve minutes, caused great loss to the trawlers. Two men were killed and six others wounded: the Crane sank; the Snipe, the Mino, the Moulmein, the Gull, and the Majestic were more or less damaged.

On the other hand, the cruiser Aurora was hit by several shots.

The majority of the commissioners observe that they have not sufficiently precise details to determine what was the object fired on

by the vessels; but the commissioners recognize unanimously that the vessels of the fishing fleet did not commit any hostile act; and, the majority of the commissioners being of opinion that there were no torpedo boats either among the trawlers nor anywhere near, the opening of the fire by Admiral Rojdestvensky was not justifiable.

The Russian commissioner, not considering himself justified in sharing this opinion, expresses the conviction that it was precisely the suspicious-looking vessels approaching the squadron with hostile intent which provoked the fire.<sup>50</sup> \* \* \*

<sup>50</sup> The Russian government accepted the facts as found by the Commission, assumed responsibility for its admiral's action, and paid damages to Great Britain amounting approximately to \$300,000. *The Hague Court Reports* (J. B. Scott, Ed., 1916) 403.

## CHAPTER II

## NATIONALITY

## SECTION 1.—ALLEGIANCE

## CASE OF ÆNEAS MACDONALD, alias ANGUS MACDONALD.

(King's Bench, 1747. Foster's Crown Law, 59.)

In the year 1747, a bill of indictment was found against him, under the special commission in Surry, for the share he had in the late rebellion. The indictment ran in the same form as those against the other prisoners, without any averment that he was in custody before the 1st of January, 1746. But the counsel for the Crown were aware of the exception taken in the case of Mr. Townly and others, and that since the whole proceeding against the prisoner was subsequent to January, 1746, the answer then given would not serve the present case. That bill was therefore withdrawn before the prisoner pleaded to it; and a new bill concluding with an averment that he was apprehended and in custody before the 1st of January, 1746, was preferred and found against him. On that bill he was arraigned in July, 1747, and his trial came on the 10th of December following.

The overt acts charged in the indictment were sufficiently proved: and also that the prisoner was apprehended and in custody before the 1st of January, 1746.

The counsel for the prisoner insisted that he was born in the dominions of the French King, and on this point they put his defence.

But apprehending that the weight of the evidence might be against them, as indeed it was, with regard to the place of the prisoner's birth, they endeavored to captivate the jury and bystanders, by representing the great hardship of a prosecution of this kind against a person, who, admitting him to be a native of Great Britain, had received his education from his early infancy in France; and spent his riper years in a profitable employment in that kingdom, where all his hopes centered: and speaking of the doctrine of natural allegiance, they represented it as a slavish principle, not likely to prevail in these times; especially as it seemed to derogate from the principles of the revolution.

Here the court interposed; and declared, that the mentioning the case of the revolution as a case any way similar to that of the prisoner, supposing him to have been born in Great Britain, can serve no purpose but to bring an odium on that great and glorious transaction.

It never was doubted that a subject-born, taking a commission from a foreign prince and committing high treason, may be punished as a subject for that treason, notwithstanding his foreign commission. It was so ruled in Dr. Storey's case: and that case was never yet denied to be law. It is not in the power of any private subject to shake off his allegiance, and to transfer it to a foreign prince. Nor is it in the power of any foreign prince by naturalizing or employing a subject of Great Britain, to dissolve the bond of allegiance between that subject and the Crown.

However, as the prisoner's counsel had mentioned his French commission as a circumstance tending in their opinion to prove his birth in France, the court permitted it to be read, the Attorney-General consenting. It was dated, the 1st of June, 1745, and appointed the prisoner commissary of the troops of France, which were then intended to embark for Scotland.

The court, with the consent of the counsel for the Crown, permitted the cartel between France and Great Britain for the exchange or ransom of prisoners likewise to be read; and observed, that as it relateth barely to the exchange or ransom of prisoners of war, it can never extend to the case of the prisoner at the bar, supposing him to be a subject-born; because by the laws of all nations, subjects taken in arms against their lawful prince, are not considered as prisoners of war, but as rebels; and are liable to the punishment ordinarily inflicted on rebels.

Lord Chief Justice LEE, in his direction to the jury, told them, that the overt acts laid in the indictment being fully proved, and not denied by the prisoner, or rather admitted by his defence, the only fact they had to try was, whether he was a native of Great Britain; if so, he must be found guilty. And as to that point, he said the presumption in all cases of this kind is against the prisoner; and the proof of his birth out of the King's dominions, where the prisoner putteth his defence on that issue, lieth upon him. But whether the evidence that had been given in the present case (which he summed up very minutely), did or did not amount to such proof, he left to their consideration.

The jury found him guilty, but recommended him to mercy. He received sentence of death as in cases of high treason; but was afterward pardoned upon the conditions mentioned below.<sup>1</sup>

<sup>1</sup> Banishment.

In *The King v. Lynch*, L. R. [1903] 1 K. B. 444, 458, it appeared that one Arthur Lynch, born in Australia of Irish parents, went through the process of naturalization in the South African Republic, in the year 1900, when Great Britain, whose allegiance he forswore, was at open war with that country. It was held by the Court of King's Bench that, notwithstanding the Naturalization Act of 1870, a British subject committed treason in becoming a citizen or a subject of a country with which Great Britain was at war.

Lord Alverstone, Chief Justice, said on this point:

"In my opinion there is nothing in the act of 1870 to justify the contention that an act of treason can give any rights to any person whatever. If it was the intention of the Legislature to produce so strange a result, that in

DE JAGER, Appellant, v. ATTORNEY-GENERAL OF NATAL,  
Respondent.

(Privy Council. [1907] L. R. App. Cas. 323.)

The petitioner was a burgher of the late South African Republic who, for ten years previous to 1899 had lived in Wachsbank in Natal. After the outbreak of the war in 1899 he continued to reside peacefully in Natal. After the military occupation of that part of the colony by the Boer forces in the fall of 1899, whereby he lost the effectual protection of Her Majesty, the petitioner alleged that he was then compellable to join, and did actually join, the invading army and that he served as commandant and commissioner and justice of the peace. In 1901 he was adjudged in a special court of the colony of Natal guilty of high treason and sentenced to five years' imprisonment and to pay a fine of £5000. This was a petition for special leave to appeal from this judgment.

It was contended that the petitioner owed only a local and temporary allegiance to Her Majesty whilst he was a resident in Natal and was actually enjoying Her Majesty's protection. The obligation ceased to be binding upon him when he was deprived of that protection, and whilst, owing to the successful military occupation of the territory where he resided by the Boer forces, he was deprived of that protection, and was de facto under the government and control of the South African Republic. Aid and assistance given to the Boer forces by the petitioner under those circumstances were not treasonable, but acts which he was legally compellable to perform.<sup>2</sup>

The judgment of their Lordships was delivered by

Lord LOREBURN, L. C. The petitioner Lodewyk Johannes De Jager was adjudged guilty of high treason by the special Court constituted by Act No. XIV of 1900 of the Colony of Natal, and now seeks special leave to appeal to His Majesty in Council from that judgment and the sentence which followed. The circumstances and the questions of law raised are fully set out in the petition and need not be repeated here. Their Lordships have not to consider any facts or features of this case except the points of law upon which Sir Robert Finlay insisted.

It is old law that an alien resident within British territory owes allegiance to the Crown, and may be indicted for high treason, though

tention must be found expressed in clear and explicit language, and not be inferred from general language designed to serve another and useful purpose. Whatever a declaration of war may or may not do, it at any rate prevents British subjects from making arrangements with the King's enemies, when such arrangements would constitute crimes against the law of the country to which they owe allegiance."

In *re The Stepney Election Petition*, L. R. 17 Q. B. Div. 54 (1886), the effect of the separation of Hanover from the Crown of England upon the citizenship of Hanoverians was discussed.

<sup>2</sup> The statement of facts is condensed.

not a subject. Some authorities affirm that this duty and liability arise from the fact that while in British territory he receives the King's protection. Hence Sir R. Finlay argued that when the protection ceased its counterpart ceased also, and that as the British forces evacuated Waschbank on October 21, 1899, the petitioner was lawfully entitled to assist the invaders on and after October 24 without incurring the penalty of high treason.

Their Lordships are of opinion that there is no ground for this contention. The protection of a state does not cease merely because the State forces, for strategical or other reasons, are temporarily withdrawn, so that the enemy for the time exercises the rights of an army in occupation. On the contrary, when such territory reverts to the control of its rightful Sovereign wrongs done during the foreign occupation are cognizable by the ordinary Courts. The protection of the Sovereign has not ceased. It is continuous, though the actual redress of what has been done amiss may be necessarily postponed until the enemy forces have been expelled. Their Lordships consider that the duty of a resident alien is so to act that the Crown shall not be harmed by reason of its having admitted him as a resident. He is not to take advantage of the hospitality extended to him against the Sovereign who extended it. In modern times great numbers of aliens reside in this and in most countries, and in modern usage it is regarded as a hardship if they are compelled to quit, as they rarely are, even in the event of war between their own Sovereign and the country where they so reside. It would be intolerable, and must inevitably end in a restriction of the international facilities now universally granted, if, as soon as an enemy made good his military occupation of a particular district, those who had till then lived there peacefully as aliens could with impunity take up arms for the invaders. A small invading force might thus be swollen into a considerable army, while the risks of transport (which in the case of oversea expeditions are the main risks of invasion) would be entirely evaded by those who, instead of embarking from their own country, awaited the expedition under the protection of the country against which it was directed. These considerations would not justify a British Court in deciding any case contrary to the law, but they offer an illustration of consequences which would follow if the law were as the petitioner maintains. There is no authority which compels their Lordships to arrive at so strange a conclusion. The questions raised are, no doubt, of general importance, but their Lordships, after hearing the arguments of counsel in support of the petition, do not consider the case to be attended with doubt, and they will therefore humbly advise His Majesty to dismiss this petition,

There will be no order as to costs.\*

\* In *Nicholas Janis v. United States et al.*, 32 Ct. Cl. 407, 410 (1897), Nott, C. J., thus stated the doctrine and the policy of the United States:

"The general principle is that an alien while domiciled in a country owes

## SECTION 2.—NATURALIZATION

## UNITED STATES v. WONG KIM ARK.

(Supreme Court of the United States, 1898. 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890.)

This was a writ of habeas corpus, issued October 2, 1895, by the District Court of the United States for the Northern District of California, to the collector of customs at the port of San Francisco, in behalf of Wong Kim Ark, who alleged that he was a citizen of the United States, of more than twenty-one years of age, and was born at San Francisco in 1873 of parents of Chinese descent and subjects of the Emperor of China, but domiciled residents at San Francisco, and that, on his return to the United States on the steamship Coptic in August, 1895, from a temporary visit to China, he applied to said collector of customs for permission to land, and was by the collector refused such permission, and was restrained of his liberty by the collector, and by the general manager of the steamship company acting under his direction, in violation of the Constitution and laws of the United States, not by virtue of any judicial order or proceeding, but solely upon the pretence that he was not a citizen of the United States.

At the hearing, the District Attorney of the United States was permitted to intervene in behalf of the United States in opposition to the writ. \* \* \*

The court ordered Wong Kim Ark to be discharged, upon the ground that he was a citizen of the United States, 71 Fed. 382. The United States appealed to this court, and the appellee was admitted to bail pending the appeal.

Mr. Justice GRAY, after stating the case, delivered the opinion of the court.<sup>4</sup>

The facts of this case, as agreed by the parties, are as follows: Wong Kim Ark was born in 1873 in the city of San Francisco, in the State of California and United States of America, and was and is a

to it a local and temporary allegiance, which continues during the period of his residence, in return for the protection which he receives. The Supreme Court carried this so far as to hold that for a breach of this temporary allegiance an alien domiciled within the United States during the Civil War became a participator in the personal responsibilities of the time, and therefore entitled, like a citizen, to the benefits of the proclamation of general amnesty. *Carlisle and Henderson's Case*, 16 Wall. 147, 21 L. Ed. 426 [1872]. So, too, it has been held by this court that where American merchants carried their goods into places under the protection of a foreign power, the subsequent seizure of their goods by a belligerent was a wrong which the United States were not bound to redress. *Leghorn Seizures*, 27 Ct. Cl. 224 [1892]."

<sup>4</sup> The statement of facts is abridged and part of the opinion of Mr. Justice Gray and the dissenting opinion of Mr. Justice Fuller are omitted.



laborer. His father and mother were persons of Chinese descent, and subjects of the Emperor of China; they were at the time of his birth domiciled residents of the United States, having previously established and still enjoying a permanent domicil and residence therein at San Francisco; they continued to reside and remain in the United States until 1890, when they departed for China; and during all the time of their residence in the United States they were engaged in business, and were never employed in any diplomatic or official capacity under the Emperor of China. Wong Kim Ark, ever since his birth, has had but one residence, to wit, in California, within the United States, and has there resided, claiming to be a citizen of the United States, and has never lost or changed that residence, or gained or acquired another residence; and neither he, nor his parents acting for him, ever renounced his allegiance to the United States, or did or committed any act or thing to exclude him therefrom. In 1890 (when he must have been about seventeen years of age) he departed for China on a temporary visit and with the intention of returning to the United States, and did return thereto by sea in the same year, and was permitted by the collector of customs to enter the United States, upon the sole ground that he was a native-born citizen of the United States. After such return, he remained in the United States, claiming to be a citizen thereof, until 1894, when he (being about twenty-one years of age, but whether a little above or a little under that age does not appear) again departed for China on a temporary visit and with the intention of returning to the United States; and he did return thereto by sea in August, 1895, and applied to the collector of customs for permission to land; and was denied such permission, upon the sole ground that he was not a citizen of the United States.

It is conceded that, if he is a citizen of the United States, the acts of Congress, known as the Chinese Exclusion Acts, prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him.

The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

I. In construing any act of legislation, whether a statute enacted by the legislature, or a constitution established by the people as the supreme law of the land, regard is to be had, not only to all parts of the act itself, and of any former act of the same law-making power, of

which the act in question is an amendment; but also to the condition, and to the history, of the law as previously existing, and in the light of which the new act must be read and interpreted.

The Constitution of the United States, as originally adopted, uses the words "citizen of the United States," and "natural-born citizen of the United States." By the original Constitution, every representative in Congress is required to have been "seven years a citizen of the United States," and every Senator to have been "nine years a citizen of the United States;" and "no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President." The Fourteenth Article of Amendment, besides declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," also declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And the Fifteenth Article of Amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude."

The Constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor v. Happersett*, 21 Wall. 162, 22 L. Ed. 627; *Ex parte Wilson*, 114 U. S. 417, 422, 5 Sup. Ct. 935, 29 L. Ed. 89; *Boyd v. United States*, 116 U. S. 616, 624, 625, 6 Sup. Ct. 524, 29 L. Ed. 746; *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent. Com. 336; Bradley, J., in *Moore v. United States*, 91 U. S. 270, 274, 23 L. Ed. 346. \* \* \*

II. The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called "li-gealty," "obedience," "faith" or "power," of the King. The principle embraced all persons born within the King's allegiance and subject to his protection. Such allegiance and protection were mutual—as expressed in the maxim, *protectio trahit subjectionem, et subjectio protectionem*—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natu-

ral-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the King's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction of the King.

This fundamental principle, with these qualifications or explanations of it, was clearly though quaintly, stated in the leading case, known as Calvin's Case, or the Case of the Postnati, decided in 1608, after a hearing in the Exchequer Chamber before the Lord Chancellor and all the Judges of England, and reported by Lord Coke and by Lord Ellesmere. Calvin's Case, 7 Rep. 1, 4b-6a, 18a, 18b; Ellesmere on Postnati, 62-64; s. c., 2 Howell's State Trials, 559, 607, 613-617, 639, 640, 659, 679.

The English authorities ever since are to the like effect. Co. Lit. 8a, 128b; Lord Hale, in Hargrave's Law Tracts, 210, and in 1 Hale, P. C. 61, 62; 1 Bl. Com. 366, 369, 370, 374; 4 Bl. Com. 74, 92; Lord Kenyon, in Doe v. Jones, 4 T. R. 300, 308; Cockburn on Nationality, 7; Dicey, Conflict of Laws, pp. 173-177, 741. \* \* \*

It thus clearly appears that by the law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, aliens, while residing in the dominions possessed by the Crown of England, were within the allegiance, the obedience, the faith or loyalty, the protection, the power, the jurisdiction, of the English Sovereign; and therefore every child born in England of alien parents was a natural-born subject, unless the child of an ambassador or other diplomatic agent of a foreign State, or of an alien enemy in hostile occupation of the place where the child was born.

III. The same rule was in force in all the English Colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established. \* \* \*

IV. It was contended by one of the learned counsel for the United States that the rule of the Roman law, by which the citizenship of the child followed that of the parent, was the true rule of international law, as now recognized in most civilized countries, and had superseded the rule of the common law, depending on birth within the realm, originally founded on feudal considerations.

But at the time of the adoption of the Constitution of the United States in 1789, and long before, it would seem to have been the rule in Europe generally, as it certainly was in France, that, as said by Pothier, "citizens, true and native-born citizens, are those who are born within the extent of the dominion of France," and "mere birth within the realm gives the rights of a native-born citizen, independently of the origin of the father or mother, and of their domicil." \* \* \*

So far as we are informed, there is no authority, legislative, execu-

tive or judicial, in England or America, which maintains or intimates that the statutes (whether considered as declaratory, or as merely prospective), conferring citizenship on foreign-born children of citizens, have superseded or restricted, in any respect, the established rule of citizenship by birth within the dominion. \* \* \*

V. In the fore front, both of the Fourteenth Amendment of the Constitution, and of the Civil Rights Act of 1866, the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms.

The Civil Rights Act, passed at the first session of the Thirty-ninth Congress, began by enacting that "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom, to the contrary notwithstanding." Act of April 9, 1866, c. 31, § 1, 14 Stat. 27.

The same Congress, shortly afterwards, evidently thinking it unwise, and perhaps, unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent Congress, framed the Fourteenth Amendment of the Constitution, and on June 16, 1866, by joint resolution proposed it to the legislatures of the several States; and on July 28, 1868, the Secretary of State issued a proclamation showing it to have been ratified by the legislatures of the requisite number of States. 14 Stat. 358; 15 Stat. 708.

The first section of the Fourteenth Amendment of the Constitution begins with the words, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside." As appears upon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in *Dred Scott v. Sandford* (1857) 19

How. 393, 15 L. Ed. 691; and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States. The Slaughterhouse Cases, *Strauder v. West Virginia* (1879) 100 U. S. 303, 306, 25 L. Ed. 664; *Ex parte Virginia* (1879) 100 U. S. 339, 345, 25 L. Ed. 676; *Neal v. Delaware* (1880) 103 U. S. 370, 386, 26 L. Ed. 567; *Elk v. Wilkins* (1884) 112 U. S. 94, 101, 5 Sup. Ct. 41, 28 L. Ed. 643. But the opening words, "All persons born," are general, not to say universal, restricted only by place and jurisdiction, and not by color or race—as was clearly recognized in all the opinions delivered in The Slaughterhouse Cases, above cited. \* \* \*

The real object of the Fourteenth Amendment of the Constitution, in qualifying the words, "All persons born in the United States," by the addition, "and subject to the jurisdiction thereof," would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the National Government, unknown to the common law), the two classes of cases—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State—both of which, as has already been shown, by the law of England, and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country. *Calvin's Case*, 7 Rep. 1, 18b; *Cockburn on Nationality*, 7; *Dicey, Conflict of Laws*, 177; *Inglis v. Sailor's Snug Harbor*, 3 Pet. 99, 155, 7 L. Ed. 617; 2 Kent. Com. 39, 42.

The principles upon which each of those exceptions rests were long ago distinctly stated by this court. \* \* \*

The foregoing considerations and authorities irresistibly lead us to these conclusions: The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke, in

Calvin's Case, 7 Rep. 6a, "strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject;" and his child, as said by Mr. Binney in his essay before quoted, "if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle." It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides—seeing that, as said by Mr. Webster, when Secretary of State, in his Report to the President on Thrasher's Case in 1851, and since repeated by this court, "independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason, or other crimes, as a native-born subject might be, unless his case is varied by some treaty stipulations." Ex. Doc. H. R. No. 10, 1st Sess. 32d Congress, p. 4; 6 Webster's Works, 526; *United States v. Carlisle*, 16 Wall. 147, 155, 21 L. Ed. 426; *Calvin's Case*, 7 Rep. 6a; *Ellesmere on Postnati*, 63; 1 Hale, P. C. 62; 4 Bl. Com. 74, 92.

To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States.

VI. Whatever considerations, in the absence of a controlling provision of the Constitution, might influence the legislative or the executive branch of the Government to decline to admit persons of the Chinese race to the status of citizens of the United States, there are none that can constrain or permit the judiciary to refuse to give full effect to the peremptory and explicit language of the Fourteenth Amendment, which declares and ordains that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." \* \* \*

It is true that Chinese persons born in China cannot be naturalized, like other aliens, by proceedings under the naturalization laws. But this is for want of any statute or treaty authorizing or permitting such naturalization, as will appear by tracing the history of the statutes, treaties and decisions upon that subject—always bearing in mind that statutes enacted by Congress, as well as treaties made by the President and Senate, must yield to the paramount and supreme law of the Constitution.

The power, granted to Congress by the Constitution, "to establish an uniform rule of naturalization," was long ago adjudged by this court to be vested exclusively in Congress. *Chirac v. Chirac* (1817)

2 Wheat. 259, 4 L. Ed. 234. For many years after the establishment of the original Constitution, and until two years after the adoption of the Fourteenth Amendment, Congress never authorized the naturalization of any but "free white persons." Acts of March 26, 1790, c. 3, and January 29, 1795, c. 20; 1 Stat. 103, 414; April 14, 1802, c. 28, and March 26, 1804, c. 47, 2 Stat. 153, 292; March 22, 1816, c. 32, 3 Stat. 258; May 26, 1824, c. 186, and May 24, 1828, c. 116, 4 Stat. 69, 310. By the treaty between the United States and China, made July 28, 1868, and promulgated February 5, 1870, it was provided that "nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States." 16 Stat. 740. By the act of July 14, 1870, c. 254, § 7, for the first time, the naturalization laws were "extended to aliens of African nativity and to persons of African descent." 16 Stat. 256. This extension, as embodied in the Revised Statutes, took the form of providing that those laws should "apply to aliens [being free white persons, and to aliens] of African nativity and to persons of African descent;" and it was amended by the act of February 18, 1875, c. 80, by inserting the words above printed in brackets. Rev. Stat. (2d Ed.) § 2169, 18 Stat. 318.<sup>5</sup> \* \* \*

<sup>5</sup> "The term 'white person' must be given its common or popular meaning. As commonly understood, the expression includes all European races and those Caucasians belonging to the races around the Mediterranean Sea, whether they are considered as 'fair whites' or 'dark whites,' as classified by Huxley, and notwithstanding that certain of the southern and eastern European races are technically classified as of Mongolian or Tartar origin.

"It is just as certain that, whether we consider the Japanese as of the Mongolian race or the Malay race, they are not included in what are commonly understood as 'white persons.'" Cushman, J., in *Re Young* (D. C.) 198 Fed. 715, 716-717 (1912).

Chancellor Kent said, in considering the subject of naturalization: "Perhaps there might be difficulties also as to the copper-colored natives of America, or the yellow or tawny races of Asiatics, and it may well be doubted whether any of them are 'white persons,' within the purview of the law." 2 Com. 78. The act of Congress of May 6, 1882, removed the doubt as to "the yellow or tawny races of Asiatics" by providing "that hereafter no state court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed." (22 Stat. 61; *In re Saito* [C. C.] 62 Fed. 126 [1894].) The African is covered by section 2169 of the Revised Statutes: "The provisions of this title shall apply to aliens (being free white persons, [*In re Camille* (C. C.) 6 Fed. 256 (1880)] and to aliens) of African nativity, and to persons of African descent." The "copper-colored natives of America" are statuteless; but in *Re Rodriguez* (D. C.) 81 Fed. 337 (1897), it was decided that a Mexican was eligible to citizenship, even although he could neither read nor write. "Congress has not seen fit," said the learned judge, "to require of applicants for naturalization an educational qualification, and courts should be careful to avoid judicial legislation."

It is universally recognized that nations may determine, not only the conditions upon which aliens may enter their territory, but also those upon which they may continue to reside therein. It follows, naturally, that nations may therefore exclude aliens. However, at the present day, expulsion would be considered a high-handed measure, unless the reasons were such as concerned the safety and well-being of the state. For the existence of the right,

The Fourteenth Amendment of the Constitution, in the declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," contemplates two sources of citizenship, and two only: birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts.

The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. "A naturalized citizen," said Chief Justice Marshall, "becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the National Legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The Constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue." *Osborn v. United States Bank*, 9 Wheat. 738, 827 (6 L. Ed. 204). Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, a fortiori no act or omission of Congress, as to providing for the naturalization of parents or children of a particular race, can effect citizenship acquired as a birth-right, by virtue of the Constitution itself, without any aid of legislation. The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.

see *Turner v. Williams*, 194 U. S. 279, 24 Sup. Ct. 719, 48 L. Ed. 979 (1904); and on the procedure to be followed in such cases, see the *Boffolo Case*, *Ralston's Venezuelan Arbitrations* of 1903, 696 (1903).

SCOTT INT.LAW



No one doubts that the Amendment, as soon as it was promulgated, applied to persons of African descent born in the United States, wherever the birthplace of their parents might have been; and yet, for two years afterwards, there was no statute authorizing persons of that race to be naturalized. If the omission or the refusal of Congress to permit certain classes of persons to be made citizens by naturalization could be allowed the effect of correspondingly restricting the classes of persons who should become citizens by birth, it would be in the power of Congress, at any time, by striking negroes out of the naturalization laws, and limiting those laws, as they were formerly limited, to white persons only, to defeat the main purpose of the Constitutional Amendment.

The fact, therefore, that acts of Congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the Constitution, "all persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

VII. Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country; for by our law, as solemnly declared by Congress, "the right of expatriation is a natural and inherent right of all people," and "any declaration, instruction, opinion, order or direction of any officer of the United States, which denies, restricts, impairs or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic." Rev. Stat. § 1999, reënacting act of July 27, 1868, c. 249, § 1; 15 Stat. 223, 224. Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful. But it would be out of place to pursue that inquiry; inasmuch as it is expressly agreed that his residence has always been in the United States, and not elsewhere; that each of his temporary visits to China, the one for some months when he was about seventeen years old, and the other for something like a year about the time of his coming of age, was made with the intention of returning, and was followed by his actual return, to the United States; and "that said Wong Kim Ark has not, either by himself or his parents acting for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom."

The evident intention, and the necessary effect, of the submission of this case to the decision of the court upon the facts agreed by the parties, were to present for determination the single question, stated at the beginning of this opinion, namely, whether a

child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States. For the reasons above stated, this court is of opinion that the question must be answered in the affirmative.

Order affirmed.\*

### LURIA v. UNITED STATES.

(Supreme Court of the United States, 1913. 231 U. S. 9, 34 Sup. Ct. 10, 58 L. Ed. 101.)

Mr. Justice VAN DEVANTER delivered the opinion of the court.†

This appeal brings under review a decree setting aside and canceling, under section 15 of the act of June 29, 1906, 34 Stat. 596, 601, c. 3592 (Comp. St. § 4374) as fraudulently and illegally procured, a certificate of citizenship theretofore issued to George A. Luria by the Court of Common Pleas of the City and County of New York. U. S. v. Luria (D. C.) 184 Fed. 643. \* \* \*

The case was heard upon an agreed statement and some accompanying papers, from all of which it indubitably appeared that Luria was born in Wilna, Russia, in 1865 or 1868 and came to New York in 1888; that he entered a medical college of that city the next year and was graduated therefrom in 1893; that he applied for and procured the certificate of citizenship in July, 1894; that in the following month he sought and obtained a passport from the Department of State, and in November left the United States for the Transvaal, South Africa, arriving there in December; that from that time to the date of the hearing, in December, 1910, he resided and practiced his profession in South Africa; that he joined the South African Medical Association and served in the Boer war; that his only return to the

\* According to *Boyd v. Thayer*, 143 U. S. 135, 162, 12 Sup. Ct. 375, 36 L. Ed. 103 (1892): "Naturalization is the act of adopting a foreigner, and clothing him with the privileges of a native citizen. \* \* \* Congress, in the exercise of the power to establish a uniform rule of naturalization, has enacted general laws under which individuals may be naturalized, but the instances of collective naturalization by treaty or by statute are numerous. \* \* \* Manifestly the nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal or otherwise, as may be provided." The learned Chief Justice (Fuller) proceeds to an enumeration of the many instances of collective naturalization in our history.

A much shorter and more recent discussion of the subject (collective naturalization on annexation of Texas) is found in *Contzen v. U. S.*, 179 U. S. 191-196, 21 Sup. Ct. 98, 45 L. Ed. 148 (1900). See, also, *Behrensmeyer v. Kretz*, 135 Ill. 591, 26 N. E. 704 (1891).

† Part of the opinion is omitted.

United States was for four or five months in 1907, for the temporary purpose of taking a postgraduate course in a medical school in New York; and that when entering that school he gave as his address, Johannesburg, South Africa. From the facts so appearing the District Court found and held that within a few months after securing the certificate of citizenship, Luria went to and took up a permanent residence in South Africa, and that this, under section 15 of the act of 1906, constituted prima facie evidence of a lack of intention on his part to become a permanent citizen of the United States at the time he applied for the certificate. \* \* \*

Section 15 of the act of 1906, under which this suit was conducted, is as follows (34 Stat. 601):

"Sec. 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship *on the ground of fraud, or on the ground that such certificate of citizenship was illegally procured.* In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

*"If any alien who shall have secured a certificate of citizenship under the provisions of this Act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship.*

"Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree

is rendered shall make an order canceling such certificate of citizenship, and shall send a certified copy of such order to the Bureau of Immigration and Naturalization; and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the Bureau of Immigration and Naturalization of such cancellation.

*"The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws."*

One of the questions arising under this section is, whether the second paragraph, dealing with the evidential effect of taking up a permanent residence in a foreign country within five years after securing a certificate of citizenship, is confined to certificates issued under the act of 1906, or applies also to those issued under prior laws, as was Luria's. If that paragraph were alone examined, the answer undoubtedly would be that only certificates under the act of 1906 are included. But the last paragraph also must be considered. It expressly declares that "the provisions of this section" shall apply, not only to certificates issued under the act of 1906, but also to all certificates theretofore issued under prior laws. The words "the provisions of this section" naturally mean every part of it, one paragraph as much as another, and that meaning cannot well be rejected without leaving it uncertain as to what those words embrace. \* \* \*

But it is said that it was not essential to naturalization under prior laws, Rev. Stat. §§ 2165-2170, that the applicant should intend thereafter to reside in the United States; that, if he otherwise met the statutory requirements, it was no objection that he intended presently to take up a permanent residence in a foreign country; that the act of 1906, differing from prior laws, requires the applicant to declare "that it is his intention to reside permanently within the United States"; and therefore that Congress, when enacting the second paragraph of section 15, must have intended that it should apply to certificates issued under that act and not to those issued under prior laws. It is true that section 4 of the act of 1906 exacts from the applicant a declaration of his intention to reside in the United States, and it is also true that the prior laws did not expressly call for such a declaration. But we think it is not true that under the prior laws it was immaterial whether the applicant intended to reside in this country or presently to take up a permanent residence in a foreign country. On the contrary, by necessary implication, as we think, the prior laws

conferred the right to naturalization upon such aliens only as contemplated the continuance of a residence already established in the United States.

Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other. Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency. *Minor v. Happersett*, 21 Wall. 162, 165, 22 L. Ed. 627; *Elk v. Wilkins*, 112 U. S. 94, 101, 5 Sup. Ct. 41, 28 L. Ed. 643; *Osborn v. Bank*, 9 Wheat. 738, 827, 6 L. Ed. 204. Turning to the naturalization laws preceding the act of 1906, being those under which Luria obtained his certificate, we find that they required, first, that the alien, after coming to this country, should declare on oath, before a court or its clerk, that it was bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign sovereignty; second, that at least two years should elapse between the making of that declaration and his application for admission to citizenship; third, that as a condition to his admission the court should be satisfied, through the testimony of citizens, that he had resided within the United States five years at least, and that during that time he had behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; and, fourth, that at the time of his admission he should declare on oath that he would support the Constitution of the United States and that he absolutely and entirely renounced and abjured all allegiance and fidelity to every foreign sovereignty. These requirements plainly contemplated that the applicant, if admitted, should be a citizen in fact as well as in name—that he should assume and bear the obligations and duties of that status as well as enjoy its rights and privileges. In other words, it was contemplated that his admission should be mutually beneficial to the Government and himself, the proof in respect of his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than for what they told of the past.

By the clearest implication those laws show that it was not intended that naturalization could be secured thereunder by an alien whose purpose was to escape the duties of his native allegiance without taking upon himself those of citizenship here, or by one whose purpose was to reside permanently in a foreign country and to use his naturalization as a shield against the imposition of duties there, while by his absence he was avoiding his duties here. Naturalization secured with such a purpose was wanting in one of its most essential elements—good faith on the part of the applicant. It involved a wrongful use of a beneficent law. True, it was not expressly forbidden; neither

was it authorized. But, being contrary to the plain implication of the statute, it was unlawful, for what is clearly implied is as much a part of a law as what is expressed. *United States v. Babbit*, 1 Black, 55, 61, 17 L. Ed. 94; *McHenry v. Alford*, 168 U. S. 651, 672, 18 Sup. Ct. 242, 42 L. Ed. 614; *South Carolina v. United States*, 199 U. S. 437, 451, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737.

Perceiving nothing in the prior laws which shows that Congress could not have intended that the last paragraph of section 15 of the act of 1906 should be taken according to the natural meaning and import of its words, we think, as before indicated, that it must be regarded as extending the preceding paragraphs of that section to all certificates of naturalization, whether secured theretofore under prior laws or thereafter under that act.

Several contentions questioning the constitutional validity of section 15 are advanced, but all, save the one next to be mentioned, are sufficiently answered by observing that the section makes no discrimination between the rights of naturalized and native citizens, and does not in anywise affect or disturb rights acquired through lawful naturalization, but only provides for the orderly cancellation, after full notice and hearing, of certificates of naturalization which have been procured fraudulently or illegally. It does not make any act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship, to which their possessors never were lawfully entitled. *Johannessen v. United States*, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. Ed. 1066. See, also, *Wallace v. Adams*, 204 U. S. 415, 27 Sup. Ct. 363, 51 L. Ed. 547.

Objection is specially directed to the provision which declares that taking up a permanent residence in a foreign country within five years after the issuance of the certificate shall be considered *prima facie* evidence of a lack of intention to become a permanent citizen of the United States at the time of the application for citizenship, and that in the absence of countervailing evidence the same shall be sufficient to warrant the cancellation of the certificate as fraudulent. It will be observed that this provision prescribes a rule of evidence, not of substantive right. It goes no farther than to establish a rebuttable presumption which the possessor of the certificate is free to overcome. If, in truth, it was his intention at the time of his application to reside permanently in the United States, and his subsequent residence in a foreign country was prompted by considerations which were consistent with that intention, he is at liberty to show it. Not only so, but these are matters of which he possesses full, if not special, knowledge. The controlling rule respecting the power of the legislature in establishing such presumptions is comprehensively stated in *Mobile, etc., Railroad Co. v. Turnipseed*, 219 U. S. 35, 42, 43, 31 Sup. Ct. 136, 137 (55 L. Ed. 78, 32 L. R. A. [N. S.] 226, Ann. Cas. 1912A, 463), as follows:

"Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue, is but to enact a rule of evidence, and quite within the general power of government: Statutes, national and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous. \* \* \*

Nor is it a valid objection to such legislation that it is made applicable to existing causes of action, as is the case here, the true rule in that regard being well stated in Cooley's Constitutional Limitations, 7th Ed. 524, in these words:

"It must also be evident that *a right to have one's controversies determined by existing rules of evidence is not a vested right*. These rules pertain to the remedies which the State provides for its citizens; and generally in legal contemplation they neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the legislature; and the changes which are enacted may lawfully be made applicable to existing causes of action, even in those States in which retrospective laws are forbidden. For the law as changed would only prescribe rules for presenting the evidence in legal controversies in the future; and it could not therefore be called retrospective even though some of the controversies upon which it may act were in progress before."

This court applied that rule in *Webb v. Den*, 17 How. 576, 578, 15 L. Ed. 35; *Hopt v. Utah*, 110 U. S. 574, 590, 4 Sup. Ct. 202, 28 L. Ed. 262; *Thompson v. Missouri*, 171 U. S. 380, 18 Sup. Ct. 922, 43 L. Ed. 204; and *Reitler v. Harris*, 223 U. S. 437, 32 Sup. Ct. 248, 56 L. Ed. 497.

That the taking up of a permanent residence in a foreign country shortly following naturalization has a bearing upon the purpose with which the latter was sought and affords some reason for presuming that there was an absence of intention at the time to reside permanently in the United States is not debatable. No doubt, the reason for the presumption lessens as the period of time between the two events is lengthened. But it is difficult to say at what point the reason so far disappears as to afford no reasonable basis for the presumption. Congress has indicated its opinion that the intervening period may be as much as five years without rendering the presumption baseless. That period seems long, and yet we are not prepared to pronounce it certainly excessive or unreasonable. But we are of opinion that as the intervening time approaches five years the presumption necessarily must weaken to such a degree as to require but slight countervailing evidence to overcome it. On the other hand, when the intervening time is so short as it is shown to have been in the present case, the presumption cannot be regarded as yielding to anything short of a

substantial and convincing explanation. So construed, we think the provision is not in excess of the power of Congress. \* \* \*

Finding no error in the record, the decree is  
Affirmed.

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### SECTION 3.—EXPATRIATION \*

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#### ACT OF VIRGINIA OF 1786 CONCERNING EXPATRIATION

V. \* \* \* And in order to preserve to the citizens of this commonwealth that natural right which all men have of relinquishing the society in which birth or accident may have thrown them, and of seeking subsistence and happiness elsewhere, and to declare explicitly what shall be deemed evidence of an intention in any citizen to exercise that right.

VI. Be it further enacted, That whensoever any citizen of this commonwealth shall, by deed in writing, under his hand and seal, executed in the presence of and subscribed by three witnesses, and by them, or two of them, proved in the general court or the court of the county wherein he resides, or by open verbal declaration made in either of the said courts, to be by them entered of record, declare that he relinquishes the character of a citizen, and shall depart out of this commonwealth, such person shall, from the time of his departure, be considered as having exercised his right of expatriation, and shall thenceforth be deemed no citizen. [An act to explain, amend, and reduce into one act, the several acts for the admission of emigrants to the rights of citizenship, and prohibiting the migration of certain persons to this commonwealth, October, 1786. 12 Hening, Virginia Statutes at Large, Chap. 10, pp. 261, 262, 263.] \*

\* For the doctrine of expatriation, see John Bassett Moore's *Principles of American Diplomacy*, c. vii, 270-305 (1918). \*

\* The original provisions concerning the right of expatriation were contained in "An act declaring who shall be deemed citizens of this commonwealth," passed in 1779. 10 Hening, Virginia Statutes at Large, Chap. 55, p. 129.

The text of the Act of 1786 differs in form, but not in substance, from that of 1779.

See *Alsberry v. Hawkins*, 9 Dana (Ky.) 177, 33 Am. Dec. 546 (1839), for the interpretation of this act.



## AN ACT CONCERNING THE RIGHTS OF AMERICAN CITIZENS IN FOREIGN STATES, 1868

(15 United States Statutes at Large, 223.)

Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any declaration, instruction, opinion, order or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government.

Sec. 2. And be it further enacted, That all naturalized citizens of the United States, while in foreign states, shall be entitled to, and shall receive from this government, the same protection of persons and property that is accorded to native-born citizens in like situations and circumstances.

Sec. 3. And be it further enacted, That whenever it shall be made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons for such imprisonment, and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, it shall be the duty of the President to use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate such release, and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

Approved, July 27, 1868.<sup>10</sup>

<sup>10</sup> Beginning with 1868 the United States concluded a series of naturalization conventions which were known as the Bancroft Treaties, from the fact that they were negotiated on behalf of the United States by George Bancroft, the distinguished historian who was at that time American Minister to Prussia and the North German Confederation, and later to the German Empire.

They are a model solution of a difficult problem, and are a happy compromise

between the doctrine of expatriation on the one hand, and inalienable allegiance on the other.

The following are the material provisions of these Treaties:

Article I. Citizens of the North German Confederation, who become naturalized citizens of the United States of America and shall have resided uninterruptedly within the United States five years, shall be held by the North German Confederation to be American citizens, and shall be treated as such.

Reciprocally, citizens of the United States of America who become naturalized citizens of the North German Confederation, and shall have resided uninterruptedly within North Germany five years, shall be held by the United States to be North German citizens, and shall be treated as such. The declaration of an intention to become a citizen of the one or the other country has not for either party the effect of naturalization.

This article shall apply as well to those already naturalized in either country as those hereafter naturalized.

Article II. A naturalized citizen of the one party on return to the territory of the other party remains liable to trial and punishment for an action punishable by the laws of his original country and committed before his emigration; saying, always, the limitations established by the laws of his original country. \* \* \*

Article IV. If a German naturalized in America renews his residence in North Germany, without the intent to return to America, he shall be held to have renounced his naturalization in the United States. Reciprocally, if an American naturalized in North Germany renews his residence in the United States, without the intent to return to North Germany, he shall be held to have renounced his naturalization in North Germany. The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country. Malloy's Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers, 1776-1909, vol. 2, 1298-1299.

In 1907, Congress passed "an act" approved by the President March 2, 1907, "in reference to the expatriation of citizens and their protection abroad." The second section, dealing with the question of expatriation, is thus worded:

"Any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

"When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: Provided, however, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: And provided also, That no American citizen shall be allowed to expatriate himself when this country is at war." 34 Stat. p. 1228 (Comp. St. § 3959).

**AN ACT TO AMEND THE LAW RELATING TO THE LEGAL  
CONDITION OF ALIENS AND BRITISH  
SUBJECTS, MAY 12, 1870.<sup>11</sup>**

(38 Vict. c. 14, Law Reports, 1870, 5 Pub. Gen. St. 166.)

4. Any person who by reason of his having been born within the dominions of Her Majesty is a natural-born subject, but who also at the time of his birth became under the law of any foreign state a subject of such state, and is still such subject, may, if of full age and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration of alienage such person shall cease to be a British subject. Any person who is

<sup>11</sup> The provisions of the above act were superseded by "An act to consolidate and amend the enactments relating to British nationality and the status of aliens, 4 & 5 Geo. V, c. 17," of August 7, 1914.

For the text of this act, which went into effect on January 1, 1915, see 9 American Journal of International Law Supplement (1915) 413-423.

On the act itself, see Richard W. Flournoy's article entitled "The New British Imperial Law of Nationality," 9 American Journal of International Law (1915) 870-882.

The German Imperial and State Citizenship Law of July 23, 1913, which went into effect on January 1, 1914, contains some unusual provisions regarding the reacquisition and retention of German citizenship, which have not commended themselves to other nations or to foreign publicists.

These provisions, contained in sections 13 and 25, are as follows:

"Sec. 13. A former German who has not taken up his residence in Germany may on application be naturalized by the state [of Germany] of which he was formerly a citizen, provided his case fulfils the requirements of Nos. 1 and 2 of paragraph 1 of section 8; the same applies to one who is descended from a former German or has been adopted as a child of such. Prior to naturalization a report must be made to the Imperial Chancellor; if he raises objections, naturalization does not take place. [The text of section 8 of the law referred to in the section just quoted is as follows: "1. If he is legally competent in accordance with the laws of his former home or would be legally competent in accordance with the laws of Germany; or if the application is made by his legal representative or with the latter's consent in accordance with the second sentence of paragraph 2 of section 7. 2. If he has led a blameless life. . . ."]

"Sec. 25. Citizenship is not lost by one who before acquiring foreign citizenship has secured on application the written consent of the competent authorities of his home State to retain his citizenship. Before this consent is given the German consul is to be heard.

"The Imperial Chancellor may order, with the consent of the Federal Council, that persons who desire to acquire citizenship in a specified foreign country, may not be granted the consent provided for in paragraph 2."

Under section 13, a German residing in a foreign country, of which he had become a naturalized citizen or subject, could reacquire German citizenship without returning to Germany. Under section 25, he could retain his German citizenship, notwithstanding the fact that he became a naturalized citizen or subject of a foreign country in which he resided. Apparently, this could be done without the knowledge of the competent authorities of the foreign state.

For the text of this important act, see 8 American Journal of International Law Supplement (1914) 217-227. For an analysis of the act, see Richard W. Flournoy's article entitled "Observations on the New German Law of Nationality," 8 American Journal of International Law (1914) 477-486; also an editorial comment on the German Imperial and State Citizenship Law, 9 American Journal of International Law (1915) 939-942.

born out of Her Majesty's dominions of a father being a British subject may, if of full age, and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration shall cease to be a British subject.

5. From and after the passing of this Act, an alien shall not be entitled to be tried by a jury demedietate linguæ, but shall be triable in the same manner as if he were a natural-born subject.

#### EXPATRIATION.

6. Any British subject who has at any time before, or may at any time after the passing of this Act, when in any foreign state and not under any disability voluntarily become naturalized in such state, shall from and after the time of his so having become naturalized in such foreign state, be deemed to have ceased to be a British subject and be regarded as an alien: Provided—

(1) That where any British subject has before the passing of this Act voluntarily become naturalized in a foreign state and yet is desirous of remaining a British subject, he may, at any time within two years after the passing of this Act, make a declaration that he is desirous of remaining a British subject, and upon such declaration hereinafter referred to as a declaration of British nationality being made, and upon his taking the oath of allegiance, the declarant shall be deemed to be and to have been continually a British subject; with this qualification, that he shall not, when within the limits of a foreign state in which he has been naturalized, be deemed to be a British subject, unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect.

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#### WILLIAMS' CASE.

(Circuit Court of the United States, D. Connecticut, 1799. Wharton's State Trials, 652, Fed. Cas. No. 17,708.)<sup>12</sup>

On the trial, it was admitted on the part of Williams, that he had committed the facts alleged against him in the indictment, but, in his defence, he offered to prove that, in the year 1792, he received from the Consul-General of the French Republic, a warrant, appointing him third lieutenant on board the *Jupiter*, a French seventy-four gun ship; that, pursuant to this appointment, he went on board the *Jupiter*, and took the command to which he was appointed; that the *Jupiter* soon after sailed for France, and arrived at Rochefort, in France, in the autumn of the same year; that at Rochefort he was duly naturalized in the various Bureaux in that place, the same autumn, renouncing his allegiance to all other countries, particularly to America, and taking an oath of allegiance to the Republic of France, all ac-

<sup>12</sup>The statement of facts is abridged and part of the opinion is omitted.

cording to the laws of said republic; that immediately after said naturalization he was duly commissioned by the Republic of France appointing him a second lieutenant on board a French frigate called the *Charont*; and that before the ratification of the treaty of amity and commerce between the United States and Great Britain, he was duly commissioned by the French Republic a second lieutenant on board a seventy-four gun ship, in the service of said republic; and that he has ever continued under the government of the French Republic down to the present time, and the most of said time actually resident in the dominions of the French Republic; that during said period he was not resident in the United States more than six months, which was in the year 1796, when he came to this country for the purpose merely of visiting his relations and friends; that, for about three years past, he has been domiciliated in the island of Guadaloupe, within the dominions of the French Republic, and has made that place his fixed habitation, without any design of again returning to the United States for permanent residence. The attorney for the district conceded the above-mentioned statement to be true; but objected that it ought not to be admitted as evidence to the jury, because it could have no operation in law to justify the prisoner in committing the facts alleged against him in the indictment. This question was argued on both sides by Mr. Pierpont Edwards for the United States, and Mr. David Daggett for the prisoner.

Judge LAW (District Judge) expressed doubts as to the legal operation of the evidence; and gave it as his opinion, that the evidence, and the operation of law thereon, be left to the consideration of the jury.

Judge ELLSWORTH, the Chief Justice of the United States, stated his views nearly in the following language:

The common law of this country remains the same as it was before the Revolution. The present question is to be decided by two great principles; one is, that all the members of civil community are bound to each other by compact. The other is, that one of the parties to this compact cannot dissolve it by his own act. The compact between our community and its members is, that the community will protect its members; and on the part of the members, that they will at all times be obedient to the laws of the community, and faithful in its defence. This compact distinguishes our government from those which are founded in violence or fraud. It necessarily results, that the members cannot dissolve this compact, without the consent or default of the community. There has been here no consent—no default. Default is not pretended. Express consent is not claimed; but it has been argued, that the consent of the community is implied by its policy—its conditions, and its acts.

In countries so crowded with inhabitants that the means of subsistence are difficult to be obtained, it is reason and policy to permit emi-

gration. But our policy is different; for our country is but sparsely settled, and we have no inhabitants to spare.

Consent has been argued from the condition of the country; because we were in a state of peace. But though we were in peace the war had commenced in Europe. We wished to have nothing to do with the war; but the war would have something to do with us. It has been extremely difficult for us to keep out of this war; the progress of it has threatened to involve us. It has been necessary for our government to be vigilant in restraining our own citizens from those acts which would involve us in hostilities. The most visionary writers on this subject do not contend for the principle in the unlimited extent, that a citizen may at any and at all times renounce his own and join himself to a foreign country. Consent has been argued from the acts of our own government, permitting the naturalization of foreigners. When a foreigner presents himself here, and proves himself to be of a good moral character, well affected to the Constitution and Government of the United States, and a friend to the good order and happiness of civil society, if he has resided here the time prescribed by law, we grant him the privilege of a citizen. We do not inquire what his relation is to his own country; we have not the means of knowing, and the inquiry would be indelicate; we leave him to judge of that. If he embarrasses himself by contracting contradictory obligations, the fault and the folly are his own. But this implies no consent of the government, that our own citizens should expatriate themselves. Therefore, it is my opinion that these facts which the prisoner offers to prove in his defence, are totally irrelevant; they can have no operation in law; and the jury ought not to be embarrassed or troubled with them; but by the constitution of the court the evidence must go to the jury. \* \* \*

The prisoner was accordingly found guilty, fined and imprisoned.<sup>13</sup>

<sup>13</sup> See the very learned note in which Dr. Wharton traces the doctrine from its promulgation in *Williams' Case*, and its fluctuations until its final recognition. "At last in *Shanks v. Dupont*, 3 Pet. 242, 7 L. Ed. 686 (1830), the long circuit of doubts and reservations was closed, and the court found itself back again at the position of *Williams' Case*, that allegiance without mutual consent is indissoluble." Wharton's *State Trials* (1849) p. 655.

From the "historical review of the principal discussions in the federal courts on this interesting subject in American jurisprudence, the better opinion would seem to be, that a citizen cannot renounce his allegiance to the United States without the permission of government, to be declared by law; and that, as there is no existing legislative regulation on the case, the rule of the English common law remains unaltered." 2 *Kent's Commentaries*, p. 49.

"Proclamation of the Prince Regent, July 24, 1814, *Cockburn's Nationality*, 77:

"A proclamation by the Prince Regent, of the 24th July, especially directed against America, after prohibiting all natural-born subjects of His Majesty from serving in the ships and armies of the United States, and charging all such persons at once to quit such service, proceeds as follows:

"And whereas it has been further represented to us that divers of our natural-born subjects as aforesaid have been induced to accept Letters of Natural-

**MACKENZIE v. HARE et al.**

(Supreme Court of California, 1913. 165 Cal. 776, 134 Pac. 713, L. R. A. 1916D, 127, Ann. Cas. 1915B, 261.)

SHAW, J. Application in this court for a writ commanding defendants, as members of the board of election commissioners of the city and county of San Francisco, to register the plaintiff as a qualified voter of said city and county.

The plaintiff was born and ever since has resided in the state of California. On August 14, 1909, being then a resident and citizen of this state and of the United States, she was lawfully married to Gordon Mackenzie, a native and subject of the kingdom of Great Britain. He had resided in California prior to that time, still resides here and it is his intention to make this state his permanent residence. He has not become naturalized as a citizen of the United States and it does not appear that he intends to do so. Ever since their marriage the plaintiff and her husband have lived together as husband and wife. On January 22, 1913, she applied to the defendants to be registered as a voter. She was then over the age of twenty-one years and had resided in San Francisco for more than ninety days.

Registration was refused to her on the ground that by reason of her marriage to Gordon Mackenzie, a subject of Great Britain, she thereupon took the nationality of her husband and ceased to be a citizen of the United States. The soundness of this objection is the question to be decided.

The qualifications necessary to entitle a person to the privilege of suffrage and the right of registration as a voter in this state are fixed, declared and controlled by section 1 of article II of the state Constitution as amended on October 10, 1911. The purpose of the amendment was to extend the privilege of suffrage to women. The portion of the section upon which the decision of this case depends is the opening clause, giving the privilege of suffrage to "every native citizen of the United States," who possesses the other qualifications mentioned in the subsequent parts of the section. It declares that persons having the qualifications stated shall "be entitled to vote at all elections." As it

ization or Certificates of Citizenship from the said United States of America, vainly supposing that by such letters or certificates they are discharged from that duty and allegiance which, as our natural-born subjects, they owe to us: Now we do hereby warn all such our natural-born subjects, that no such letters of Naturalization or Certificates of Citizenship do, or can, in any manner discharge our natural-born subjects of the allegiance, or in any degree alter the duty which they owe to us, their natural sovereign. \* \* \*

"Moreover, that all such, our subjects, as aforesaid, who have voluntarily entered, or shall enter, or voluntarily continue to serve on board of any such ships of war, or in the land forces of the said United States of America, at enmity with us, are, and will be, guilty of high treason." Freeman Snow's Cases and Opinions on International Law, 215, note (1893).

is admitted that the plaintiff possesses all the other qualifications required, the sole question presented is whether or not, upon the facts we have stated, she is a "native citizen of the United States." If she comes within that definition she is entitled to registration as demanded.

She was a citizen of the United States prior to her marriage to Mackenzie. No event affecting her status as a citizen, except said marriage, has occurred since that time. She therefore still remains a citizen of the United States unless she has lost her citizenship by her marriage with an unnaturalized resident alien. *Hauenstein v. Lynham*, 100 U. S. 484, 25 L. Ed. 628.

The status of persons as citizens or aliens, respectively, is controlled entirely by the Constitution of the United States and the acts of Congress passed in pursuance thereof. We must look solely to them to ascertain whether or not the plaintiff is a citizen and as such a voter entitled to registration. And in determining their meaning and effect the state courts are bound by the interpretation put upon them by the courts of the United States.

Prior to any legislation on the subject by Congress there was some uncertainty and conflict of authority concerning the right of expatriation. The question first arose in 1795, in *Talbot v. Janson*, 3 U. S. (Dall.) 133, 162, 1 L. Ed. 540, where Iredell, J., discusses it at length, stating his conclusion to be that a citizen could not denationalize himself without the consent of his government. The other justices expressed no opinion on the point. Similar views were stated in *Shanks v. Dupont* (1830) 3 Pet. 246, 7 L. Ed. 666; *Inglis v. Sailor's Snug Harbor* (1830) 3 Pet. 101, 125, 7 L. Ed. 617; and in *United States v. Gillies* (1815) Pet. C. C. 161, Fed. Cas. No. 15,206. In *Shanks v. Dupont*, supra, the court said, per Story, J.: "The general doctrine is, that no persons can, by any act of their own, without the consent of their government, put off their allegiance, and become aliens." And on this ground it was held that the marriage of a woman citizen with an alien did not change her allegiance to the United States. There was, at that time, no legislation permitting expatriation. In *Stoughton v. Taylor*, 2 Paine, C. C. 661, Fed. Cas. No. 7558, it is said that the right of expatriation is fundamental and inherent. To the same effect see *Alsberry v. Hawkins*, 39 Ky. (9 Dana) 178, 33 Am. Dec. 546. Other state courts were of the same opinion. The denial of the right of voluntary expatriation was somewhat inconsistent with the laws of the United States providing for the naturalization of foreigners, the first of which was enacted in 1790. 1 U. S. Stats. 103. The question was practically set at rest by the Act of July 27, 1868 (15 U. S. Stats. 223; U. S. Rev. Stats. § 1999). The preamble thereof declares that the right of expatriation is a natural and inherent right of all people. The body of the act declares further that any decision of any officer of the government denying, restricting, or impairing the right of expatriation is "inconsistent with the fundamental principles of this government." This lan-



guage seems to be but little more than a legislative declaration of national policy. But it clearly is operative in this, that it gives the consent of the national government to the expatriation of any citizen by his or her voluntary act. If such consent of the nation is essential to a valid expatriation, this law is evidence thereof. The absolute right of expatriation is now recognized as the settled doctrine of this country. *Browne v. Dexter*, 66 Cal. 40, 4 Pac. 913; *Kane v. McCarthy*, 63 N. C. 302; *Burton v. Burton*, \*40 N. Y. 359, 1 Abb. Dec. 271; *Kelly v. Owen*, 74 U. S. 496, 19 L. Ed. 283; *In re Look Tin Sing* (C. C.) 21 Fed. 905. In the case last cited the court says: "The United States recognize the right of every one to expatriate himself and choose another country." In view of the contention to be hereafter mentioned, it is to be noticed that this case was decided after the adoption of the Fourteenth Amendment.

The first legislation by Congress in regard to the status of married women as citizens was the act of 1855. 10 U. S. Stats. 604; U. S. Rev. Stats. § 1994. Section 2 is as follows: "That any woman who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen." In the Revised Statutes the words "and taken" are omitted. The effect of this statute is that every alien woman who marries a citizen of the United States becomes perforce a citizen herself, without the formality of naturalization and regardless of her wish in that respect. *Kane v. McCarthy*, *supra*; *Kelly v. Owen*, *supra*. It is not entirely certain that, under our state Constitution, such citizenship would entitle such foreign-born woman to vote. Our Constitution confers that privilege only on three classes of persons: (1) Native citizens; (2) those who became citizens under the Treaty of Queretaro, or, as it is commonly called, the Treaty of Guadalupe-Hidalgo; and, (3) naturalized citizens. An alien woman who marries a citizen thereby herself becomes a citizen, but there may be doubt if she thereby becomes a naturalized citizen within the meaning of the Constitution. This is, of course, a question not here involved. We mention it only to call attention to the distinction and to make it clear that we have not decided it.

The act of 1855 determines the citizenship of an alien woman who marries a citizen. We have in this case the converse of the proposition; the effect of the marriage of a native female citizen to a man who is not a citizen, but is a subject of some other country. In *Pequignot v. Detroit* (C. C. 1883) 16 Fed. 211, Judge Brown, afterward Justice of the United States supreme court, decided that an alien woman who had become a citizen under the aforesaid act of 1855 by marrying a citizen, and who was divorced from that husband and thereafter married an unnaturalized alien, lost her citizenship by the last marriage and again became an alien, although both she and her last husband continued to reside in this country with the intention of remaining. In *Ruckgaber v. Moore* (C. C.) 104 Fed. 947, decided in

1900, the court held that a native woman who marries a French citizen and thereafter resides with him in France thereby loses her American citizenship and becomes a citizen of France, adding, however, that to accomplish this result she must, by residence abroad, or other equivalent act, express her intention to renounce her former citizenship by her marriage. Similar views were expressed in *Trimbles v. Harrison*, 40 Ky. (1 B. Mon.) 147. In *Comitis v. Parkerson* (C. C.) 56 Fed. 556, decided in 1893, the court held that a native born woman who had married an alien subject of Italy, permanently residing in the United States and intending to continue therein, did not thereby lose her citizenship but remained a citizen of this country. The court said that the power to declare how the right of expatriation should be exercised, as well as that of naturalization, was exclusively in Congress, that expatriation could not take place without the consent of the United States, and that "Congress has made no law authorizing any implied renunciation of citizenship." It was mainly on this ground that the court rested its conclusion, although it was also said that in the absence of any law of Congress as to the method of expatriation, it could not be said to take place, unless it was manifested by a removal from this country and a residence elsewhere. See, also, *Beck v. McGillis*, 9 Barb. (N. Y.) 49; *Shanks v. Dupont*, supra; *Jennes v. Landes* (C. C.) 84 Fed. 74; *Kreitz v. Behrensmeyer*, 125 Ill. 197, 198, 17 N. E. 232, 8 Am. St. Rep. 349.

When an alien and a citizen intermarry, they not infrequently return to reside, either temporarily or permanently, to the country of the alien spouse, thereby giving rise to questions concerning their rights as citizens or aliens of the respective countries, from which there have ensued international disputes to be discussed and settled by diplomatic correspondence between the United States and the foreign country. The fact that the courts of this country have held variant opinions on some phases of the subject had caused some perplexity in the state department and like diversity of opinions had appeared from time to time in the correspondence of that department. All the courts have agreed, however, that the entire subject of naturalization and expatriation, including the method by which each might or could be accomplished and manifested, is a matter within the exclusive control of Congress. Under these conditions, the United States Senate, on April 13, 1906, passed a joint resolution for the appointment of a commission to "examine into the subjects of citizenship of the United States, expatriation, and protection abroad," and make a report with proposals for legislation thereon. In June, 1906, the House Committee on Foreign Affairs, to which this resolution had been referred, requested the Secretary of State to select three men connected with the State Department, familiar with the subject, to investigate and make the desired report and recommendations. In pursuance of this request Hon. Elihu Root, then Secretary of State, directed Mr. James B. Scott, Solicitor for the Department of State; Mr. David

Jayne Hill, then Minister to The Netherlands, and Mr. Gaillard Hunt, Chief of the Passport Bureau, to make an inquiry, report and proposals for legislation, as requested. These gentlemen proceeded and on December 18, 1906, they made an elaborate and exhaustive report of 538 pages, with recommendations for legislation covering all the phases of the subject except that of naturalization, which was already provided for. With this document before it, Congress framed an act which became a law on March 2, 1907. 34 U. S. Stats. 1228 (U. S. Comp. St. §§ 3958-3964). This act now controls the subject referred to, including that involved in this case. Section 3 thereof is practically decisive of the case before us and it is as follows:

"That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."

There is no escape from the conclusion that, under the provisions of this section, the plaintiff in this case, when she married Gordon Mackenzie, a British subject, thereupon took the nationality of her husband and ceased to be a citizen of the United States. Just as an alien woman who marries a citizen becomes a citizen herself, whether she wishes it or not, as the cases we have cited declare, so a female citizen who marries an alien becomes herself an alien, whether she intends that result as the consequence of her marriage or not. She must bow to the will of the nation as expressed by the act of Congress. Owing to the possibility of international complications, the rule has generally prevailed, from considerations of policy, that the wife should not have a citizenship, nor an allegiance, different from that of her husband. The section aforesaid was intended to put this general doctrine into statutory form. When after Congress by this act had declared that her marriage to an alien would accomplish her expatriation, she thereafter married an alien, she is conclusively presumed to have intended thereby to renounce her citizenship of the United States and become a subject of Great Britain.

It is suggested that the object of the act, as expressed in its title, was to legislate solely for the protection of citizens abroad and therefore that it should not be construed to apply to women who marry here and continue to reside in this country, or who marry an alien permanently residing in this country. As has been stated in reciting the origin of the act, such persons frequently remove to the country of which the husband is a subject, or to other foreign countries. It was the obvious purpose to provide a rule which should govern in cases of that kind. Furthermore, the language of the section shows that it contemplates that an American woman included within its terms will in some cases reside in the United States after contracting the marriage

with the alien, and that it intends that she shall continue to have the nationality of her husband during such residence here, so long as the marriage relation continues. The interpretation contended for would be contrary to this provision, and therefore it is not permissible.

Plaintiff's counsel also contends that the act of Congress is contrary to the opening sentence of the Fourteenth Amendment to the Constitution of the United States declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." In support of this position they cite *In re Look Tin Sing*, supra, and *United States v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890. In the first mentioned case, which was decided in 1884, Justice Field of the United States Supreme Court, writing the decision for the Circuit Court of the United States for the District of California, held that a person born in the United States, of Chinese parents residing therein at the time of his birth and not members of the diplomatic force of China, was a native citizen of the United States and was not subject to the act of Congress forbidding the re-entry into this country of Chinese who had returned temporarily to China, except where they had obtained a certificate allowing such return. This decision declares that a native-born person of any race is a citizen, under the aforesaid provision of the Fourteenth Amendment, and it follows the familiar rule that such person remains a citizen so long as he chooses, provided he does no act which under our laws will have the effect of renouncing or forfeiting such citizenship. The Chinese Exclusion Act, it was held, did not affect the right of citizenship. But the quotation we have already given from this case shows that the court did not intend to hold and did not hold that the Fourteenth Amendment forbids expatriation, or takes from Congress the power to legislate concerning it. In *United States v. Wong Kim Ark*, the same question was involved and the same conclusion was reached. In the course of its very elaborate discussion of the proposition that the Fourteenth Amendment affirms the "ancient and fundamental rule of citizenship by birth within the territory" (169 U. S. 693, 18 Sup. Ct. 473, 42 L. Ed. 890) the court said (169 U. S. 703, 18 Sup. Ct. 477, 42 L. Ed. 890): "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away." From this remark it is argued that a native-born citizen cannot, since the adoption of that amendment, renounce his citizenship. But this by no means follows: The court in the quoted sentence was speaking of the power of Congress to deprive a person of his citizenship without his consent and for no sufficient or reasonable cause. In the next paragraph of the opinion the court says (169 U. S. 704, 18 Sup. Ct. 478, 42 L. Ed. 890):

"Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No

doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents or of any other country."

Thus the opinion relied on itself recognizes and declares that citizenship may be renounced, notwithstanding the provisions of the Fourteenth Amendment. As we have held that the act of the plaintiff here in marrying an alien was in effect a renunciation of her citizenship, it follows that she is not prevented from committing this act of expatriation by the aforesaid provision of the Fourteenth Amendment.

We think it advisable to state here that the question of the effect of the marriage of a native female citizen to an alien, where such marriage had taken place before the passage of the act of 1907 aforesaid, is a question not involved in this case. It is not therefore to be deemed as a decision upon the question whether the section of the act of Congress above quoted was applicable to and operated upon citizens of the United States who were at that time married to alien husbands. From what we have said the conclusion is clear that the plaintiff here is not now a citizen of the United States within the meaning of the act of Congress above quoted, and as that act controls the question of her citizenship, and her right to vote is made by our Constitution, as amended in 1911, dependent upon her status as a citizen of the United States, and does not exist unless she is such citizen, she is not entitled to the exercise of the privilege of suffrage and cannot demand registration as a voter.

It is ordered that the writ applied for be denied.

BEATTY, C. J., ANGELLOTTI, LORIGAN, SLOSS, MELVIN, and HENSHAW, JJ., concurred.

Rehearing denied.<sup>14</sup>

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### STOECK v. PUBLIC TRUSTEE.

(Chancery Division, 1921. 37 Times Law Rep. 666.)

Mr. Justice Russell gave judgment in this action, which was before him on April 14 and 15. In it plaintiff asked for a declaration that he was not a German national within the Treaty of Peace Order, or within Part X, section 4, of the Treaty of Peace with Germany.

The plaintiff was born in 1872 in Rhenish Prussia. In 1895 he went to live in Belgium. In 1896 he was discharged from his Prussian nationality, and thereby he became discharged from his Imperial German nationality. In November, 1896, he came to live in England, and he lived here until the outbreak of war, but he was never naturalized as a British subject. In 1916 he was interned, and then he brought

<sup>14</sup> The principal case, as involving a federal question, came before the Supreme Court of the United States, and the decision of the lower court was affirmed, in *Mackenzie v. Hare*, 239 U. S. 299, 38 Sup. Ct. 106, 60 L. Ed. 297, Ann. Cas. 1916E, 645 (1915).

an action for a declaration that he was not an enemy subject. That action was compromised in November, 1917, upon the terms that certain shares belonging to the plaintiff should be sold and the proceeds paid into the plaintiff's bank. These shares were sold for £2,722, but before the proceeds were paid the plaintiff was sent, in March, 1918, to Holland as a civilian prisoner, and thence he went to Germany. As he thereupon became an enemy within the Trading with the Enemy Acts, a vesting order was made on the application of the Board of Trade on June 15, 1918, and the £2,722 was paid to the Custodian.

After the Treaty of Peace came into force on January 10, 1920, the plaintiff brought this action against the Public Trustee as Custodian and the Attorney-General for the declaration and for payment to him of the moneys in the hands of the Custodian.

At the hearing it was admitted that these moneys should not be affected by this action, as they must abide the Order in Council to be made under section 5 of the Trading with the Enemy (Amendment) Act, 1914, at the termination of the war, which Order had not yet been made, but the declaration was required to enable the plaintiff to deal with the balance at his bank and with certain furniture.

The question to be decided was whether a denationalized German who had not acquired any other nationality was for the purposes of the Treaty of Peace a German national, and, incidentally, whether English law recognized the condition of a "stateless man"—i. e., a man of no nationality. \* \* \*

Mr. Justice RUSSELL, after stating the facts, said that the Solicitor-General had contended that he ought not to construe the Treaty of Peace, which was a matter for the contracting Powers. But under the Treaty of Peace Act, 1919, and the Treaty of Peace Order, 1919, certain sections of the Treaty, including the sections in question, were made part of the municipal law of England, and he could not accede to that contention. The action must fail as regards the money in the hands of the Custodian, but the plaintiff required the declaration asked for, as otherwise he could not deal with the bank balance or the furniture, which, if he were a German national, were charged under section 1 (16) of the Treaty of Peace Order, and under section 1 (17) could not be dealt with under penalty of fine and imprisonment. The question was whether on January 10, 1920, when the Treaty of Peace came into force, the plaintiff was a German national.

The plaintiff said that he had been divested of his German nationality and that he had acquired no other nationality, and that he was a "stateless person." The defendants said that a "stateless person" was not recognized by English law, that the words of the Treaty of Peace must be construed according to English law; and that, although he had been divested of his German nationality, the plaintiff was by English law a German national. Two authorities had been cited to him, *Ex parte Weber*, 32 The Times L. R. 312, [1916] 1 A. C. 421, and *Rex v. Superintendent of Vine-Street Police Station*, 32 The Times L. R. 3,

[1916] 1 K. B. 268. In *Ex parte Weber*, supra, it was decided by the Court of Appeal and affirmed by the House of Lords that a denationalized German who had been interned was not entitled to a writ of habeas corpus, on the ground that it was not clear that he had so completely lost his German nationality as to be entitled to the writ. In the House of Lords great stress was laid on the liability of the applicant as a stateless person to military service under the German Military Law of 1874, but it was not brought to the knowledge of the House that this law had been replaced by a law of 1913, which imposed the liability not only on stateless persons but on the descendants of former German nationals who were possessed of other nationality. *Rex v. Superintendent of Vine-Street Police Station*, supra, only followed *Ex parte Weber*, supra, and he did not think that these cases decided the question.

Two German lawyers had been called before him, and from their evidence he was satisfied that by German law the plaintiff had absolutely lost his German nationality, that he was by German law a stateless person, and that he had no obligation to Germany, except that with other classes of persons he might be liable to military service were he of military age.

Was the condition of a "stateless person" to be recognized? Different opinions of authorities on international law had been cited to him. Hall and Oppenheim recognized the condition, while an eminent German writer held the contrary opinion. It was clear, however, that by German municipal law the condition was recognized, as the witnesses had proved to him. Was it recognized by English municipal law? No authority had been cited to him except some expressions in the judgment of Lord Justice Phillimore in *Ex parte Weber*, [1916] 1 K. B. at page 283, in which he said:

"It is going a step further to say that any country has recognized that a man can shake off his position as a national of the country in which he was born without acquiring the duties and responsibilities of a national of some other country. This applicant might long ago have procured nationalization in this country. He has not done so, and, as at present advised, I think that he must be taken, as far as this country is concerned, to be still retaining his nationality of origin."

In the House of Lords the point was specifically kept open. The Solicitor-General cited section 14 of the British Nationality and Status of Aliens Act, 1914, as supporting his contention. This reproduced section 4 of the Naturalization Act, 1870, and although by subsection (1) only a person who was also a subject of a foreign State could divest himself of his British nationality, by subsection (2) any person born out of his Majesty's dominions might make a declaration of alienage and cease to be a British subject. If a person who was not a subject of a foreign State made the declaration under subsection (2), he became an alien though not a subject of another State. For instance, the illegitimate child of an Englishman born in Germany would

not be a German national. Neither the British Nationality and Status of Aliens Act, 1918, nor the Aliens Restriction (Amendment) Act, 1919, threw light on the question.

The definition of "former enemy alien" in section 15 of the latter Act, which was passed on December 23, 1919, after the Treaty of Peace had been signed, but before it came into force, might include denationalized Germans. It was not surprising that authority could not be found, as the question was seldom of importance, but it would appear that a "stateless person" might be an alien, and he (his Lordship) held that a "stateless person" was not unknown to English law. Whether a person was a national of any country must be decided by the municipal law of that country. It might be said that a person was to be "deemed to be" or "treated as" a national of another country, but he could not be made such a national. By German law the plaintiff was not a German national and he could not be made one by English law. He would make a declaration that the plaintiff was not a German national within the Treaty of Peace Order, 1919, or within the sections of the Treaty of Peace that were set out in the schedule to the Order. As the plaintiff had failed in one part of his claim and succeeded in the other there would be no order as to costs.

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**In re CHAMBERLAIN'S SETTLEMENT.**

(Chancery Division, 1921. 37 Times L. Rep. 966.)

See post, p. 478, for a report of the case.

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**FASBENDER v. ATTORNEY GENERAL.**

(Chancery Division, 1921. 38 Times L. Rep. 114.)

See post, p. 480, for a report of the case.

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**CASE OF LUCIAN ALIBERT.**

(Superior Military Court at Toulon, 1852. *Foreign Relations of the United States*, 1873, Part 1, vol. 2, p. 1801.)

Alibert was a native of Digne, Basses Alpes. He went to the United States in 1838, at the age of 18, and, after going through the usual formalities, was naturalized in 1846. In 1852 he returned to France and was arrested while on a visit to Dignes as an "insoumis" of 1839, and pleaded his naturalization as exempting him from service. The United States consul at Marseilles applied to the general commanding the district, who informed him that Alibert's claim was founded in right, if his naturalization was really dated in 1846, as his naturalization would incapacitate him from serving in the French army, and the date of it would prove that more than three years had elapsed since the offense was committed, (that being the period of limitation required by the penal code,) and that he could not consequently be proceeded against for insubordination. Nevertheless Alibert was brought before a "conseil de guerre" at Marseilles, and condemned to a month's imprisonment.



The cause was then brought by appeal before a superior military court at Toulon, and the sentence quashed, thereby establishing Alibert's immunity from conscription.<sup>18</sup>

<sup>18</sup> "Article 17. The following lose their French nationality:

"1. A Frenchman naturalized in a foreign country or who acquires foreign nationality at his own request by the effect of the law.

"If he is still subject to the obligations of military service in the active army, his naturalization abroad will not work a loss of his French nationality unless it has been authorized by the French Government." Article 17, Law of Nationality of June 28, 1889. Report on the subject of Citizenship, Expatriation, and Protection Abroad, Document 826, H. R. 59th Congress, 2d Session, 1906, p. 318.

The subject or citizen owes permanent allegiance to his country, and, in return, his country owes protection. Allegiance and protection are correlative.

While the government of a country should protect its subjects or citizens in all quarters of the globe, great difficulty is often experienced in securing to naturalized subjects or citizens protection which would be accorded as of right to the native born. This is especially the case with naturalized subjects or citizens upon their return to their country of origin. Some leading cases of this kind are stated in the following note:

*Hausing's Case* (1885), in which it was held that children born in the United States of alien parents, and never dwelling in the United States, are not citizens thereof (3 Moore's Digest, 278); *Emden's Case* (1885) held that children born abroad of citizens of the United States, and continuing to reside abroad, are not citizens thereof unless they elect to become such on coming of age (3 Moore's Digest, 466); and in *A Prussian Subject's Case* (1875), it was held by the Attorney General that under the treaty of 1868 between the United States and the North German Confederation, a Prussian by birth, naturalized in the United States, is presumed to have renounced his American citizenship if he returns to Prussia, and resides there two years (3 Moore's Digest, 539).

In the United States there are two classes, native and naturalized citizens. These possess equal rights under the law, *Osborn v. U. S. Bank*, 9 Wheat. 738, 827, 6 L. Ed. 204 (1824), but by the Constitution only the native-born are eligible to the presidency and vice-presidency. "It seems to have grown into a rule," says Attorney General Bradford, in 1794, "that a nation ought not to interfere in the causes of its citizens brought before foreign tribunals, excepting in the case of a refusal of justice—palpable and evident injustice—or a violation of rules and forms," and in *Murray v. Charming Betsy*, 2 Cr. 64, 120 (1804), Chief Justice Marshall says: "The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of his own government; and if, without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American Government in his favor would be considered as a justifiable interposition. But his situation is completely changed where, by his own act, he has made himself the subject of a foreign power."

After speaking of the protection the citizen enjoys in the United States, Mr. Justice Miller says: "Another privilege of a citizen of the United States is to demand the care and protection of the federal government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States." *Slaughter House Cases*, 16 Wall. 36, 79, 21 L. Ed. 394 (1872). See, also, the case of *The Leghorn Seizures*, 27 Ct. of Cl. 224, 235, 236, 241 (1892). And in *De Bode v. Reg.*, 3 H. L. C. 449, 465 (1851), Lord Chancellor Truro held: "It is admitted law that if the subject of a country is spoliated by a foreign government he is entitled to obtain redress from the foreign government through the means of his own government. But if, from weakness, timidity, or any other cause on the part of his own government, no redress is obtained from the foreigner, then he has a claim against his own country."

The alien, as well as his property, enjoys an equal protection before the

law; for the temporary allegiance which he owes demands in return protection from the government. To what extent this protection is enjoyed the above cases show. If the alien temporarily or permanently residing in foreign parts is not reciprocally well treated, the government whose citizens are injured may expel or place under corresponding disability citizens of the offending nation within its limits, or it may demand through diplomatic channels their protection. In case of the native-born, this is a perfect right; in case of naturalized citizens the right is perfect as against third parties, but imperfect as against the mother country, while in cases of mere "declaration of intention" and incomplete naturalization the claim is of the slightest. The following cases will perhaps serve to make this clear:

Wagner's Case, 1883 (8 Moore's Digest, 627), to the effect that a foreign minor who emigrates to and becomes naturalized in the United States, may on returning to his original state be forced to perform military service due at time of his original departure, but that it would be highly unreasonable to exact the performance of a service or duty non-existent or inchoate at the time of his emigration.

Kosztz's Case, 1853 (Cockburn's Nationality, 118), was one of imperfect naturalization, in that the claimant had merely declared his intention to become a citizen, but had not as yet fully complied with final requirements of the law. It appears that he was a Hungarian refugee of 1848-49; that he was domiciled in the United States; that he had previously declared his intention to become an American citizen; that he was temporarily absent from the United States; that he was furnished with a consular traveling pass, stating that he was entitled to American protection.

The subsequent proceedings are thus described by Mr. Justice Miller, in *Re Neagle*, 135 U. S. 1, 64, 10 Sup. Ct. 658, 34 L. Ed. 55 (1890): "One of the most remarkable episodes in the history of our foreign relations, and which has become an attractive historical incident, is the case of Martin Kosztz, a native of Hungary, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen. While in Smyrna he was seized by command of the Austrian consul-general at that place and carried on board the *Hussar*, an Austrian vessel, where he was held in close confinement. Captain Ingraham, in command of the American sloop of war *St. Louis*, arriving in port at that critical period, and ascertaining that Kosztz had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with. It was, however, to prevent bloodshed, agreed that Kosztz should be placed in the hands of the French consul, subject to the result of diplomatic negotiations between Austria and the United States. The celebrated correspondence between Mr. Marcy, Secretary of State, and Chevallier Hülsenmann, the Austrian minister [chargé d'affaires] at Washington, which arose out of this affair and resulted in the release and restoration to liberty of Kosztz attracted a great deal of public attention, and the position assumed by Mr. Marcy met the approval of the country and of Congress, who voted a gold medal to Captain Ingraham for his conduct in the affair." For the diplomatic correspondence between the two governments, see 2 Wharton's Digest, §§ 175, 198.

Kosztz's Case excited at the time and since much unfavorable and some favorable criticism and comment, for which see Hall's Int. Law, 251-254 and Calvo, vol. II, pp. 45-47, 66, 142-145. Professor Pomeroy's position is as follows: "The discussion between the two cabinets was long and somewhat acrimonious. But I believe that Mr. Marcy conducted the correspondence with so much ability that he convinced even his opponents. \* \* \* Now, although Kosztz's crime was a political one, \* \* \* I see no reason why the same doctrine would not apply to the case of any other offender. Doubtless, indeed, our government would not have exhibited as much alacrity, in case the man had been a common murderer or thief, but they certainly might have done so with the same result." International Law, 254.

Tousig's Case, 1854 (Lawrence's Wheaton, 1863, 929), was simple: he was an Austrian by birth who had acquired a domicile in the United States, and although unnaturalized, had been improperly furnished with an American passport. On his return to Austria he was arrested and charged with offences committed before emigrating from Austria. The difference between the two cases is sufficiently plain. Tousig voluntarily subjected himself to Austrian

### CHAPTER III

### TERRITORY OF STATES

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#### SECTION I.—MODES OF ACQUISITION

##### I. DISCOVERY AND OCCUPATION

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In re DELAGOA BAY.

#### GREAT BRITAIN v. PORTUGAL.

(Award of the President of the French Republic, 1875. Martens, 8 Nouveau Recueil Général de Traités [2d Series] 517.)<sup>1</sup>

We, Marie Edme Patrice Maurice de MacMahon, Duke of Magenta, Marshal of France, President of the French Republic, declare that by reason of the powers which have been conferred on the President of the French Republic as expressed in the terms of the protocol signed at Lisbon the 25th of September, 1872, by which the Government of Her Majesty the Queen of Great Britain and of Ireland and that of His Majesty the King of Portugal, have agreed to submit to the President of the French Republic, to be settled by him finally and without appeal, the controversy which has been pending since 1823 in relation to the possession of the territories of Tembe and of Maputo and of the Islands of Inyack and the Elephants situated upon Delagoa or Lorenzo Marquez Bay on the east coast of Africa;

In view of the cases submitted to the arbitrator by the counsel of the two parties on the 15th of September, 1873, and the counter cases also submitted by them the 14th and 15th of September, 1874;

In view of the letters of His Excellency the Ambassador of England and of the Minister of Portugal at Paris dated February 8, 1875;

The commission created March 10, 1873, in order to study the papers and documents respectively submitted having made known to us the result of their examination;

Whereas, the controversy which it is intended to settle by the cases submitted to the arbitrator and finally by the letters cited above of the representatives of the two parties at Paris, deals with the right to the following territories, namely:

jurisdiction; Koszta wisely kept away from the fatherland, and was apprehended by Austrian authorities in neutral territory. In Tousig's case the American Government neither should nor did offer protection; in Koszta's case it protected Koszta's "inchoate rights"—a phrase much employed by Fuller, C. J., in *Boyd v. Thayer*, 143 U. S. 135, 12 Sup. Ct. 375, 38 L. Ed. 103 (1891)—against violation in a neutral port. If Koszta had returned to Austria, the cases would have been on all fours.

<sup>1</sup> See, also, 66 British and Foreign State Papers, 554.

1. The territory of Tembe, bounded on the north by the river Espirito Santo or English river, and by the river Lorenzo Marquez or Dundas, on the west by the Lebombo Mountains, on the south and east by the river Maputo and from the mouth of this river to that of the Espirito Santo by the shore of the bay of Delagoa or Lorenzo Marquez:

2. The territory of Maputo, in which are contained the peninsula and island of Inyack, also the Island of the Elephants, and which is bounded on the north by the shore of the Bay, on the west by the river Maputo from its mouth to the parallel  $26^{\circ} 30'$  of south latitude, on the south by the same parallel and on the east by the sea.

Whereas, the Delagoa or Lorenzo Marquez Bay was discovered in the 16th century by Portuguese mariners and in the 17th and 18th centuries Portugal occupied several places on the north shore of this bay and upon the island of Inyack, of which the Islet of the Elephants is a dependancy;

Whereas, since its discovery, Portugal has continuously claimed rights of sovereignty over the whole of the Bay and the bordering territories, as well as the exclusive right to trade there, and furthermore, supported this claim by force of arms against the Dutch about 1732, and against the Austrians in 1781;

Whereas the acts by which Portugal has supported its claim have never given rise to any counterclaim on the part of the government of the United Provinces, and in 1782 these claims were tacitly accepted by Austria following diplomatic arrangements exchanged between that power and Portugal;

Whereas, in 1817 England herself did not dispute the right of Portugal when she concluded with the Government of His Most Faithful Majesty the Convention of July 28 for the suppression of the slave trade; and in fact the second article of this Convention should be interpreted in the sense that it designates as part of the possessions of the Crown of Portugal the whole of the Bay to which is applied indifferently either the names Delagoa or Lorenzo Marquez;

Whereas, in 1822 the Government of Her Britannic Majesty, when it delegated to Captain Owen the hydrographic survey of Delagoa Bay and of the rivers which empty therein, commended him to the good offices of the Portuguese Government;

Whereas, if the accidental weakening of Portuguese authority in this quarter had created in 1823 an error in the mind of Captain Owen and made him in good faith treat as really independent of the Crown of Portugal the native chiefs of the territories now in dispute, nevertheless the agreements concluded by him with those chiefs were no less contrary to the rights of Portugal;

Whereas, almost immediately after the sailing of the English ships, the native chiefs of Tembe and Maputo renewed their allegiance to the Portuguese officials, thereby themselves attesting that they had not had the power to enter into contracts;

Whereas, the Conventions signed by Captain Owen and the native chiefs of Tembe and Maputo, even if they had been agreed upon between parties capable of contracting, would be today without legal effect, since the act in relation to Tembe stipulated essential conditions which have not been executed, and the act concerning Maputo, concluded for a limited time, was not renewed after the expiration of this period:

For these reasons we have concluded and decided that the claims of the Government of his Faithful Majesty to the territories of Tembe and Maputo, to the peninsula of Inyack and of the Elephants, are duly proved and established.

Versailles, July 24, 1875.

MAL. DE MACMAHON Duc de Magenta.<sup>2</sup>

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### JOHNSON and GRAHAM'S LESSEE v. McINTOSH.

(Supreme Court of the United States, 1823. 8 Wheat. 543, 5 L. Ed. 681.)

Error to the District Court of Illinois.

This was an action of ejectment for lands in the state and district of Illinois, claimed by the plaintiffs under a purchase and conveyance from the Piankeshaw Indians, and by the defendant, under a grant from the United States. It came up on a case stated, upon which there was a judgment below for the defendant. \* \* \*

Chief Justice MARSHALL delivered the opinion of the court.<sup>3</sup>

The plaintiffs in this cause claim the land in their declaration mentioned, under two grants, purporting to be made, the first in 1773, and the last in 1775, by the chiefs of certain Indian tribes, constituting the Illinois and the Piankeshaw nations; and the question is, whether this title can be recognised in the courts of the United States? The facts, as stated in the case agreed, show the authority of the chiefs who executed this conveyance, so far as it could be given by their own people; and likewise show, that the particular tribes for whom these chiefs acted were in rightful possession of the land they sold. The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title, which can be sustained in the courts of this country.

As the right of society to prescribe those rules by which property may be acquired and preserved is not, and cannot, be drawn into question; as the title to lands, especially, is, and must be, admitted, to depend entirely on the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not

<sup>2</sup> For a further recognition and application of principle of discovery and occupation, see the Arbitral Award of Victor Emanuel III in the dispute between Brazil and Great Britain. *Revue Générale de Droit International Public*, 18d (1904).

<sup>3</sup> The statement of facts and parts of the opinion are omitted.

simply those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves, that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated, as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented. Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but, were, necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives.

These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.

The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles. Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France with Great Britain, and with the United States, all show that she placed it on the rights given by discovery. Portugal sustained her claim to the Brazils by the same title. France, also, founded her title to the vast territories she claimed in America on discovery. \* \* \* The States of Holland also made acquisitions in America, and sustained their right on the common principle adopted by all Europe. \* \* \* The claim of the Dutch was always contested by the English; not because they questioned the title given by discovery, but because they insisted on being themselves the rightful claimants under that title. Their pretensions were finally decided by the sword.

No one of the powers of Europe gave its full assent to this principle, more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to Christian people, and to take possession of them in the name of the king of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery, the English trace their title. In this effort made by the English government to acquire territory on this continent, we perceive a complete recognition of the principle which has been mentioned. The right of discovery given by this commission, is confined to countries "then unknown to all Christian people;" and of these countries, Cabot was empowered to take possession in the name of the king of England. Thus asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery. The same principle continued to be recognized. \* \* \*

Thus has our whole country been granted by the crown, while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees. In those governments which were denominated royal, where the right to the soil was not vested in individuals, but remained in the crown, or was vested in the colonial government, the king claimed and exercised the right of granting lands, and of dismembering the government, at his will. The grants made out of the two original colonies, after the resumption of their charters by the crown, are examples of this. The governments of New England, New York, New Jersey, Pennsylvania, Maryland, and a part of Carolina, were thus created. In all of them the soil, at the

time the grants were made, was occupied by the Indians. Yet almost every title within those governments is dependent on these grants. In some instances, the soil was conveyed by the crown, unaccompanied by the powers of government, as in the case of the northern neck of Virginia. It has never been objected to this, nor to any other similar grant, that the title as well as possession was in the Indians when it was made, and that it passed nothing on that account.

These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. A charter intended to convey political power only, would never contain words expressly granting the land, the soil and the waters. Some of them purport to convey the soil alone; and in those cases in which the powers of government, as well as the soil, are conveyed to individuals, the crown has always acknowledged itself to be bound by the grant. \* \* \*

Further proofs of the extent to which this principle has been recognized, will be found in the history of the wars, negotiations and treaties, which the different nations, claiming territory in America, have carried on, and held with each other. \* \* \*

These conflicting claims produced a long and bloody war, which was terminated by the conquest of the whole country east of the Mississippi. In the treaty of 1763, France ceded and guarantied to Great Britain, all Nova Scotia or Acadie, and Canada, with their dependencies; and it was agreed, that the boundaries between the territories of the two nations, in America, should be irrevocably fixed by a line drawn from the source of the Mississippi, through the middle of that river and the Lakes Maurepas and Ponchartrain, to the sea. This treaty expressly cedes, and has always been understood to cede, the whole country, on the English side of the dividing line, between the two nations, although a great and valuable part of it was occupied by the Indians. Great Britain, on her part, surrendered to France all her pretensions to the country west of the Mississippi. It has never been supposed, that she surrendered nothing, although she was not in actual possession of a foot of land. She surrendered all right to acquire the country; and any after attempt to purchase it from the Indians, would have been considered and treated as an invasion of the territories of France.

By the 20th article of the same treaty, Spain ceded Florida, with its dependencies, and all the country she claimed east or south-east of the Mississippi, to Great Britain. Great part of this territory also was in possession of the Indians. By a secret treaty, which was executed about the same time, France ceded Louisiana to Spain; and Spain has since retroceded the same country to France. At the time both of its cession and retrocession, it was occupied, chiefly by the Indians. Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by

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the Indians. Have the American states rejected or adopted this principle?

By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the "propriety and territorial rights of the United States," whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these states. We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled. It has never been doubted, that either the United States, or the several states, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it. \* \* \*

The states, having within their chartered limits different portions of territory covered by Indians, ceded that territory, generally, to the United States, on conditions expressed in their deeds of cession, which demonstrate the opinion, that they ceded the soil as well as jurisdiction, and that in doing so, they granted a productive fund to the government of the Union. The lands in controversy lay within the chartered limits of Virginia, and were ceded with the whole country north-west of the river Ohio. This grant contained reservations and stipulations, which could only be made by the owners of the soil; and concluded with a stipulation, that "all the lands in the ceded territory, not reserved, should be considered as a common fund, for the use and benefit of such of the United States as have become, or shall become members of the confederation," etc., "according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever." The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted. \* \* \*

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise. The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown or its grantees. The validity of the titles given by either has never been

questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians. \* \* \*

That law which regulates and ought to regulate in general, the relations between the conqueror and the conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty. However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice. \* \* \*

After bestowing on this subject a degree of attention which was more required by the magnitude of the interest in litigation, and the able and elaborate arguments of the bar, than by its intrinsic difficulty, the court is decidedly of opinion, that the plaintiffs do not exhibit a title which can be sustained in the courts of the United States; and that there is no error in the judgment which was rendered against them in the district court of Illinois.

Judgment affirmed, with costs.<sup>4</sup>

<sup>4</sup> See *Jones v. United States*, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691 (1890), applying the principle of acquisition by discovery to guano islands.

For nonjudicial precedents, see the controversy between Great Britain and United States relative to Oregon, 1845-46, Richard Henry Dana's *Wheaton*, 250-254 (1866); John W. Foster's *Century of American Diplomacy*, 302-313 (1900); the Delagoa Bay controversy, 1875, William Edward Hall's *International Law* (4th Ed.) 122 (1895); The Santa Lucia dispute, 1 Sir Robert Phillimore, *Int. Law* (3d Ed. 1879) 368.

"At the present time it is generally conceded that discovery alone is not enough to give title to territory; it must be followed by actual occupation.

"In regard to the extent of the interior country to which the occupation

## II. CONQUEST AND CESSION

## THE FAMA.

(High Court of Admiralty, 1804. 5 C. Rob. Adm. 106.)

This was a question respecting the national character of Louisiana, whether it was, at the time of capture, May, 1803, to be considered as a Spanish settlement, or as belonging to France, by reason of the treaty of Ildefonso, 1796, by which it was ceded to that country. The question arose on the claim of Mr. ———, a merchant, resident at New Orleans, for property taken, May, 1803, on a voyage from New Orleans to Havre de Grace. \* \* \*

Sir W. SCOTT. The present question is a general one, respecting the situation, in which the people of a distant settlement are placed, by a Treaty of the State to which they undoubtedly belong, and by which they are stipulated to be transferred to another power. The case proceeded for a considerable time without dispute as to principle, on a mere enquiry into the fact of possession; under an understanding, as I apprehended, that if possession had not been taken by France, the French character could not be deemed to have attached. The question has however now been fully argued as to the principle of law, whether the Treaty did not in itself confer full sovereignty and right of dominion, and whether the inhabitants were not so ceded by that Treaty, as to become immediately French subjects. Another question has also been started, respecting the Treaty of Ildefonso, whether such a Treaty

of the seacoast gives title, the extravagant claim was put forward in some of the earlier charters, granting lands in North America, that such right extended from the Atlantic to the Pacific Ocean. A more reasonable rule was laid down by the United States Commissioners, appointed to settle the boundary of Louisiana, namely, 'that when any European nation takes possession of any extent of seacoast, that possession is understood as extending into the interior country, to the sources of the rivers emptying themselves within that coast, to all their branches, and the country they cover, and to give it a right in exclusion of all other nations to the same.' Freeman Snow's Cases on International Law, pp. 12, 13, note (1893).

The Conference of Berlin Concerning the Congo, adopted, among other valuable provisions, a "Declaration Relative to the Conditions Essential to be Fulfilled in Order that New Occupations upon the Coasts of the African Continent may be Considered as Effective." The provisions of the Conference, in so far as the present subject is concerned, are contained in the following articles of the general act:

"Article 34. The power which henceforth shall take possession of a territory upon the coast of the African continent situated outside of its present possessions, or which, not having had such possessions hitherto, shall come to acquire them, and likewise, the power which shall assume a protectorate there, shall accompany the respective act with a notification addressed to the other signatory powers of the present act, in order to put them in a condition to make available, if there be occasion for it, their reclamations.

"Article 35. The signatory powers of the present act recognize the obligation to assure, in the territories occupied by them, upon the coasts of the African continent, the existence of an authority sufficient to cause acquired rights to be respected and, the case occurring, the liberty of commerce and of transit in the conditions upon which it may be stipulated." 78 British and Foreign State Papers, 19.

made clandestinely, as it is said, during hostilities, and with a provision that it should not take effect till after the war, is not to be considered in the light of a fraudulent covering of French interests, for the purpose of defeating the belligerent rights of this country. This latter question cannot, I think, fairly be brought into discussion; nor is it necessary to decide, what would be the situation of a neutral country, delivering up its rights to one belligerent, and continuing to nurse and feed the colony for the benefit of that belligerent during the war. It is, I say, needless to enquire, in the present case, what rights of war would accrue to the other belligerent from such a conduct; because Spain, very soon after the signing of that Treaty, became herself a party in the war, and was as much exposed to the attacks of this Country in all her settlements, as they could have been in the possession of France. It is impossible, therefore, that Spain can be said to have lent her aid and assistance as a neutral Country during the war, to nourish and protect this colony as a colony of France. On the return of peace, no objection in the way of protest or public reclamation was made against the Treaty on the part of this country. I shall therefore dismiss this branch of the argument, as not fairly supported by the circumstances of the case. The other question of law, how far full sovereignty can be held to have passed by the mere words of the Treaty, without actual delivery, was in the first stages of this cause not mooted. As it has now been brought into discussion, it is fit that I should give my opinion upon it.

It is to be observed then, that all corporeal property depends very much upon occupancy. With respect to the origin of property, this is the sole foundation, *Quod nullius est ratione naturali occupanti id conceditur*. So with regard to transfer also, it is universally held in all systems of jurisprudence, that to consummate the right of property, a person must unite the right of the thing with possession. A question has been made indeed by some writers, whether this necessity proceeds from what they call the natural law of nations, or from that which is only conventional. Grotius seems to consider it as proceeding only from civil institutions.<sup>5</sup> Puffendorf<sup>6</sup> and Pothier<sup>7</sup> go farther. All

<sup>5</sup> Que la délivrance de la chose même que l'on transfère à autrui n'est nécessaire qu'en vertu des loix civiles. B. 2, c. 6, 1-4, Barbeyrac's Translation.

<sup>6</sup> Cela posé, il est clair, que les conventions toutes seules suffisent pour faire passer d'une person ne à l'autre la propriété considérée purement et simplement comme une qualité morale, détachée de la possession; mais lorsque l'idée de la propriété renferme de plus un pouvoir physique, que met en état de faire actuellement usage de ce droit il faut, outre l'accord mutuel, que la chose même soit délivrée. C'est une suite des maximes naturelles de la raison, & non pas des seuls réglemens du droit positif. Puff. 1, 4, c. 9, § 8.

<sup>7</sup> Quoiqu'il soit de cette question traitée selon le pur droit naturel, que nous abandonnons à la dispute de l'école, le principe du droit Romain, que le domaine de propriété d'une chose ne peut passer d'une person ne à une autre, que par une tradition réelle ou feinte de la chose, étant un principe reçu dans la jurisprudence, comme en conviennent ceux, qui sont de l'opinion contraire, nous devons nous y tenir. Pothier, c. 4, p. 437.

concur, however, in holding it to be a necessary principle of jurisprudence, that to complete the right of property, the right to the thing, and the possession of the thing itself, should be united; or, according to the technical expression, borrowed either from the civil law, or as Barbeyrac explains it, from the commentators on the Canon Law, that there should be both the *jus in rem*, and the *jus in re*. This is the general law of property, and applies, I conceive, no less to the right of territory than to other rights. Even in newly discovered countries, where a title is meant to be established, for the first time, some act of possession is usually done and proclaimed as a notification of the fact. In transfer, surely, where the former rights of others are to be superseded, and extinguished, it cannot be less necessary that such a change should be indicated by some public acts, that all who are deeply interested in the event, as the inhabitants of such settlements, may be informed under whose dominion, and under what laws they are to live. This I conceive to be the general propriety of principle on the subject, and no less applicable to cases of territory, than to property of every other description.

It will be only necessary to enquire then, whether the practice has been conformable to what we might conceive to be the true principle of law. On this point no doubt can be entertained. The Corps Diplomatique is full of instances of this kind: Where stipulations of Treaties for ceding particular countries are to be carried into execution, solemn instruments of cession are drawn up, and adequate powers are formally given to the persons, by whom the actual delivery is to be made. In modern times, more especially, such a proceeding is become almost a matter of necessity, with regard to the colonial establishments of the States of Europe, in the new world. The Treaties by which they are affected may not be known to them for months after they are made. Many articles must remain executory only, and not executed, till carried into effect; and until that is done by some public act, the former sovereignty must remain. Amongst the instances that might be cited to shew what the practice has been on this subject, I will mention only a few. On the cession of Nova Scotia to France by Treaty, 21st July, 1667, the act of cession, which purports to be made in consequence of the Treaty, was not drawn up till February, 1668, when full powers were sent out to deliver up the settlement to the person who should be empowered to take possession, under the great seal of France.—Another instance, which comes nearer to the present question, is to be found in the proceedings which took place when this very settlement of Louisiana was ceded by France to Spain in 1762. It passed by act of cession drawn up in solemn form, and dated more than a year after the Treaty itself. Indeed modern history abounds in such instances. If to these it were necessary to add the authority of a judicial recognition of the principle, I think the case of *Wroughton* against *Mann*, to which I alluded on the former day, is strongly in point. That

was a case before the delegates on appeal in a revenue cause. The Act of Court pleaded, "that East Florida was ceded to Spain by Treaty of 1803, and that eighteen months were allowed for emigration. 2dly. that notwithstanding the Treaty, the English laws continued till the Spanish Government arrived and received delivery from General Tonin; and the formal instruments, under which possession was afterwards taken, were exhibited." The offence charged was an act of importation contrary to the British Revenue Laws, long after the ratification of the Treaty, but before the arrival of the Spanish Governor, and the actual delivery. Objections were taken to the allegations similar to the arguments which have been urged in the present case, viz., "That the country had passed to Spain by virtue of the Treaty; that the continuance of British possession was but an usurpation; and that the offence was no longer amenable to the British laws. If that could have been sustained, the plea must have been bad; but it was not so held. The Court of Delegates were of opinion, that the contract was merely executory, and till it was carried into execution, the British possession, and the British laws," continued in full force. On this ground the allegation was admitted. The cause proceeded, and went off afterwards on failure of proof as to the fact; but the opinion of the Court, as to the law, was fully declared by the admission of such a plea. I am of opinion, therefore, that on all the several grounds of reason or practice, and judicial recognition, until possession was actually taken, the inhabitants of New Orleans continued under the former sovereignty of Spain. Then as to the fact of possession. There are undoubtedly some expressions in these letters, which might raise a supposition, that the person who had arrived, had taken possession on the part of the French Government. A letter from a French Loyalist expresses "the expectation of French troops and a civil officer to take possession, and make Frenchmen of us, who are now Spaniards." It is afterwards said that Citizen Laussart had arrived to take possession. A proclamation is issued by him, which is drawn up very much in the present tense; but that mode of speaking is used also, I observe, relative to some circumstances which had certainly not taken place, as "that the military Prefect brings with him troops, &c." when it is certain that not a soldier had appeared. From other parts of the evidence, I think it is sufficiently clear that he was either not the person who was charged with the act of taking possession, or that some considerations had induced him to defer it. A letter written by him states, "if the taking possession had passed," etc. There is also the Convention entered into: "That the French flag should enjoy the same privileges, as if the possession had actually been taken." These passages strongly indicate that the actual delivery had not passed. Then comes the certificate of the Spanish Governor, accompanied by an instruction equally formal, from the American Consul. These are, I think, decisive as to the fact. They state, that Citizen Laussart had arrived in March to make the neces-

sary arrangements, but that no cession had taken place, and that he had never exercised any jurisdiction. On the whole of this evidence I am led to conclude, either that Mr. Laussart was not the person authorized<sup>a</sup> to take possession, or that the act of cession had from some causes been deferred. In this situation of things, it appears to me, upon the grounds before stated, that the colony must be considered as continuing, at the time of capture, under the dominion of Spain, and consequently that these persons, as Spanish subjects, are entitled to restitution.

### THE FOLTINA.

(High Court of Admiralty, 1814. 1 Dodson, 450.)

This was the case of a ship and cargo seized on the 15th of December, 1811, whilst lying at anchor in the roadstead of Heligoland, which island had been surrendered to his Majesty's forces on the 5th of September, 1807. The question was, whether the ship and cargo should be condemned as droits of admiralty or otherwise.

Sir W. SCOTT. This is the case of a vessel which was taken in the roadstead of Heligoland, not at the time of the surrender of the island, but afterwards, and the seizure is represented to have taken place within the harbor. The locality of the transaction is, I think, sufficiently described by the terms made use of by the witnesses, who must be understood to mean that portion of the sea to which vessels are carried for the purpose of landing their cargoes at Heligoland; and whether the same portion of the sea is more or less enclosed, whether it is completely land-locked or not, does not appear to be material to the issue in the present case. The Gazette, too, describes the place as a haven, a compliment to which it is certainly not, in strictness, entitled; but it is used as a haven, and may, therefore, fairly be considered as such, at least, for the purposes of the present question. There is certainly no reason for saying that the property is not within the grant of the crown to the Lord High Admiral, so far as the locality of the seizure is concerned; for it is the ordinary rule, that ships, taken in such places during the existence of hostilities, become droits of admiralty.

<sup>a</sup> It appears from the American papers, December 18, 1803, that Mr. Laussart was the person who afterwards took possession; "that a few days previous to that date, the Province of Louisiana was, with all due ceremonial, surrendered to the French Republic. The governor, Salcedo, and the Marquis de De Gaffa Calvo, acted as commissioners on the part of his Catholic Majesty; and the colonial prefect, citizen Laussart, as the representative of the French Government." From the same authority, January 23, 1804, it appears that, 20th December, 1803, possession was formally ceded by France to the American governor, with appropriate ceremonies. The concluding paragraph describes the new establishment to have consisted principally of Frenchmen. "The governor has confirmed the municipality, which consists of a mayor, council, secretary, and city treasurer. They are all Frenchmen. The same duties are paid as under the old régime."

But the chief point to be considered is, whether, at the time this seizure was made, Heligoland formed part of the dominions of the crown of Great Britain or not. The island, it appears, had been conquered and taken possession of by British forces, but the conquest had not been confirmed to this country by a treaty of peace. It was a firm capture in war, but was still subject to a kind of latent title in the enemy, by which he might have recovered it at the conclusion of the war, provided this country would have consented to its restitution.

It is somewhat extraordinary that, in the course of the numerous and long wars in which this country has been engaged, no case should have been determined which might serve as a guide to the court in the decision of the present question. It does not appear that any case of the kind has hitherto occurred, with the solitary exception of that which has been mentioned in the argument, (*The Esperanza*), and that is admitted to have passed with very little notice, and without opposition. A cause thus passing sub silentio cannot be considered of great weight in point of authority. I observe that the grant from the crown to the Lord High Admiral applies to the king's dominions generally, and that there is nothing which points to a distinction between those parts of the king's dominions over which the crown has plenum dominium or otherwise. No point is more clearly settled in courts of common law than that a conquered country forms immediately part of the king's dominions. (*Campbell v. Hall*, Cowper's Rep. 208.) In a late instance, we know that an island so acquired (*Guadaloupe*) was transferred to a third power, subject, undoubtedly, to the shadowy right of the former proprietor. It is said, that a conquest of this kind may be re-acquired *flagranti bello* by the state from which it was taken; but so may any other possession, though forming part of the original and established dominions of the crown of this country, if the enemy has it in his power to make the conquest. The same observation is applicable to the Isle of Wight, as well as to Heligoland, for the enemy has the same right to make a conquest of one as the other. It is said that the enemy may recover back the island of Heligoland when peace takes place; but it is equally true that the conqueror may retain it if he can; and, if nothing is said about it in the treaty, it remains with the possessor, whose title cannot afterwards be called in question. The distinction between the two species of territories is, in fact, rather more formal than real and substantial, at least I must profess my inability to see any distinction between them that can materially affect the present question. The power of the British government was full and complete; and, though the Lords Commissioners of the Admiralty might not have interposed the particular authority with which they are invested, yet the crown had exercised its authority, and the admiralty, as the grantee of the crown, would succeed to its rights. It might have erected a court there, for the exercise of admiralty jurisdiction; and, if it did not, I presume that it only refrained from so doing because it



was not thought that public convenience required it. The enemy certainly had no right to say that a court of that kind should not be there erected. Under the circumstances, I think there is no solid ground for the distinction that has been taken; and though I am by no means disposed, at this time of day, to enlarge the bounds of the ancient grant from the crown to the Lord High Admiral, which is now become of less consequence, yet it is the duty of the court to maintain ancient landmarks. I shall pronounce for the claim of the admiralty, and condemn this ship as droits of admiralty.\*

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### AMERICAN INSURANCE CO. et al. v. CANTER.

(Supreme Court of the United States, 1828. 1 Pet. 511, 7 L. Ed. 242.)

Chief Justice MARSHALL delivered the opinion of the court.<sup>10</sup>

The plaintiffs filed their libel in this cause, in the district court of South Carolina, to obtain restitution of 356 bales of cotton, part of the cargo of the ship *Point à Petre*; which has been insured by them, on a voyage from New Orleans to Havre de Grace, in France. The *Point à Petre* was wrecked on the coast of Florida, the cargo saved by the inhabitants, and carried into Key West, where it was sold, for the purpose of satisfying the salvors, by virtue of a decree of a court, consisting of a notary and five jurors, which was erected by an act of the territorial legislature of Florida. The owners abandoned to the underwriters, who having accepted the same, proceeded against the property; alleging that the sale was not made by order of a court competent to change the property.

\* See *Campbell v. Hall*, 1 Cowp. 204 (1774), in which Lord Mansfield discusses the various conquests made by Great Britain, and the relation of the conquered territories to the Crown.

In the earlier case of *Rex v. Vaughan*, 4 Burr. 2494, 2500 (1769), Lord Mansfield had said:

"The argument is strong, that these statutes do not extend to Jamaica; though they were enacted long before that island belonged to the Crown of England.

"If Jamaica was considered as a conquest, they would retain their old laws, till the conqueror had thought fit to alter them.

"If it is considered as a colony, (which it ought to be, the old inhabitants having left the island,) then these statutes are positive regulations of police, not adapted to the circumstances of a new colony; and therefore no part of that law of England which every colony, from necessity, is supposed to carry with them at their first plantation.

"No act of Parliament made after a colony is planted, is construed to extend to it, without express words shewing the intention of the Legislature to be 'that it should.'"

See, also, on this subject, the very interesting case of *Van Deventer v. Hancke and Mossop*, *Transvaal Law Reports*, 401 (1903), in which the conquest of the Transvaal and its consequences are considered by the Supreme Court of what was then the Transvaal Colony, now an integral part of the South African Union.

<sup>10</sup> The statement of facts and part of the opinion are omitted.

David Canter claimed the cotton as a bona fide purchaser, under the decree of a competent court, which awarded seventy-six per cent. to the salvors, on the value of the property saved. The district judge pronounced the decree of the territorial court a nullity, and awarded restitution to the libellants, of such part of the cargo as he supposed to be identified by the evidence; deducting therefrom a salvage of fifty per cent. The libellants and claimant both appealed. The circuit court reversed the decree of the district court, and decreed the whole cotton to the claimant, with costs; on the ground, that the proceedings of the court at Key West were legal, and transferred the property to the purchaser. From this decree, the libellants have appealed to this court.

The cause depends, mainly, on the question whether the property in the cargo saved, was changed, by the sale at Key West. The conformity of that sale to the order under which it was made, has not been controverted. Its validity has been denied, on the ground, that it was ordered by an incompetent tribunal. The tribunal was constituted by an act of the territorial legislature of Florida, passed on the 4th of July, 1823, which is inserted in the record. That act purports to give the power which has been exercised; consequently, the sale is valid, if the territorial legislature was competent to enact the law.

The course which the argument has taken, will require, that, in deciding this question, the court should take into view the relation in which Florida stands to the United States. The Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty. The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held, that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse, and general conduct of individuals, remains in force, until altered by the newly created power of the state.

On the 2d of February, 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession contains the following provision: "The inhabitants of the territories, which his Catholic Majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the prin-

ciples of the federal Constitution; and admitted to the enjoyment of the privileges, rights and immunities of the citizens of the United States." This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States. It is unnecessary to inquire, whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government, till Florida shall become a state. In the meantime, Florida continues to be a territory of the United States; governed by virtue of that clause in the Constitution, which empowers Congress "to make all needful rules and regulations, respecting the territory, or other property, belonging to the United States."

Perhaps, the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the fact, that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned. In execution of it, Congress, in 1822 (1 Stat. 654), passed "an act for the establishment of a territorial government in Florida;" and on the 3d of March, 1823, passed another act to amend the act of 1822 (1 Stat. 750). Under this act, the territorial legislature enacted the law now under consideration. \* \* \*

We think, then, that the act of the territorial legislature, erecting the court by whose decree the cargo of the *Point à Petre* was sold, is not "inconsistent with the laws and Constitution of the United States," and is valid. Consequently, the sale made in pursuance of it changed the property, and the decree of the circuit court, awarding restitution of the property to the claimant, ought to be affirmed, with costs.

Decree affirmed.<sup>11</sup>

<sup>11</sup> In *Mormon Church v. United States*, 136 U. S. 1, 42, 43, 10 Sup. Ct. 792, 34 L. Ed. 481 (1890), Mr. Justice Bradley, delivering the opinion of the Court, said:

"The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory, other than the territory northwest of the Ohio river, (which belonged to the United States at the adoption of the Constitution,) is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty. The territory of Louisiana, when acquired from France, and the territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories.

## UNITED STATES v. MORENO.

(Supreme Court of the United States, 1863. 1 Wall. 400, 17 L. Ed. 633.)

On an appeal from the decree of the District Court of the United States for the Southern District of California, the record disclosed the following facts:

On the 5th of April, 1845, Moreno submitted to Pio Pico, then Governor of the Department of California, a petition, wherein he set forth that he had "denounced, in due form, a square league of land situate between Temecula and the Lagoon called Santa Rosa, to which, after previous judicial investigation," he prayed "to be awarded the respective title, on the ground that it is absolutely vacant and without any availableness." The governor ordered the petition "to be sent for the report of" the proper officer. The officer reported that the land was "in an entire vacant state." The governor thereupon ordered the petition to be returned to Moreno, that he might annex a plat of the land,—the application to come again before the government. Moreno was authorized to occupy the land "provisionally," and it was added, "meanwhile the mentioned title-deed is being made out."

On the 31st of January, 1846, Moreno presented the governor a new petition with the required plat. In this petition he says: "In accordance with the decree your excellency thought fit to give in the month of April, in the year 1845, requiring me to present the plat of the land I occupy provisionally, called Santa Rosa, I hereby, with the deepest submission, accompany my petition and the plat, that your excellency may have the goodness to make out the title-deed of ownership to me of the land bordering on Temecula, the Lagoon, and Santa Margarita, not naming the number of leagues, as I might be mistaken, but I ask that the land which has no owner, and which I demand in due form, be set apart for my individual benefit and that of my family."

The governor ordered "the title-deed to be issued and given to the interested party with obligation to amend the plat." On the day last mentioned, a deed was issued, subject to the approval of the Depart-

Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No state of the Union had any such right of sovereignty over them; no other country or government had any such right. These propositions are so elementary, and so necessarily follow from the condition of things arising upon the acquisition of new territory, that they need no argument to support them. They are self-evident. Chief Justice Marshall, in the case of *American Insurance Co. v. Canter*, 1 Pet. 511, 542, 7 L. Ed. 242 (1828), well said: "Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts, that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned."

mental Assembly. \* \* \* It contained with others the following clauses:

"The land donated to him is the same as exhibited in the plat attached to this expediente, and borders on the land of Temecula, on the Lagoon, and on Santa Margarita.

"The judge who shall possess him of it will cause it to be measured conformable to ordinance, and give notice to the government of the number of leagues (*sitios de ganado mayor*) it may contain.

"Consequently, I order that this title-deed, being held firm and valid, it be entered in the respective book and delivered to the interested party for his security and other purposes."

The subject was submitted to the Departmental Assembly, and on the 3d June, 1846, that body approved and confirmed the grant.

It appeared by the testimony of one Foster, in early life a justice of the peace, but who had been for many years a "ranchero" in California, that "Santa Rosa" was the name given to a well-known tract; that it adjoined another well-known tract, called "Temecula," on the east, a second, known as "Santa Margarita," on the west, and that a third, called "La Laguna," stood off in a direction northeasterly. This was confirmed by two other witnesses.

Moreno resided upon and cultivated the land from the time he was authorized to occupy it until the acquisition of the country by the United States.

After the acquisition he presented a petition to the board of Commissioners, established by the act of Congress of 3d March, 1851 (9 Stat. 631), to ascertain and settle private land claims in California, to have his title confirmed, pursuant to the provisions of that statute. The commissioners having confirmed it, an appeal was taken by the United States to the District Court; and that court having affirmed the report of the commissioners, the United States brought the case here by appeal.

It was objected on behalf of the United States to the decree of the District Court: \* \* \*

2. That the location and quantity of the land are entirely uncertain both in the grant and in the *diseño*. \* \* \*

Mr. Justice SWAYNE delivered the opinion of the court.<sup>12</sup> \* \* \*

The tract is described in the *título* as known by the name of Santa Rosa, and as bounding upon Temecula, the Lagoon, and Santa Margarita. The petitioner asked for a title to all the vacant land in that locality, and it was conceded to him accordingly.

It is proved by the testimony of three witnesses that Santa Rosa was a well-known rancho; that Temecula, the Lagoon, and San Margarita were well-known contiguous ranchos, and that there was not the least difficulty either in identifying Santa Rosa, or in ascertaining its boundaries. There is no contradictory evidence upon the subject. The

<sup>12</sup> Part of the statement of facts and part of the opinion are omitted.

District Court held the evidence to be sufficient, and we concur in that opinion.

The record presents every link in the chain of a perfect *espediente*. There is a petition with a *diseño*, an order of reference, an *informe* by the proper officer, a decree of concession, a *titulo*, and the approval of the Departmental Assembly. *United States v. Knight's Adm'r*, 1 Black, 245, 17 L. Ed. 1, 76.

The Surveyor-General of California certifies that the *espediente* is copied from the archives in his possession. It is not necessary to the validity of the title that the land should have been surveyed and the quantity ascertained. *Fremont v. United States*, 17 How. 542, 15 L. Ed. 241; *United States v. Vaca*, 18 How. 556, 15 L. Ed. 485.

California belonged to Spain by the rights of discovery and conquest. The government of that country established regulations for transfers of the public domain to individuals. When the sovereignty of Spain was displaced by the revolutionary action of Mexico, the new government established regulations upon the same subject. These two sovereignties are the spring heads of all the land titles in California, existing at the time of the cession of that country to the United States by the treaty of Guadalupe Hidalgo. That cession did not impair the rights of private property. They were consecrated by the law of nations, and protected by the treaty. The treaty stipulation was but a formal recognition of the pre-existing sanction in the law of nations. The act of March 3d, 1851, was passed to assure to the inhabitants of the ceded territory the benefit of the rights of property thus secured to them. It recognizes alike legal and equitable rights, and should be administered in a large and liberal spirit. A right of any validity before the cession was equally valid afterwards, and while it is the duty of the court in the cases which may come before it to guard carefully against claims originating in fraud, it is equally their duty to see that no rightful claim is rejected. No nation can have any higher interest than the right administration of justice.

The decree of the District Court is affirmed.

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#### FOURTEEN DIAMOND RINGS v. UNITED STATES.

(Supreme Court of the United States, 1901. 183 U. S. 176, 22 Sup. Ct. 59, 46 L. Ed. 138.)

Mr. Chief Justice FULLER delivered the opinion of the court.<sup>18</sup>

Emil J. Pepke, a citizen of the United States and of the State of North Dakota, enlisted in the First Regiment of the North Dakota United States Volunteer Infantry, and was assigned for duty with his regiment in the island of Luzon, in the Philippine Islands, and con-

<sup>18</sup> Part of the opinion is omitted. The concurring opinion of Mr. Justice Brown, and the dissenting opinions of Justices Gray, Shiras, White, and McKenna are omitted.

tinued in the military service of the United States until the regiment was ordered to return, and, on arriving at San Francisco, was discharged September 25, 1899.

He brought with him from Luzon fourteen diamond rings, which he had there purchased, or acquired through a loan, subsequent to the ratification of the treaty of peace between the United States and Spain, February 6, 1899, and the proclamation thereof by the President of the United States, April 11, 1899.

In May, 1900, in Chicago, these rings were seized by a customs officer as having been imported contrary to law, without entry, or declaration, or payment of duties, and an information was filed to enforce the forfeiture thereof.

To this Pepke filed a plea setting up the facts, and claiming that the rings were not subject to customs duties; the plea was held insufficient; forfeiture and sale were decreed; and this writ of error was prosecuted.

The tariff act of July 24, 1897, 30 Stat. 151, in regulation of commerce with foreign nations, levied duties "upon all articles imported from foreign countries."

Were these rings, acquired by this soldier after the ratification of the treaty was proclaimed, when brought by him from Luzon to California, on his return with his regiment to be discharged, imported from a foreign country?

This question has already been answered in the negative, in respect of Porto Rico, in *De Lima v. Bidwell*, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041, and unless the cases can be distinguished, which we are of opinion they cannot be in this particular, that decision is controlling.

The Philippines, like Porto Rico, became, by virtue of the treaty, ceded conquered territory or territory ceded by way of indemnity. The territory ceased to be situated as Castine was when occupied by the British forces in the war of 1812, or as Tampico was when occupied by the troops of the United States during the Mexican war, "cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part." *Thorington v. Smith*, 8 Wall. 10, 19 L. Ed. 361. The Philippines were not simply occupied but acquired, and having been granted and delivered to the United States, by their former master, were no longer under the sovereignty of any foreign nation.

In *Cross v. Harrison*, 16 How. 164, 14 L. Ed. 889, the question was whether goods imported from a foreign country into California after the cession were subject to our tariff laws, and this court held that they were.

In *De Lima v. Bidwell*, the question was whether goods imported into New York from Porto Rico, after the cession, were subject to duties imposed by the act of 1897 on "articles imported from foreign

countries," and this court held that they were not. That act regulated commerce with foreign nations, and Porto Rico had ceased to be within that category; nor could territory be foreign and domestic at the same time.

Among other things it was there said: "The theory that a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the customs union, presupposes that a country may be domestic for one purpose and foreign for another. It may undoubtedly become necessary for the adequate administration of a domestic territory to pass a special act providing the proper machinery and officers, as the President would have no authority, except under the war power, to administer it himself; but no act is necessary to make it domestic territory if once it has been ceded to the United States. \* \* \* This theory also presupposes that territory may be held indefinitely by the United States; that it may be treated in every particular, except for tariff purposes, as domestic territory; that laws may be enacted and enforced by officers of the United States sent there for that purpose; that insurrections may be suppressed, wars carried on, revenues collected, taxes imposed; in short, that everything may be done which a government can do within its own boundaries, and yet that the territory may still remain a foreign country. That this state of things may continue for years, for a century even, but that until Congress enacts otherwise, it still remains a foreign country. To hold that this can be done as matter of law we deem to be pure judicial legislation. We find no warrant for it in the Constitution or in the powers conferred upon this court. It is true the non-action of Congress may occasion a temporary inconvenience; but it does not follow that courts of justice are authorized to remedy it by inverting the ordinary meaning of words."

No reason is perceived for any different ruling as to the Philippines. By the third article of the treaty Spain ceded to the United States "the archipelago known as the Philippine Islands," and the United States agreed to pay to Spain the sum of twenty million dollars within three months. The treaty was ratified; Congress appropriated the money; the ratification was proclaimed. The treaty-making power, the executive power, the legislative power, concurred in the completion of the transaction.

The Philippines thereby ceased, in the language of the treaty, "to be Spanish." Ceasing to be Spanish, they ceased to be foreign country. They came under the complete and absolute sovereignty and dominion of the United States, and so became territory of the United States over which civil government could be established. The result was the same although there was no stipulation that the native inhabitants should be incorporated into the body politic, and none securing to them the right to choose their nationality. Their allegiance became



due to the United States and they became entitled to its protection. \* \* \*

It is further contended that a distinction exists in that while complete possession of Porto Rico was taken by the United States, this was not so as to the Philippines, because of the armed resistance of the native inhabitants to a greater or less extent.

We must decline to assume that the government wishes thus to disparage the title of the United States, or to place itself in the position of waging a war of conquest.

The sovereignty of Spain over the Philippines, and possession under claim of title had existed for a long series of years prior to the war with the United States. The fact that there were insurrections against her, or that uncivilized tribes may have defied her will did not affect the validity of her title. She granted the islands to the United States, and the grantee in accepting them took nothing less than the whole grant.

If those in insurrection against Spain continued in insurrection against the United States, the legal title and possession of the latter remained unaffected.

We do not understand that it is claimed that in carrying on the pending hostilities the government is seeking to subjugate the people of a foreign country, but, on the contrary, that it is preserving order and suppressing insurrection in territory of the United States. It follows that the possession of the United States is adequate possession under legal title, and this cannot be asserted for one purpose and denied for another. We dismiss the suggested distinction as untenable. \* \* \*

Decree reversed and cause remanded with directions to quash the information.<sup>14</sup>

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### III. ACCRETION

#### THE ANNA.

(High Court of Admiralty, 1805. 5 O. Rob. 373.)

This was the case of a ship under American colors, with a cargo of logwood, and about thirteen thousand dollars on board, bound from the Spanish main to New Orleans, and captured by *The Minerva*, privateer, near the mouth of the river Mississippi. A claim was given under the direction of the American ambassador for the ship and cargo, "as taken within the territory of the United States, at the distance of a mile and a half from the western shore of the principal entrance of the

<sup>14</sup> The cases referred to in this passage of the opinion of the court, but not mentioned by name, are *United States v. Rice*, 4 Wheat. 246, 4 L. Ed. 562 (1819) post, p. 707; and *Fleming v. Page*, 9 How. 603, 13 L. Ed. 278 (1850), post, p. 708. They do not deal with the cession of territory, but with the status of territory in the temporary occupation of the enemy.

Mississippi, and within view of a post protected by a gun, and where is stationed an officer of the United States." \* \* \*

Sir W. SCOTT.<sup>15</sup> \* \* \* When the ship was brought into this country, a claim was given of a grave nature, alleging a violation of the territory of the United States of America. This great leading fact has very properly been made a matter of much discussion, and charts have been laid before the court to show the place of capture, though with different representations from the adverse parties. The capture was made, it seems, at the mouth of the river Mississippi, and, as it is contended in the claim, within the boundaries of the United States.

We all know that the rule of law on this subject is, "*terræ dominium finitur, ubi finitur armorum vis*," and since the introduction of fire-arms, that distance has usually been recognized to be about three miles from the shore. But it so happens in this case, that a question arises as to what is to be deemed the shore, since there are a number of little mud islands composed of earth and trees drifted down by the river, which form a kind of portico to the main land. It is contended that these are not to be considered as any part of the territory of America; that they are a sort of "no man's land," not of consistency enough to support the purposes of life, uninhabited, and resorted to only for shooting and taking birds' nests. It is argued that the line of territory is to be taken only from the Balize, which is a fort raised on made land by the former Spanish possessors. I am of a different opinion; I think that the protection of territory is to be reckoned from these islands; and that they are the natural appendages of the coast on which they border, and from which, indeed, they are formed. Their elements are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the books of law, *Quod vis fluminis de tuo prædio detraxerit, et vicino prædio attulerit, palam tuum remanet*, Inst. L. 2, tit. 1, § 21, even if it had been carried over to an adjoining territory. Consider what the consequence would be if lands of this description were not considered as appendant to the main land, and as comprised within the bounds of territory. If they do not belong to the United States of America, any other power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America. It is physically possible, at least, that they might be so occupied by European nations, and then the command of the river would be no longer in America, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to show that these islands are not to be considered as part of the territory of America. Whether they are composed of earth or solid rock, will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.

<sup>15</sup> Only the portion of the opinion relating to this question is printed. For the remainder of the opinion, see post, p. 848.

I am of opinion that the right of territory is to be reckoned from those islands. That being established, it is not denied that the actual capture took place within the distance of three miles from the islands, and at the very threshold of the river. \* \* \* <sup>16</sup>

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KER & CO. v. COUDEN.

(Supreme Court of the United States, 1912. 223 U. S. 268, 32 Sup. Ct. 284, 56 L. Ed. 432.)

The facts, which involve the title to land in the Philippine Islands formed by action of the sea, are stated in the opinion.

Mr. Justice HOLMES delivered the opinion of the court.

This is an action brought by Ker & Company to recover possession of land held by the defendant under a claim of title in the United States. The land is the present extremity of Sangley Point, in the Province of Cavite and island of Luzon, projecting into Manila Bay. It has been formed gradually by action of the sea; all of it since 1811, about three-quarters since 1856, and a part since 1871. For a long time the property was used by the Spanish Navy and it now is occupied by the present government as a naval station, works costing more than half a million dollars having been erected upon it. The plaintiffs claim title under conveyances from the owner of the upland. The Philippine courts held that under the Partidas, III, tit. 28, laws 3, 4, 6, 24 and 26, and the Law of Waters of 1866, the title to the accretions remained in the government, and the vexed question has been brought to this court.

That the question is a vexed one is shown not only by the different views of Spanish commentators but by the contrary provisions of modern codes and by the occasional intimations of the doctors of the Roman law. Justinian's Institutes, 2, 1, 20 (Gaius II, 70), followed by the Partidas, 3, 28, 26, give the alluvial increase of river banks to the owner of the bank. If this is to be taken as an example illustrating a general principle there is an end of the matter. But the Roman law is not like a deed or a modern code prepared *uno flatu*. History plays too large a part to make it safe to generalize from a single passage in so easy a fashion. Alongside of the rule as to rivers we find that the right of alluvion is not recognized for lakes and ponds, D. 41, 1, 12, a rule often repeated in the civil law codes, e. g., Philippine Civil Code of 1889, arts. 366, 367; Code Napoléon, art. 550; Italy, Civil Code, 1865, art. 454; Mexico, art. 797. If we are to generalize the analogy of lakes to the sea is closer than that of rivers. We find further that

<sup>16</sup> See *Attorney General of Southern Nigeria v. John Holt & Co.* [1915] L. R. App. Cas. 599 (1914), holding that the doctrine of accretion only applies if it be natural. In the case of a change of boundary through acts of parties in what may be called artificial accretion or reclamation, the doctrine is excluded.

In agris limitatis jus alluvionis locum non habet. And the right of alluvion is denied for the agrum manu captum, which was limitatum in order that it might be known (exactly) what was granted. D. 41, 1, 16. The gloss of Accusius treats this as the reason for denying the jus alluvionis. If this reason again were generalized, it might lead to a contrary result from the passage in the Institutes. Grotius treats the whole matter as arbitrary, to be governed by local rules, and both the doctrine as to rivers and the distinction as to accurately bounded lands as rational enough. De Jure B. & P. lib. 2, cap. 8, 11, 12. A respectable modern writer thinks that it was a mistake to preserve the passage concerning definitely bounded grants in the Digest, 1 Demangeat, Droit Romain (2d Ed.) 441 ('antiquirt' Puchta, Pandekten, § 165), but so far as we have observed this is an exceptional view, and from the older commentators that we have examined down to the late brilliant and admirable work of Girard, Droit Romain (4th Ed.) 324, this passage seems to be accepted as a part of the law. At all events it shows that, as we have said, it is unsafe to go much beyond what we find in the books. And to illustrate a little further the uncertainty as to the Roman doctrine we may add that Donellus mentions the opinion that alluvion from the sea goes to the private owner only to remark that the texts cited do not support it. De Jur. Civ. IV, c. 27, 1 Opera (Ed. 1828), 839 n., and treats the rule of the Institutes as peculiar to rivers, as also Vinnius in his comment on the passage stating the rule seems to do, while Huberus, on the other hand, thinks that rivers furnish the principle that ought to prevail. Prælectiones, II, Tit. 1, 34.

The seashore flowed by the tides, unlike the banks of rivers, was public property; in Spain belonging to the sovereign power. Inst. II, tit. 1, 3, 4, 5, D. 43, 8, 3; Partidas, III, tit. 28, 3, 4. And it is a somewhat different proposition from that laid down as to rivers if it should be held that a vested title is withdrawn by accessions to what was owned before. Perhaps a stronger argument could be based on the rule that the title to the river bed changes as the river changes its place. Part. III, tit. 28, Law 31; Inst. 2, 2, 23. D. 41, 7, 5. But we are less concerned with the theory than with precedent in a matter like this, whether we agree with Grotius or not in his general view. The Spanish commentators do not help us, as they go little beyond a naked statement one way or the other. It seems to us that the best evidence of the view prevailing in Spain is to be found in the codification which presumably embodies it. The Law of Waters of 1866, which became effective in the Philippines in September, 1871, and the validity of which we see no reason to doubt, after declaring like the Partidas that the shores (playas), or spaces alternately covered and uncovered by the sea, are part of the national domain and for public use, arts. 1, 3, goes on thus: "Art. 4. The lands added to the shores by the accessions and accretions caused by the sea belong to the public domain. When they are not (longer) washed by the waters of the sea, and are not necessary for objects of public utility, nor for the establishment of

special industries, nor for the coast guard service, the government shall [will?] declare them property of the adjacent estates, in increase of the same."

Notwithstanding the argument that this article is only a futile declaration concerning accessions to the shore while it remains such in a literal sense, that is, washed by the tide, we think it plain that it includes and principally means additions that turn the shore to dry land. These all remain subject to public ownership unless and until the Government shall decide that they are not needed for the purposes mentioned and shall declare them to belong to the adjacent estates. The later provision in Article 9, that the public easement for salvage, &c., shall advance and recede as the sea recedes or advances, simply determines that neither public nor private ownership shall exclude the customary public use from the new place. The Spanish Law of Ports of 1880, like the Law of Waters, asserts the title of the State although it confers private rights when there is no public need.

The presumption that the foregoing provisions of the Law of Waters express the understanding of the codifiers as to what the earlier law had been, becomes almost inexpugnable when we find that the other leading civil law countries have adopted the same doctrine. The Code Napoléon, after laying down the Roman rule for alluvion in rivers, arts. 556, 557, adds at the end of the latter article: "*Ce droit n'a pas lieu à l'égard des relais de la mer,*" which seems to have been adopted without controversy at the Conférence. See further Marcadé, *Explication*, 5th ed. vol. 2, p. 439. And compare 2 Hall's *Am. Law Journal*, 307, 324, 329, 333. The Civil Code of Italy, 1865, art. 454, is to similar effect. See also, Chile, Civil Code art. 650. The Supreme Court of Louisiana in like manner confines the private acquisition of alluvion to rivers and running streams, and denies the private right in the case of lakes and the sea. *Zeller v. Yacht Club*, 34 La. Ann. 837. And the provision of the Louisiana Code, art. 510, is like those of France, Italy and Spain. The court of first instance below refers to judgments of the Supreme Court of Spain that seems to look in the same direction. We have neither heard nor found anything on the other side that seems to us to approach the foregoing considerations in weight, not to speak of the respect that we must feel for the concurrent opinion of both the courts below upon a matter of local law with which they are accustomed to deal. Of course we are dealing with the law of the Philippines, not with that which prevails in this country, whether of mixed antecedents or the common law.

As the case was brought up on the single question that we have discussed the judgment of the court below must be affirmed.

Judgment affirmed.

Mr. Justice McKENNA, dissenting.

I cannot agree with the conclusion of the court. It seems to be conceded that it is not necessarily determined by the authorities which

are cited. I think the better deduction from them is that they only declare the constant integrity of the shore, and the dominion of the government over it whether it recede or advance. When it ceases to be washed by the tides or the seas it becomes part of the upland and belongs to the owner of the upland. And this is but the application of the principle, said to be of natural justice, that he who loses by the encroachments of the sea should gain by its recession. *Banks v. Ogden*, 2 Wall. 57, 67, 17 L. Ed. 818.<sup>17</sup>

## SECTION 2.—BOUNDARIES

### I. RIVERS <sup>18</sup>

#### HANDLY'S LESSEE v. ANTHONY.

(Supreme Court of the United States, 1820. 5 Wheat. 374, 5 L. Ed. 113.)

Mr. Chief Justice MARSHALL delivered the opinion of the court. This was an ejectment brought in the Circuit Court of the United States for the District of Kentucky, to recover land which the plaintiff claims under a grant from the State of Kentucky, and which the defendants hold under a grant from the United States as being part

<sup>17</sup> The passage to which Mr. Justice McKenna refers is as follows:

"The rule governing additions made to land, bounded by a river, lake, or sea, has been much discussed and variously settled by usage and by positive law. Almost all jurists and legislators, however, both ancient and modern, have agreed that the owner of the land, thus bounded, is entitled to these additions. By some, the rule has been vindicated on the principle of natural justice, that he who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion; by others, it is derived from the principle of public policy, that it is the interest of the community that all land should have an owner, and most convenient, that insensible additions to the shore should follow the title to the shore itself.

"There is no question in this case that the accretion from Lake Michigan belongs to the proprietor of land bounded by the lake. The controversy turns on ownership." Per Mr. Chief Justice Chase in *Banks v. Ogden*, 2 Wall. 57, 67, 17 L. Ed. 818 (1864).

For more elaborate treatment of the doctrine of accretion, see *New Orleans v. United States*, 10 Pet. 662, 9 L. Ed. 573 (1836); *County of St. Clair v. Livingston*, 23 Wall. 46, 23 L. Ed. 59 (1874).

<sup>18</sup> "It seems difficult upon principle to support the right to the free use of rivers as a right stricti juris. While this is not expressly admitted, it is tacitly conceded by nearly all the advocates. They define this right of use as an 'imperfect right.' The term is an anomaly. The fallacy is thus aptly stated by a learned authority on international law: 'A right, it is alleged, exists; but it is an imperfect one, and therefore its enjoyment may always be subjected to such conditions as are required in the judgment of the state whose

of Indiana. The title depends upon the question whether the lands lie in the State of Kentucky, or in the State of Indiana.

At this place, as appears from the plat and surveyor's certificate, the Ohio turns its course, and runs southward for a considerable distance, and then takes a northern direction, until it approaches within less than three miles, as appears from the plat, of the place where its southern course commences. A small distance above the narrowest part of the neck of land which is thus formed, a channel, or what is commonly termed in that country a bayou, makes out of the Ohio, and enters the same river a small distance below the place where it resumes its westward course. This channel, or bayou, is about nine miles by its meanders, three miles and a half in a straight line, and from four to five poles wide. The circuit made by the river appears to be from fifteen to twenty miles. About midway of the channel two branches empty into it from the northwest, between six and seven hundred yards from each other; the one of which runs along the channel at low water, eastward, and the other westward, until they both enter the main river. Between them is ground over which the waters of the Ohio do not pass until the river has risen about ten feet above its lowest state. It rises from forty to fifty feet, and all the testimony proves that this channel is made by the waters of the river, not of the creeks which empty into it. The people who inhabit this peninsula, or island, have always paid taxes to Indiana, voted in Indiana, and been considered as within its jurisdiction, both while it was a territory, and since it has become a state. The jurisdiction of Kentucky has never been extended over them.

The question whether the lands in controversy lie within the State

property is affected, and for sufficient cause it may be denied altogether.' Hall, p. 140.

"Woolsey terms it 'only a moral or imperfect right to navigation.'"

"However, it is no longer to be doubted that the reason of the thing and the opinion of other jurists, spoken generally, seem to agree in holding that the right can only be what is called (however improperly) by Vattel and other writers imperfect, and that the state through whose domain the passage is to be made 'must be the sole judge as to whether it is innocent or injurious in its character.' Phillimore, CLVII, citing Puffendorf, Wheaton's Elements of International law, Hesty's Law of Nations, Wolff's Institutes, and Vattel."

Per Duffield, Umpire, in *The Faber Case*, German-Venezuelan Commission of 1903, *Ralston's Reports of Venezuelan Arbitrations*, 600, 630 (1903).

The *Faber Case* decided in effect, as stated by the headnote, that:

"States through the territory of which navigable streams flow, although these streams rise in the territory of other states, have the right to close these rivers to navigation at their discretion, and no appeal will lie therefrom. This doctrine would seem to apply even though these rivers emptied directly into the sea, instead of debouching into an inland lake, as in the case under consideration, wholly within the territory of the state seeking to control the navigation of these rivers. This doctrine being applicable to the inhabitants of the state at the headwaters of the streams is all the more applicable to domiciled foreigners."

This case contains a citation of authorities and numerous quotations from publicists of international standing.

of Kentucky or of Indiana, depends chiefly on the land law of Virginia, and on the cession made by that State to the United States.

Both Kentucky and Indiana were supposed to be comprehended within the charter of Virginia at the commencement of the war of our revolution. At an early period of that war, the question whether the immense tracts of unsettled country which lay within the charters of particular states, ought to be considered as the property of those states, or as an acquisition made by the arms of all, for the benefit of all, convulsed our confederacy, and threatened its existence. It was probably with a view to this question that Virginia, in 1779, when she opened her land office, prohibited the location or entry of any land "on the northwest side of the river Ohio."

In September, 1780, Congress passed a resolution, recommending "to the several states having claims to waste and unappropriated lands in the western country, a liberal cession to the United States, of a portion of their respective claims, for the common benefit of the Union." And in January, 1781, the commonwealth of Virginia yielded to the United States "all right, title, and claim, which the said Commonwealth had to the territory northwest of the river Ohio, subject to the conditions annexed to the said act of cession." One of these conditions is, "that the ceded territory shall be laid out and formed into states." Congress accepted this cession, but proposed some small variation in the conditions, which was acceded to; and in 1783 Virginia passed her act of confirmation, giving authority to her members in Congress to execute a deed of conveyance.

It was intended then by Virginia, when she made this cession to the United States, and most probably when she opened her land office, that the great river Ohio should constitute a boundary between the States which might be formed on its opposite banks. This intention ought never to be disregarded in construing this cession.

At the trial, the counsel for the defendants moved the court to instruct the jury, 1. That the lessor of the plaintiff cannot recover, the land in contest not being at any time subject to the laws of Kentucky, but to those of Indiana. 2. Because the evidence does not show that the land is within the limits of the state of Kentucky. The court instructed the jury, that, admitting that the western and north-western boundary of Kentucky included all the islands of the Ohio, and extended to the western and north-western bank of the Ohio, yet no land could be called an island of that river, unless it was surrounded by the waters of the Ohio at low-water mark; and to low-water mark only, on the western or north-western side of the Ohio, did the boundaries of the state of Kentucky extend. The counsel for the plaintiff excepted to this opinion, and then moved the court to instruct the jury, that if they found the land in question was covered by the grant to the lessor of the plaintiff, and that it was surrounded by a regular water-channel of the Ohio on the north-western side, and was, at the mid-



dle and usual state of the water in Ohio, embraced and surrounded by the water of the Ohio flowing in said channel, it was an island, and within the state of Kentucky. But the court refused to give the instructions aforesaid, but instructed the jury, that if the water did not run through said channel at low water, but left part thereof dry, it was not an island, nor within the state of Kentucky. To this opinion, also, the counsel for the plaintiff excepted. The jury found a verdict for the defendants, on which the court rendered judgment, which judgment is now before this court on a writ of error.

The two exceptions present substantially the same questions to the court, and may therefore be considered together. They are, whether land is properly denominated an island of the Ohio, unless it be surrounded with the water of the river, when low? and whether Kentucky was bounded on the west and northwest by the low water mark of the river, or at its middle state? or, in other words, whether the state of Indiana extends to low-water mark, or stops at the line reached by the river when at its medium height?

In pursuing this inquiry, we must recollect that it is not the bank of the river, but the river itself, at which the cession of Virginia commences. She conveys to Congress all her right to the territory "situate, lying, and being to the northwest of the river Ohio." And this territory, according to express stipulation, is to be laid off into independent states. These states, then, are to have the river itself, wherever that may be, for their boundary. This is a natural boundary, and in establishing it, Virginia must have had in view the convenience of the future population of the country.

When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one state is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly created state extends to the river only. The river, however, is its boundary.

"In case of doubt," says Vattel, "every country lying upon a river, is presumed to have no other limits but the river itself; because nothing is more natural than to take a river for a boundary, when a state is established on its border; and wherever there is a doubt, that is always to be presumed which is most natural and most probable."

"If," says the same author, "the country which borders on a river, has no other limits than the river itself, it is in the number of territories that have natural or indetermined limits, and it enjoys the right of alluvion." Lib. 1, c. 22, § 268.

Any gradual accretion of land, then, on the Indiana side of the Ohio, would belong to Indiana, and it is not very easy to distinguish between land thus formed, and land formed by the receding of the water.

If, instead of an annual and somewhat irregular rising and falling of the river, it was a daily and almost regular ebbing and flowing of the tide, it would not be doubted that a country bounded by the river would extend to low-water mark. This rule has been established by the common consent of mankind. It is founded on common convenience. Even when a state retains its dominion over a river which constitutes the boundary between itself and another state, it would be extremely inconvenient to extend its dominion over the land on the other side, which was left bare by the receding of the water. And this inconvenience is not less where the rising and falling is annual, than where it is diurnal. Wherever the river is a boundary between states, it is the main, the permanent river, which constitutes that boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low-water mark.

When the state of Virginia made the Ohio the boundary of states, she must have intended the great river Ohio, not a narrow bayou into which its waters occasionally run. All the inconvenience which would result from attaching a narrow strip of country lying on the north-west side of that noble river to the states on its southeastern side, would result from attaching to Kentucky, the state on its southeastern border a body of land lying northwest of the real river, and divided from the mainland only by a narrow channel, through the whole of which the waters of the river do not pass, until they rise ten feet above the low-water mark.

The opinions given by the court must be considered in reference to the case in which they were given. The sole question in the cause respected the boundary of Kentucky and Indiana; and the title depended entirely upon that question. The definition of an island which the court was requested to give, was either an abstract proposition, which it was unnecessary to answer, or one which was to be answered according to its bearing on the facts in the cause. The definition of an island was only material so far as that definition might aid in fixing the boundary of Kentucky. In the opinion given by the court on the motion made by the counsel for the defendants, they say that "no land can be called an island of the Ohio, unless it be surrounded by the waters of that river at low-water mark." We are not satisfied that this definition is incorrect, as respected the subject before the court; but it is rendered unimportant, by the subsequent member of the sentence, in which they say, "that to low-water mark only, on the western and north-western side of the Ohio, does the state of Kentucky extend."

So, in the motion made by the counsel for the plaintiff, the court was requested to say, that if the waters of the Ohio flowed in the channel, in its middle and usual state, it was not only an island, but "within the state of Kentucky."

If the land was not within the state of Kentucky, the court could

not give the direction which was requested. The court gave an instruction substantially the same with that which had been given on the motion of the defendant's counsel.

If it be true, that the river Ohio, not its ordinary bank, is the boundary of Indiana, the limits of that state can be determined only by the river itself. The same tract of land cannot be sometimes in Kentucky, and sometimes in Indiana, according to the rise and fall of the river. It must be always in the one state, or the other.

There would be little difficulty in deciding, that in any case other than land which was sometimes an island, the state of Indiana would extend to low-water mark. Is there any safe and secure principle, on which we can apply a different rule to land which is sometimes, though not always, surrounded by water?

So far as respects the great purposes for which the river was taken as the boundary, the two cases seem to be within the same reason, and to require the same rule. It would be as inconvenient to the people inhabiting this neck of land, separated from Indiana only by a bayou or ravine, sometimes dry for six or seven hundred yards of its extent, but separated from Kentucky by the great river Ohio, to form a part of the last-mentioned state, as it would for the inhabitants of a strip of land along the whole extent of the Ohio, to form a part of the state on the opposite shore. Neither the one nor the other can be considered as intended by the deed of cession.

If a river, subject to tides, constituted the boundary of a state, and at flood the waters of the river flowed through a narrow channel, round an extensive body of land, but receded from that channel at ebb, so as to leave the land it surrounded at high water, connected with the main body of the country; this portion of territory would scarcely be considered as belonging to the state on the opposite side of the river, although that state should have the property of the river. The principle that a country bounded by a river extends to low-water mark, a principle so natural, and of such obvious convenience as to have been generally adopted, would, we think, apply to that case. We perceive no sufficient reason why it should not apply to this.

The case is certainly not without its difficulties; but in great questions which concern the boundaries of states, where great natural boundaries are established in general terms, with a view to public convenience, and the avoidance of controversy, we think the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals. The state of Virginia intended to make the great river Ohio, throughout its extent, the boundary between the territory ceded to the United States and herself. When that part of Virginia, which is now Kentucky, became a separate state, the river was the boundary between the new states erected by Congress in the ceded territory, and Kentucky. Those principles and considerations which

produced the boundary, ought to preserve it. They seem to us to require, that Kentucky should not pass the main river, and possess herself of lands lying on the opposite side, although they should, for a considerable portion of the year, be surrounded by the waters of the river flowing into a narrow channel.

It is a fact of no inconsiderable importance in this case, that the inhabitants of this land have uniformly considered themselves, and have been uniformly considered, both by Kentucky and Indiana, as belonging to the last-mentioned state. No diversity of opinion appears to have existed on this point. The water on the northwestern side of the land in controversy, seems not to have been spoken of as a part of the river, but as a bayou. The people of the vicinage, who viewed the river in all its changes, seem not to have considered this land as being an island of the Ohio, and as a part of Kentucky, but as lying on the northwestern side of the Ohio, and being a part of Indiana.

The compact with Virginia, under which Kentucky became a state, stipulates that the navigation of, and jurisdiction over, the river, shall be concurrent between the new states, and the states which may possess the opposite shores of the said river. This term seems to be a repetition of the idea under which the cession was made. The shores of a river border on the water's edge.

Judgment affirmed, with costs.

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BUTTENUTH et al. v. ST. LOUIS BRIDGE CO.

(Supreme Court of Illinois, 1888. 123 Ill. 535, 17 N. E. 439, 5 Am. St. Rep. 545.)

SCOTT, J.<sup>19</sup> It is alleged that complainant, the St. Louis Bridge Company, is the legal successor of the Illinois & St. Louis Bridge Company, which was incorporated in 1868, and which constructed a bridge over the Mississippi river from East St. Louis to St. Louis. The work was completed on the 4th day of July, 1874, and from that time on the bridge was operated by the original corporation until September 20, 1878, when it was sold under a decree of court, and passed to complainant, and has since been operated and controlled by it. Only two persons are named as defendants. One is William Buttenuth, the assessor for the year 1885 for the town in which the property is situated, and the other is Philip Rhein, who was then county clerk of the county in which the property is situated. Two principal grounds of relief are relied upon: (1) That complainant's property was assessed so high, in proportion to other property in the town, that it was a fraud on its rights, and was oppressive; and (2) that a portion of the bridge that was in fact within the state of Missouri was assessed to complainant by the local assessor as property situated in this state. The bill contains

<sup>19</sup> Part of the opinion is omitted.

other matters of complaint of a less serious nature, some of which may be noticed further on. The specific prayer of the bill is that the assessment may be set aside, and that defendant Rhein, the county clerk, be enjoined and restrained from extending any taxes on the assessment made on complainant's property. \* \* \* On the final hearing the court found the assessment complained of was so grossly disproportionate to the valuation of other property in the township, and so excessive, as to amount to a fraud on complainant; and the court further found that part of the bridge structure, that is to say, all of that part that lies west of the easternmost pier of the bridge, is outside of the limits of the state of Illinois, and was illegally assessed and included in the assessment with that part of the bridge which is within the limits of the state of Illinois. \* \* \*

It is so obvious the proposition needs no discussion, where the excessive valuation complained of is the result of a mere honest error in judgment on the part of the assessor making the assessment, chancery has no jurisdiction to afford the party aggrieved any relief. \* \* \*

On the whole evidence considered, it does not appear that the valuation placed upon complainant's property is so much higher in proportion to that placed on other property in the town that it is fraudulent for that reason. Nor does it appear from anything contained in this record that the assessment is excessive in itself. There is no evidence of the value of that part of the bridge and its approaches subject to taxation in this state; and without evidence of its value it cannot be declared, as a matter of fact, that the present valuation is excessive to that degree that it is fraudulent in law.

The remaining ground of relief insisted upon is, that part of the bridge structure which lies west of its easternmost pier is outside of the State of Illinois, and was illegally assessed and included in the assessment with that part which is confessedly within the limits of the State. On this branch of the case some evidence was offered, and some discussion has been had as to the boundary line between the States of Missouri and Illinois at the point where the bridge structure spans the Mississippi River. That question is certainly one of great gravity, and one this court will hardly undertake to determine definitely on the meagre evidence to be found in this record, and in a case where neither State is represented, and where there are no defendants other than private citizens, neither of whom had the slightest personal interest in the matter. The utmost this court will assume to decide is, what part of complainant's bridge is to be regarded as within the State of Illinois for the purposes of taxation, or, what is the same thing, does the valuation of complainant's property, as made by the assessor for 1885, include any portion of the bridge not subject to taxation in this State.

It is certain no part of that portion of the bridge structure assessed by the local assessor for taxation in this State is in the State of Mis-

souri, nor does it appear that it was ever subject to taxation in that State. In the act of Congress, March 6, 1820 (3 U. S. Stat. at Large, p. 545), to enable the territory of Missouri to form a constitution, in fixing the boundaries it is declared, "thence due east to the middle of the main channel of the Mississippi River, thence down and following the course of the Mississippi River, in the middle of the main channel thereof." The State of Missouri, by its constitution of 1820, ratified the boundaries as fixed by the enabling act of Congress, and there can be no pretence the eastern boundary of the State has since been changed. The constitution of 1875, of that State, simply ratified and confirmed the boundaries of the State as established by law. Notwithstanding the fact the main channel of the river might be changed by imperceptible natural wear on one side, or by gradual formation of alluvions, still "the middle of the main channel," when ascertained, would be the boundary of the State. It might be a slightly shifting line, hardly perceptible; still it would be a well-known and easily ascertainable boundary line. The rule of law is, when a stream dividing co-terminous States, being a boundary line, alters its channel by a gradual or imperceptible process of wear or of alluvions, the boundary shifts with the channel. No matter what conclusion might be reached as to the western boundary of Illinois, it cannot be maintained the eastern boundary of the State of Missouri is farther east than the "middle of the main channel" of the Mississippi at the point where the bridge structure spans that river. It is not alleged in the bill, nor claimed in argument, any portion of the bridge assessed by the local assessor in this State lies west of the "middle of the main channel" of the river. It would seem to follow, therefore, if that portion of the bridge included in the assessment that lies between the eastern pier of the bridge and the "middle of the main channel" of the river, is not within the limits of the State of Illinois, it is not included within the defined boundaries of either State. That conclusion will hardly be adopted, unless the question will admit of no other solution.

The act of Congress of April 18, 1818, to enable the people of the Territory of Illinois to form a State constitution, fixed the western boundary at the "middle of the Mississippi River," and declared the State should have concurrent "jurisdiction on the Mississippi River with any State or States to be formed west thereof, so far as said river shall form a common boundary to both." By the constitution of 1818, the people ratified the boundaries fixed for the State by the enabling act of Congress, and in the constitutions of 1848 and of 1870 the same boundaries and jurisdiction are declared, except in the two last constitutions it is provided "this State shall exercise such jurisdiction upon the Ohio River as she is now entitled to, or such as may be agreed upon by this State and the State of Kentucky." It seems clear, from all legislation and ordinances on this subject, it was intended the Mississippi River should constitute "a common boundary"

between the State of Illinois and any State or States that might be formed to the west and next to that river. That intention is more definitely declared than it was in regard to the Ohio River, for in fixing the boundary of Illinois, when the line down along the middle of the Mississippi River should reach the confluence of that river with the Ohio, the boundary should be from thence up the latter river "along its northwestern shore," and yet it has been held the river is the boundary between States divided by the Ohio River, although the original proprietor, in granting the territory, retained the river within its own domain. The law, as stated by law writers, and in the adjudged cases, seems to be, that where a river is declared to be the boundary between States, although it may change imperceptibly, from natural causes, the river, "as it runs, continues to be the boundary." But if the river should suddenly change its course, or desert the original channel, the rule of law is, the boundary remains in the middle of the deserted river bed. Where a river is a boundary between States, as is the Mississippi between Illinois and Missouri, it is the main—the permanent—river which constitutes the boundary, and not that part which flows in seasons of high water, and is dry at other times. (*Handly's Lessee v. Anthony*, 5 Wheat. 374, 5 L. Ed. 113.) In no other way would a river be a permanent fixed boundary, at all times readily ascertainable. There are many cogent reasons why the boundary lines between States should be permanent, otherwise territory in one State at one time, sooner or later might be in another State. It must be in one State all the time, or else the State would lose jurisdiction over it.

Treating, then, as must be done, the Mississippi River as a common boundary between the States of Illinois and Missouri, what meaning is to be given to the term, "middle of the Mississippi River," used in the enabling act of Congress and in the constitution, defining the boundaries of the State of Illinois? Whether, when mere private rights are involved, the phrases the "middle of the river," and the "middle of the main channel," or, what is the same thing, the "thread of the stream," mean the same thing, and may be interchangeably used, there are many considerations affecting the public welfare why it should be held the "middle of the channel" of a river between independent States or countries should be regarded as the boundary line between them, in the absence of express agreement to the contrary. When applied to rivers as boundaries between States, the phrases, "middle of the river," "and middle of the main channel," are equivalent expressions, and both mean the centre line of the main channel,—or, as it is most frequently expressed, the "thread of the stream." Should the expression, "middle of the river," be construed to mean a line midway of the water surface, that would give no permanent boundary that could be ascertained. It would be at one point at one time, and distant away at another. Had the boundaries of Illinois been

fixed at the time of the high water in 1844, and the middle of the river opposite St. Louis be held to be a line midway of the surface of the water, that line would then have been far east of the present city of East St. Louis, and on the waters receding, it would have shifted back towards the west, nearer the city of St. Louis. So unsatisfactory a proposition as that will not be adopted. It would lead to insurmountable difficulties. Some light will be cast upon the subject of inquiry by first ascertaining, as near as may be, the meaning of the words, "main channel," "mid-channel," "middle of the current," as those terms are used in the adjudged cases, and in the text-books that shall be examined.

The definition of the word "channel," given in the most recent edition of Webster's Dictionary, is "the bed of a stream of water; especially the deeper part of a river or bay where the main current flows." The case of *Dunleith & Dubuque Bridge Co. v. County of Dubuque*, 55 Iowa, 558, 8 N. W. 443, while this court does not approve the decision of the case, contains a very accurate definition of the word "channel," as commonly used by river men. It is "the word channel, when employed in treating subjects connected with the navigation of rivers, indicates the line of the deep water which vessels follow." In *Rowe v. Smith*, 51 Conn. 266, 50 Am. Rep. 16, it is said, "the expression, 'middle of the channel of the bay or harbor,' does not refer to the thread of deepest water, but to that space within which ships can and usually do pass." It is apprehended it is in this sense the expressions, "middle of the river," "middle of the main channel," "mid-channel," "middle thread of the channel," are used in enabling acts of Congress and in State constitutions establishing State boundaries. It is the free navigation of the river,—when such river constitutes a common boundary, that part on which boats can and do pass, sometimes called "nature's pathway," that States demand shall be secured to them. When a river, navigable in fact, is taken or agreed upon as the boundary between two nations or States, the utility of the main channel, or, what is the same thing, the navigable part of the river, is too great to admit a supposition that either State intended to surrender to the State or nation occupying the opposite shore, the whole of the principal channel or highway for vessels, and thus debar its own vessels the right of passing to and fro for purposes of defence or commerce. That would be to surrender all, or at least the most valuable part, of such river boundary, for the purposes of commerce or other purposes deemed of great value, to independent States or nations.

Construing, then, the phrases, "middle of the Mississippi River," and the "middle of the main channel of the Mississippi River," to mean the same thing, both acts of Congress fixing the boundaries of Illinois and Missouri declare the middle of the main channel of the



Mississippi River to be the boundary line between the States, and that is the thread of the main stream.

In *Thomas v. Hatch*, 3 Sumn. 170, Fed. Cas. No. 13,899, Story, J., said: "I consider the law to be clearly settled that a boundary on a stream, on or by a stream, or to a stream, includes the flats, at least to low-water mark, and in many cases to the middle thread of the river."

A valuable case on this subject is *Morgan v. Reading*, 3 Smedes & M. (Miss.) 366. The opinion is by Chief Justice Sharkey. Although not directly involved, the discussion, in part, had relation to the boundary line of the State of Mississippi. The facts as stated in the opinion are, that by various treaties and cessions the United States had succeeded to all the territory east of a line drawn along the middle of the Mississippi, above the 31st degree of latitude. Louisiana was then bounded on the east by the same line,—the middle of the river above the river Iberville, as it had been established by the treaty of 1763. In 1798, while the middle of the river was still the boundary line between the province of Louisiana and the United States, Congress established the Mississippi territory, bounding it on the west by the Mississippi. It was in reference to that line the court said, "we have said that Congress omitted to mention the middle of the river, but bounded the territory by the Mississippi." The common law, by construction, extends grants bounded "by" or "on" or "along" a fresh water stream, to the thread of the stream. The Mississippi territory, by this rule, extended to the middle of the river.

In *Handly's Lessee v. Anthony*, supra, it was said by the court: "Where a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream."

Mr. Field, in his work entitled "Outlines of an International Code," (2d ed.) section 30, in speaking of boundary by stream or channel, says: "The limits of national territory bounded by a river or stream, or by a strait or sound, or arm of the sea, the other shore of which is the territory of another nation, extend outward to a point equidistant from the territory of the nation occupying the opposite shore, or, if there be a stream or a navigable channel, to the thread of the stream,—that is, to the mid-channel,—or, if there be several channels, to the middle of the principal one."

In his work on the "Law of Nations," p. 31, Mr. Polson says: "If the river divides two States, the mid-channel is considered as the boundary line, unless prior occupation has given to the one or the other the right of possession to the whole."

There are cases in this and other courts, although the discussion had reference directly to riparian rights, and not to boundaries between States, that illustrate this same doctrine. In *Fletcher v. Thunder Bay Boom Co.*, 51 Mich. 277, 16 N. W. 645, it was held, the riparian

rights of defendant in the case being considered, extended to the thread of the stream—to the center of the main channel of the river. It was said by this court in *Middleton v. Pritchard*, 3 Scam. 510, 38 Am. Dec. 112, "that all grants bounded upon a river not navigable by the common law, entitled the grantee to all islands lying between the mainland and the center thread of the current." In *Cobb v. Lavalle*, 89 Ill. 331, 31 Am. Rep. 91, it was said: "It seems to be the settled law of this country, that the owner of land bordering upon a river not navigable at common law, such as the Mississippi River, will be entitled to claim to the center of the current of the stream." The same doctrine was restated in *Piper v. Connelly*, 108 Ill. 646, where it is said: "The general doctrine that grants of land bounded upon rivers, or the margins above tide water, carry the exclusive right and title of the grantee to the center thread of the current, unless the terms of the grant clearly denote the intention to stop at the margin of the river, has been too long established and too firmly adhered to by this court to be now questioned."

No reason is perceived why the principles here stated should not control the decision of the case being considered. As before remarked, it is manifest it was the intention of Congress the Mississippi River should constitute a "common boundary" between the States of Illinois and Missouri, and had the words the "middle of the Mississippi River," and the "middle of the main channel," been omitted in both enabling acts of Congress, still the river itself would be the boundary, and each State would hold to the "middle of the stream,"—that is to say, the middle thread of the stream. The intention in this respect is made most manifest by the fact it must have been and was known to Congress when it passed the enabling act for Missouri, and fixed the boundary at the "middle of the main channel of the Mississippi River," that the western boundary of Illinois had been fixed "at the middle of the Mississippi River," and certainly it was not intended to fix two distinct or different boundary lines. That would have left a space not in either State, and no such absurd intention should be imputed to Congress. It was most appropriately said by the court in *Morgan v. Reading*, supra, in respect to the boundary line as fixed by the act of Congress organizing the territory of Mississippi, which established the "Mississippi River" as the western boundary: "All west of that line,"—that is, the middle of the river—"was owned by a foreign power, and we cannot suppose Congress, under the circumstances, designed to limit the jurisdiction of the territory by the bank of the river."

The suggestion, Congress, by its enabling acts, may have established one line in the Mississippi River for the eastern boundary for Missouri, and another line, farther east, for the western boundary of Illinois, has nothing, in law or in fact, upon which to rest. The whole legislation on this subject shows, as before remarked, it was the intention of Congress to make the river a "common boundary"

between these States, and the expressions used in both enabling acts, although the words used may not be the same, make the middle of the main channel of the permanent river the boundary line. In such cases the principle is as stated by Mr. Woolsey, in his work on International Law, § 58: "Where a navigable river forms the boundary between States, both are presumed to have free use of it, and the dividing line will run in the middle of the channel, unless the contrary is shown by long occupancy or agreement of parties." Commercial considerations make it imperative, where States or nations are divided by a navigable river, each should hold to the center thread of the main channel or current along which vessels in the carrying trade pass. That is the "channel of commerce,"—not the shallow water of the stream, which, at some seasons of the year, may be impossible of navigation,—upon which each nation or State demands the right to move its products without any interference from the State or nation occupying the opposite shore. So important has this right ever been deemed, it is thought to be embraced in all treaties, cessions, ordinances, statutes and constitutions made, enacted or adopted in regard to the Mississippi River since the Federal Government was organized. It was the great desire to secure this important privilege that gave rise to all the efforts on the part of the general Government to obtain the control of the Mississippi River from its source to that point where it empties into the gulf and connects with the sea.

It has been often ruled, the intention in such great matters as State boundaries, when clearly manifested by cessions, grants or legislative acts, should control. It is a fact so well known it is not called in question, that so far back as can be known, either from history or tradition, the main channel of the Mississippi River at the point where complainant's bridge is constructed, was always west of Bloody Island,—that is, between that island and the Missouri shore. Both States have always recognized this fact, and for that reason "Bloody Island," although the river east of it was, in fact, at one time, navigable for shallow-draft vessels,—certainly in seasons of high water,—was always regarded as being within the limits of the State of Illinois. At one time grave apprehensions were entertained that the main channel of the river might change to the east side of "Bloody Island," and thus leave the Missouri side; but by the consent of Illinois, expressed by the General Assembly, dykes and other structures were erected at the upper end of the island to keep the main channel on the Missouri side, where it had previously been. Those structures proved efficient, and the main channel of the river now flows where it did since before the boundaries of either State divided by it were established by Congress or declared by State constitutions. It is not claimed, either by the bill or in the evidence, that any part of complainant's bridge that was assessed by the local assessor lies west of the middle of what has always been the main channel of the river

since the States were organized under the acts of Congress, and this court has no hesitation in coming to the conclusion that all of that part of the bridge, with its approaches, that lies east of the middle line of the main channel of the river, is within the jurisdiction of the State of Illinois, for the purposes of State and local taxation. Only that part of the bridge east of the middle of the main channel of the river, as appears from the plat used in making the assessment, was assessed in this case, and that was warranted by law.

The case of *Missouri v. Kentucky*, 11 Wall. 395, 20 L. Ed. 116, cited by counsel for complainant as being conclusive of the case in hand, has been examined, and it is not perceived it contains anything in conflict with the general views here expressed. Indeed, some of the reasoning in that case has been adopted in this opinion.

The judgment of the circuit court will be reversed, and the cause will be remanded, with directions to that court to dismiss the bill. Judgment reversed.<sup>20</sup>

#### COOLEY v. GOLDEN et al.

(Kansas City Court of Appeals, Missouri, 1893. 52 Mo. App. 229.)

SMITH, P. J. This is an action of forcible entry and detainer which was brought before a justice of the peace of Atchison county.

By the act of Congress, approved June 7, 1836, 5 United States Statutes at Large, 34, entitled "An act to extend the western boundary of the State of Missouri to the Missouri river," it was provided that, when the Indian title to all the lands lying between the state of Missouri and the Missouri river should be extinguished, the jurisdiction over said lands should be thereby ceded to the state of Missouri. It is to be observed that the act ceded the land between the old state line and the river, and the extension of the boundary was to the river, not to the bank, thus making the natural water-course the boundary; and the general rules, construing such words of cession as shown by

<sup>20</sup> See, also, the *Wasserbillig Case*, 9 Decisions of the Reichsgericht in Criminal Cases, 370 (1884), regarding a crime committed on a bridge forming the boundary between Luxemburg and Prussia.

Sir William Scott states the law tersely in *The Twee Gebroeders*, 3 O. Rob. 336, 339 (1801): "The law of rivers flowing entirely through the provinces of one state is perfectly clear. In the sea, out of the reach of cannon-shot, universal use is presumed. In rivers flowing through coterminous states, a common use to the different states is presumed. Yet in both of these there may, by legal possibility, exist a peculiar property, excluding the universal or the common use. Portions of the sea are prescribed for; so are rivers flowing through contiguous states; the banks on one side may have been first settled, by which the possession and property may have been acquired, or cessions may have taken place upon conquests, or other events. But the general presumption certainly bears strongly against such exclusive rights, and the title is a matter to be established, on the part of those claiming under it, in the same manner as all other legal demands are to be substantiated, by clear and competent evidence."

the adjudged cases, carry that boundary to the center of the channel. *Benson v. Morrow*, 61 Mo. 345; *Jones v. Soulard*, 24 How. 41, 16 L. Ed. 604; *Howard v. Ingersoll*, 13 How. 381, 14 L. Ed. 189; *Railroad v. Devereux* (C. C.) 41 Fed. 14; *Missouri v. Iowa*, 7 How. 660, 12 L. Ed. 861. And this seems to have been the intention of Congress; for it will be seen by reference to the act providing for the admission of the territory of Nebraska into the Union that one of the boundaries of the state so admitted should be from the junction of the Niobrara river down the middle of the channel of the latter river following the meanderings thereof, etc. 13 United States Statutes at Large, 47. It would be unreasonable to suppose that Congress intended to limit the extension of the territorial jurisdiction of the state of Missouri to the bank of the Missouri, and thus leave a sort of neutral territory between the Missouri shore and the middle of the channel of the river over which neither the state of Missouri nor Nebraska had jurisdiction.

The Constitution of Missouri, section 1, article 1, declared that the boundaries of the state as heretofore established by law are hereby ratified and confirmed; so that it is not to be doubted that Congress by the ceding act extended the northern boundary line of the state to the middle of the channel of the Missouri river, and from thence down the river to the middle of the Kansas river. Act of Congress of March 6, 1820, for the admission of Missouri; Revised Statutes, 1889, 47. In the cession act of June 7, 1836, is embraced what is commonly known as the "Platte purchase," consisting of a number of counties, among which is Atchison, situate in the northwest corner of the state.

At the time of the cession and until the year 1867, the Missouri river in its course along the western boundary of Atchison county made a horseshoe-shaped bend, with toe to the east, and heel pointing to the west. During the spring of the last-named year the river, during a great flood, changed its course by effecting a channel across the heel of the bend, and thus abandoned its former channel around the bend. The bend became a lake and gradually filled up with sedimentary matter until it became solid land, fit for tillage and pasture. The land, the possession of which is in dispute in this suit, is situate in the old abandoned bed of the river in this bend. The decisive questions in the case arise on the instructions given and refused by the court.

The theory of the plaintiff's instructions which were refused by the court was to the effect that if the lands in dispute were situate in the old bed of the river which had become dry on account of the change of its course by cutting off a bend on the Nebraska side and forming a new channel, then in that case it was not material on which side of the main channel of the old river bed the lands in dispute were situate. The theory of the defendant which was adopted by the court was that the ordinary boundary of Atchison county where it borders on the Missouri river extended to the middle of the main channel of

the river as the main channel ran or was located in the year 1867 prior to the change or cut-off, and that, unless it was found the land in question was situate in Atchison county, the plaintiff could not recover. The defendant's theory further was that the boundary line of the state of Missouri at the location in question was the middle of the main channel of the Missouri river as the main channel ran before the cut-off in 1867. These theories are wholly irreconcilable. The jury found under the instructions that the land in dispute was not in Atchison county, and, as there was substantial testimony tending to establish that fact, the finding is conclusive upon us. It seems that the river by its changed course cut off a considerable area of land which was formerly on the Nebraska side, but is now on the Missouri side of it, so that the river as it runs along the western border of this area of cut-off land is wholly within the state of Nebraska.

It is not contended, as we understand it, that the change of the course of the river in 1867 effected a change of the boundary line between the two states as it was fixed in the ceding act, for, if it were, such contention could not be sustained, because it is plain to be seen that the allowance of such consequences might result most disastrously to the geography of the state. The law seems to be well settled that when a river is declared to be the boundary between states, although it may change imperceptibly from natural causes, the river as it runs continues to be the boundary. But, if the river should suddenly change its course or desert the original channel, the rule of law is, the boundary remains in the middle of the deserted river bed. *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186; *St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. 337, 34 L. Ed. 941; *Missouri v. Kentucky*, 11 Wall. 395, 20 L. Ed. 116; *Buttenuth v. Bridge Co.*, 123 Ill. 535, 17 N. E. 439, 5 Am. St. Rep. 545; *Holbrook v. Moore*, 4 Neb. 437; *Collins v. State*, 3 Tex. App. 324, 30 Am. Rep. 142; *Gould on Waters*, § 159.

But the real question is whether the states of Missouri and Nebraska have concurrent jurisdiction over the old bed of the river just as was the case when the river ran there before 1867. The jurisdiction of this state over that part of the river which forms a common boundary of the states is concurrent. It extends not only to the middle of the channel but over the entire channel. *Constitution*, art. 1, § 1; *Swearingen v. Steamboat*, 13 Mo. 519; *Sanders v. Anchor Line*, 97 Mo. 26, 10 S. W. 595, 3 L. R. A. 390. But here there is no river, but in its stead is dry land upon which are cultivated fields and pastures. The physical conditions have been changed. Is the case different than if the boundary line between the two states had been located originally on dry land instead of in the middle of the channel of the river? We think not. The concurrent jurisdiction of the states of Missouri and Nebraska under their enabling acts does not in any case extend beyond their common boundary, except when that boundary is the middle of the channel of the Missouri river. Congress has imposed this

limitation upon its existence. It is difficult to see why it exists here any more than if the river had always run where it did after 1867. The reason for the grant of this concurrent jurisdiction, which is so well and forcibly expressed by Judge Barclay in 97 Mo., supra, lends no support to plaintiff's claim of concurrent jurisdiction in this case. The conditions are wanting which constitute the basis of this jurisdiction. The boundary line between the states is the middle of the former bed of the river, and to this line the jurisdiction of each extends, but the concurrent jurisdiction along there disappeared when the river did.

It is not believed that it was contemplated by Congress or the states that the grant of concurrent jurisdiction of the two states on the river authorized the bringing of an action of forcible entry and detainer or of ejectment in this state for the recovery of lands situate anywhere within the territorial limits of Nebraska. We cannot sustain the theory of the plaintiff's instructions which were to that effect. We do not think that the elimination by the court of a part of the plaintiff's fourth instruction was harmful to him, in view of the issues submitted to the jury by other instructions and found adversely to the plaintiff.

The case was fairly submitted to the jury by the instructions of the court. The judgment seems to be for the right party and so will be affirmed. All concur.<sup>21</sup>

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## II. SOUNDS, STRAITS, AND LAKES

### MAHLER v. NORWICH & N. Y. TRANSP. CO.

(Court of Appeals of New York, 1886. 35 N. Y. 352.)

Appeal from the Supreme Court. The action was for damages caused by the negligence of the defendant, and resulting in the death of the intestate.

On the trial at the Kings Circuit, it appeared that the deceased was on board of a sloop on Long Island Sound, on the 28th of October, 1853; that within a short distance of Sands' Point the sloop was sunk by a collision with a steamer of the defendant, caused by the

<sup>21</sup> Elaborate cases dealing with rivers as boundaries are *Missouri v. Kentucky*, 11 Wall. 395, 20 L. Ed. 116 (1870), *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186 (1892), and *Iowa v. Illinois*, 147 U. S. 1, 13 Sup. Ct. 239, 37 L. Ed. 55 (1893).

The question of the prolongation of the river boundary beyond the land is dealt with in *Louisiana v. Mississippi*, 202 U. S. 1, 26 Sup. Ct. 408, 571, 50 L. Ed. 913 (1906). See, also, *In the Matter of the International Title to the Chamizal Tract*, 5 *American Journal of International Law*, 785 (1911), in which a dispute regarding the Rio Grande as the boundary between the United States and Mexico, was submitted to an International Boundary Commission.

negligence of those in charge of the steamer, and that the intestate was drowned.

The complaint was dismissed; the court holding, as matter of law, that the place at which the collision occurred was not within the jurisdiction of the state of New York. The judgment was affirmed at the General Term in the second judicial district, and the plaintiff appealed to this court. The case is reported in 45 Barbour, 232.

PORTER, J.<sup>22</sup> The collision which resulted in the death of the intestate occurred about two miles east of Sands' Point, and within a mile of the Long Island shore. If the court below was right in holding that this portion of the sound is not within the limits of our jurisdiction, the complaint was properly dismissed, as the right of action rests upon a statute which has no extraterritorial force.

The islands in the sound, as well as those between it and the Atlantic, are confessedly within our limits. Fisher's Island, which is situate at its eastern extremity, is about two miles from the Connecticut shore. The opening, known as "The Race," between Little Gull Island and Fisher's Island, is the ship inlet to the sound from the ocean. Blunt's Coast Pilot (16th Ed.) 196. Both these islands are in the state of New York. The distance between them is about four miles, which is also the width of the sound at the point where the collision occurred.

The question whether the injury to the intestate was committed within our jurisdiction, depends on the course of the New York boundary line from Fisher's Island to Lyon's Point. The court below held that this line must be so run as to exclude the waters of the sound below low-water mark. The statute defining the boundaries of the state does not indicate the course of the line from Sandy Hook to Lyon's Point, otherwise than by declaring that it is to be run "in such manner as to include Staten Island and the islands of meadow on the west side thereof, Shooter's Island, Long Island, the Isle of Wight (now called Gardiner's Island), Fisher's Island, Shelter Island, Plumb Island, Robin's Island, Ram Island, the Gull Islands, and all the islands and waters in the Bay of New York and within the bounds above described." 1 R. S. 65.

It seems quite obvious that a direction, so to run the line as to include the islands within the bounds of the state, is not a direction so to run it as to exclude the intermediate waters. If New York was of right entitled to those waters, a renunciation of her title must be sought elsewhere than in her assertion of right up to a line embracing the islands beyond them.

The description purports to define the exterior lines of a continuous territorial domain; and not to declare the respective boundaries of detached and separate tracts, divided from each other by the ocean, and connected only by the bonds of political union. Every intend-

<sup>22</sup> Part of the opinion is omitted.



ment, therefore, is in favor of the natural and obvious construction, that the lines indicated constitute a continuous boundary, at no point diverging from our possessions, to traverse either lands or waters which we do not own.

It is never to be assumed, except upon the clearest evidence, that a sovereign state intends, by its own legislation, to renounce a right of territorial domain, to which its title is clear and absolute. Such a relinquishment, in respect to one of the two great maritime avenues from New York City to the ocean, would be an abdication of rights, which we continue to assert in respect to the other, up to an ocean line stretching much farther from headland to headland, and which might well be open to question, if the doctrine could be admitted, on the basis of which it is claimed that we have renounced all dominion over the waters of Long Island Sound.

It would be an abandonment, by a maritime power, of jurisdiction over an inland body of water, inclosed within the state at each of its termini, and with no outlet to the ocean except under the command of our cannon from either shore. If such a surrender resulted from the adoption of the Revised Statutes, it had not even the merit of a voluntary cession to a sister state, or to the federal government, of the dominion we disclaim; but it amounted to a mere abandonment of a large portion of our internal domain to the indeterminate law of the ocean, without regard to the necessity of police regulation upon its waters, or the importance of maintaining our jurisdiction, with a view to the protection of our commercial interests in peace, and to preparation, if occasion should arise, to repel aggression in case of civil or of foreign war.

As the injury in question occurred between our own shores, and west of the Connecticut boundary, it would be inappropriate in this case to determine the further question, whether the line should be run directly from Fisher's Island to Lyon's Point, as held by one of the former judges of this court, or whether it should follow the thread of the sound, with such deflections as may be required to include the islands confessedly within our jurisdiction.

That Long Island Sound was included within the territorial dominions of the British Empire, at the date of the charter from Charles the Second to the Duke of York, is a proposition too plain for argument. It was an inland arm of the sea, washing no shores but those of the provinces, and with no opening to the ocean, except by passing between British headlands less than five miles apart. The right of the king depended on none of the vexed questions involved in the claims of dominion, by the English over the waters of the Channel, by the Turks over those of the Black Sea, by the Venetians over those of the Adriatic, or the Romans over those of the Mediterranean. It rested on clear and fundamental principles of international law. The rule is one of universal recognition that a bay, strait, sound or arm of the sea, lying wholly within the domain of a sovereign, and ad-

mitting no ingress from the ocean, except by a channel between contiguous headlands which he can command with his cannon on either side, is the subject of territorial dominion. Wheaton's *International Law*, 320; Vattel's *Law of Nations*, 130; Hautefeuille, *Droits des Nations* (2d Ed.) 89; *Church v. Hubbard*, 2 Cranch, 187, 2 L. Ed. 249. It is an immemorial rule of the common law, and has been asserted by the kings and courts of England from the earliest period of our ancestral history. Halleck's *International Law*, 134, and the authorities there cited. Within this rule, the islands at the eastern extremity of Long Island Sound are the fauces terræ, which define the limits of territorial authority, and mark the line of separation between the open ocean and the inland sea. *United States v. Grush*, 5 Mason, 290, Fed. Cas. No. 15,268; *Marten's Law of Nations*, 171; *Wheaton's Law of Nations*, 322; Vattel, 130.

The right of the king to the waters of these inland seas and bays, and his authority to grant or withhold them in his royal charters, was settled by the Supreme Court of the United States in the case of *Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997. The question, whether the waters of the sound were embraced in the royal grant to the Duke of York, is one which we are not called upon to determine. If they were, they passed under the subsequent grants to the states of New York and Connecticut. If they were not, they remained in the king until his rights were divested by the Revolution. The states contiguous to these, as to our other inland seas and bays, then succeeded to his dominion over their waters, and their property in them became absolute, subject to the public right of navigation. *Martin v. Waddell*, 16 Pet. 367, 410, 10 L. Ed. 997; *Corfield v. Coryell*, 4 Wash. C. C. 371, 385, 386, Fed. Cas. No. 3,230.

In the absence of any prior grant of the whole or any portion of these waters, each of the contiguous states succeeded to territorial dominion from its own shore to the middle of the sound, so far as their possession was coterminous; the property of New York in the residue extending from shore to shore. Such is the settled rule applicable to neighboring states bounded by a territorial inland sea. *Corfield v. Coryell*, 4 Wash. C. C. 386, Fed. Cas. No. 3,230; *Wheaton's International Law*, 320; *Angell on Tide Waters*, 7; 1 *Azuni's Maritime Law*, 225. When the states succeeded to these rights of the king, as Judge Story observed, in a kindred case, where a bay was the boundary, "the law of nations must, under such circumstances, be presumed silently to prevail; and annex the bay, to the middle of the stream, to the territories of the adjacent provinces; and as there was at all times a common right of passage and navigation, and it was necessary for the convenience of all parties, the whole waters must be deemed common for these purposes." *The Schooner Fame*, 3 Mason, 147, 151, Fed. Cas. No. 4,634.

The state of New York has not relinquished to the federal government its territorial rights or its general jurisdiction over the waters

of Long Island Sound. The Supreme Court of the United States has adjudged that the cession by the states to the federal authorities of admiralty and maritime jurisdiction over our inland seas and bays was not a cession of the waters, or of general jurisdiction over them, and that the states retain unimpaired the residuary powers of legislation and their rights of territorial dominion. *United States v. Bevans*, 3 Wheat. 336, 4 L. Ed. 404.

We entertain no doubt, therefore, that, to the extent we have indicated, the waters of Long Island Sound are within the jurisdiction of this state. \* \* \*

On the general question of the dominion of the state over the waters of Long Island Sound, we are fortified in our conclusion by the fact that such jurisdiction has been constantly asserted by the political department of the government to which subjects of this nature appropriately belong. Laws have been enacted from time to time, as occasion has required, granting exclusive rights of ferriage across the sound, regulating its fisheries and navigation, directing the diversion of its waters, and the construction of new inlets into the Long Island ports, authorizing the projection of piers into its waters, and the collection of dockage and wharfage in its harbors, and empowering the commissioners of the land office to make grants, for like purposes, of lands under the waters of the sound, not extending five hundred feet below low-water mark, as well as lands between high and low water mark. Laws 1853, c. 83; Laws 1865, c. 642; Laws 1849, c. 435; Laws 1839, c. 173; Laws 1855, c. 556; Laws 1847, c. 409; Laws 1858, c. 261; Laws 1835, c. 234; *Id.* c. 232; 1 R. S. (3d Ed.) 231, §§ 81, 82, 85.

The territorial jurisdiction of the state is disputed by no power, either foreign or domestic. Its title is clear under the decisions of our own tribunals, and equally clear under the rules of international law. We see no reason why it should not be upheld by the courts as firmly as it has been maintained by the state government.

Judgment should be reversed, and a new trial should be ordered.

HUNT, J., also read an opinion for reversal.

All the judges concurring, except DAVIES, C. J., who read a dissenting opinion.

Judgment reversed, and a new trial ordered.\*

\*Natural bodies of water connecting the high seas should be open to navigation, even although their termini are within one and the same state.

In artificial bodies of water connecting the high seas, such as canals, the nations possessing the land through which the canal runs (as in the case of the Kiel Canal), or holding the stock when shares have been issued for its construction (as in the case of the Suez Canal), or building the canal (as in the case of the Panama Canal), claim special rights to the canal and in its supervision and use.

For the International Convention of October 29, 1888, regulating the Suez Canal, and the treaty between Great Britain and the United States of November 18, 1901, concerning the Panama Canal, see the Proceedings of the American Society of International Law for 1913.

For the rules concerning the use of the Kiel Canal, see the Treaty of Versailles of June 28, 1919, articles 380-386.

## UNITED STATES v. RODGERS.

(Supreme Court of the United States, 1893. 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071.)

In February, 1888, the defendant, Robert S. Rodgers, and others, were indicted in the District Court of the United States for the Eastern District of Michigan for assaulting, in August, 1887, with a dangerous weapon, one James Downs, on board of the steamer Alaska, a vessel belonging to citizens of the United States, and then being within the admiralty jurisdiction of the United States, and not within the jurisdiction of any particular state of the United States, viz. within the territorial limits of the Dominion of Canada.

The indictment contained six counts, charging the offence to have been committed in different ways, or with different intent, and was remitted to the Circuit Court for the Sixth Circuit of the Eastern District of Michigan. There the defendant Rodgers filed a plea to the jurisdiction of the court, alleging that it had no jurisdiction of the matters charged, as appeared on the face of the indictment, and to the plea a demurrer was filed. Upon this demurrer the judges of the Circuit Court were divided in opinion, and they transmitted to this court the following certificate of division: \* \* \*

"The matter of the plea of the jurisdiction coming on to be heard, \* \* \* the said circuit and district judges were divided in opinion on the question: 'Whether the courts of the United States have jurisdiction, under section 5346 of the Revised Statutes of the United States, to try a person for an assault, with a dangerous weapon, committed on a vessel belonging to a citizen of the United States, when such vessel is in the Detroit River, out of the jurisdiction of any particular State and within the territorial limits of the Dominion of Canada.' \* \* \*

Section 5346 of the Revised Statutes (Comp. St. § 10449), upon which the indictment was found, is as follows:

"Sec. 5346. Every person who, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, on board any vessel belonging in whole or part to the United States, or any citizen thereof, with a dangerous weapon, or with intent to perpetrate any felony, commits an assault on another shall be punished by a fine of not more than three thousand dollars and by imprisonment at hard labor not more than three years."

The statute relating to the place of trial in this case is contained in section 730 of the Revised Statutes (Comp. St. § 1023), which is as follows:

"Sec. 730. The trial of all offences committed upon the high seas or elsewhere, out of the jurisdiction of any particular state or district,

shall be in the district, where the offender is found or into which he is first brought." <sup>22</sup>

Mr. Justice FIELD delivered the opinion of the court.

Several questions of interest arise upon the construction of section 5346 of the Revised Statutes (Comp. St. § 10449), upon which the indictment in this case was found. The principal one is whether the term "high seas," as there used, is applicable to the open, unenclosed waters of the Great Lakes, between which the Detroit river is a connecting stream. The term was formerly used, particularly by writers on public law, and generally in official communications between different governments, to designate the open, unenclosed waters of the ocean, or of the British seas, outside of their ports and havens. At one time it was claimed that the ocean, or portions of it, were subjected to the exclusive use of particular nations. The Spaniards, in the sixteenth century, asserted the right to exclude all others from the Pacific Ocean. The Portuguese claimed, with the Spaniards, under the grant of Pope Alexander VI., the exclusive use of the Atlantic Ocean west and south of a designated line. And the English, in the seventeenth century, claimed the exclusive right to navigate the seas surrounding Great Britain. Woolsey on International Law, § 55.

In the discussions which took place in support of and against these extravagant pretensions the term "high seas" was applied, in the sense stated. It was also used in that sense by English courts and law writers. There was no discussion with them as to the waters of other seas. The public discussions were generally limited to the consideration of the question whether the high seas, that is, the open, unenclosed seas, as above defined, or any portion thereof, could be the property or under the exclusive jurisdiction of any nation, or whether they were open and free to the navigation of all nations. The inquiry in the English courts was generally limited to the question whether the jurisdiction of the admiralty extended to the waters of bays and harbors, such extension depending upon the fact whether they constituted a part of the high seas.

In his treatise on the rights of the sea, Sir Matthew Hale says: "The sea is either that which lies within the body of a county, or without. That arm or branch of the sea which lies within the fauces terræ, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, and, therefore, within the jurisdiction of the sheriff or coroner. That part of the sea which lies not within the body of a county is called the main sea or ocean." *De Jure Maris*, c. iv. By the "main sea" Hale here means the same thing expressed by the term "high sea"—"*mare altum*," or "*le haut mer*."

<sup>22</sup> The statement of facts is abridged and the dissenting opinions of Mr. Justice Gray and Mr. Justice Brown are omitted.

In *Waring v. Clarke*, 5 How. 440, 453, 12 L. Ed. 226, this court said that it had been frequently adjudicated in the English common law courts since the restraining statutes of Richard II and Henry IV "that high seas mean that portion of the sea which washes the open coast." In *United States v. Grush*, 5 Mason, 290, Fed. Cas. No. 15,268, it was held by Mr. Justice Story, in the United States Circuit Court, that the term "high seas," in its usual sense, expresses the unenclosed ocean or that portion of the sea which is without the fauces terræ on the sea-coast, in contradistinction to that which is surrounded or enclosed between narrow headlands or promontories. It was the open, unenclosed waters of the ocean, or the open, unenclosed waters of the sea, which constituted the "high seas" in his judgment. There was no distinction made by him between the ocean and the sea, and there was no occasion for any such distinction. The question in issue was whether the alleged offences were committed within a county of Massachusetts on the seacoast, or without it, for in the latter case they were committed upon the high seas and within the statute. It was held that they were committed in the county of Suffolk, and thus were not covered by the statute.

If there were no seas other than the ocean, the term "high seas" would be limited to the open, unenclosed waters of the ocean. But as there are other seas besides the ocean, there must be high seas other than those of the ocean. A large commerce is conducted on seas other than the ocean and the English seas, and it is equally necessary to distinguish between their open waters and their ports and havens, and to provide for offences on vessels navigating those waters and for collisions between them. The term "high seas" does not, in either case, indicate any separate and distinct body of water; but only the open waters of the sea or ocean, as distinguished from ports and havens and waters within narrow headlands on the coast. This distinction was observed by Latin writers between the ports and havens of the Mediterranean and its open waters—the latter being termed the high seas.<sup>24</sup> In that sense the term may also be properly used in reference to the open waters of the Baltic and the Black Sea, both of which are inland seas, finding their way to the ocean by a narrow and distant channel. Indeed, wherever there are seas in fact, free to the navigation of all nations and people on their borders, their open waters outside of the portion "surrounded or enclosed between narrow headlands or promontories," on the coast, as stated by Mr. Justice Story, or "without the body of a county," as declared by Sir Matthew Hale, are properly characterized as high seas, by whatever name the bodies of water of which they are a part may be designated. Their names do not deter-

<sup>24</sup> "Insula portum

Efficit objectu laterum, quibus omnis ab alto

Frangitur, inque sinus scindit sese unda reductos."

—The *Æneid*, Lib. 1, v. 159-161.

mine their character. There are, as said above, high seas on the Mediterranean (meaning outside of the enclosed waters along its coast), upon which the principal commerce of the ancient world was conducted and its great naval battles fought. To hold that on such seas there are no high seas, within the true meaning of that term, that is, no open, unenclosed waters, free to the navigation of all nations and people on their borders, would be to place upon that term a narrow and contracted meaning. We prefer to use it in its true sense, as applicable to the open, unenclosed waters of all seas, than to adhere to the common meaning of the term two centuries ago, when it was generally limited to the open waters of the ocean and of seas surrounding Great Britain, the freedom of which was then the principal subject of discussion. If it be conceded, as we think it must be, that the open, unenclosed waters of the Mediterranean are high seas, that concession is a sufficient answer to the claim that the high seas always denote the open waters of the ocean.

Whether the term is applied to the open waters of the ocean or of a particular sea, in any case, will depend upon the context or circumstances attending its use, which in all cases affect, more or less, the meaning of language. It may be conceded that if a statement is made that a vessel is on the high seas, without any qualification by language or circumstance, it will be generally understood as meaning that the vessel is upon the open waters of one of the oceans of the world. It is true, also, that the ocean is often spoken of by writers on public law as the sea, and characteristics are then ascribed to the sea generally which are properly applicable to the ocean alone; as, for instance, that its open waters are the highway of all nations. Still the fact remains that there are other seas than the ocean whose open waters constitute a free highway for navigation to the nations and people residing on their borders, and are not a free highway to other nations and people, except there be free access to those seas by open waters or by conventional arrangements.

As thus defined, the term would seem to be as applicable to the open waters of the great northern lakes as it is to the open waters of those bodies usually designated as seas. The Great Lakes possess every essential characteristic of seas. They are of large extent in length and breadth; they are navigable the whole distance in either direction by the largest vessels known to commerce; objects are not distinguishable from the opposite shores; they separate, in many instances, states, and in some instances constitute the boundary between independent nations; and their waters, after passing long distances, debouch into the ocean. The fact that their waters are fresh and not subject to the tides, does not affect their essential character as seas. Many seas are tideless, and the waters of some are saline only in a very slight degree.

The waters of Lake Superior, the most northern of these lakes, after traversing nearly 400 miles, with an average breadth of over 100 miles, and those of Lake Michigan, which extend over 350 miles, with an average breadth of 65 miles, join Lake Huron, and, after flowing about 250 miles, with an average breadth of 70 miles, pass into the river St. Clair; thence through the small lake of St. Clair into the Detroit river; thence into Lake Erie and, by the Niagara river, into Lake Ontario; whence they pass, by the river St. Lawrence, to the ocean, making a total distance of over 2,000 miles. *Ency. Britannica*, vol. 21, p. 178. The area of the Great Lakes, in round numbers, is 100,000 square miles. *Id.* vol. 14, p. 217. They are of larger dimensions than many inland seas which are at an equal or greater distance from the ocean. The waters of the Black Sea travel a like distance before they come into contact with the ocean. Their first outlet is through the Bosphorus, which is about 20 miles long and for the greater part of its way less than a mile in width, into the Sea of Marmora, and through that to the Dardanelles, which is about 40 miles in length and less than four miles in width, and then they find their way through the islands of the Greek Archipelago, up the Mediterranean Sea, past the Straits of Gibraltar to the ocean, a distance, also, of over 2,000 miles. \* \* \*

It is to be observed also that the term "high" in one of its significations is used to denote that which is common, open, and public. Thus every road or way or navigable river which is used freely by the public is a "high" way. So a large body of navigable water other than a river, which is of an extent beyond the measurement of one's unaided vision, and is open and unconfined, and not under the exclusive control of any one nation or people, but is the free highway of adjoining nations or people, must fall under the definition of "high seas" within the meaning of the statute. We may as appropriately designate the open, unenclosed waters of the lakes as the high seas of the lakes, as to designate similar waters of the ocean as the high seas of the ocean, or similar waters of the Mediterranean as the high seas of the Mediterranean.

The language of section 5346, immediately following the term "high seas," declaring the penalty for violent assaults when committed on board of a vessel in any arm of the sea or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, equally as when committed on board of a vessel on the high seas, lends force to the construction given to that term. The language used must be read in conjunction with that term, and as referring to navigable waters out of the jurisdiction of any particular state, but connecting with the high seas mentioned. The Detroit river, upon which was the steamer *Alaska* at the time the assault was committed, connects the waters of Lake Huron (with which, as stated above, the waters of Lake Superior



and Lake Michigan join) with the waters of Lake Erie, and separates the Dominion of Canada from the United States, constituting the boundary between them, the dividing line running nearly midway between its banks, as established by commissioners, pursuant to the treaty between the two countries. 8 Stat. 274, 276. The river is about 22 miles in length and from one to three miles in width, and is navigable at all seasons of the year by vessels of the largest size. The number of vessels passing through it each year is immense. Between the years 1880 and 1892, inclusive, they averaged from thirty-one to forty thousand a year, having a tonnage varying from sixteen to twenty-four millions. \* \* \*

The statute under consideration, provides that every person who, upon the high seas or in any river connecting with them, as we construe its language, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, commits, on board of any vessel belonging in whole or in part to the United States, or any citizen thereof, an assault on another with a dangerous weapon or with intent to perpetrate a felony, shall be punished, etc. The Detroit river, from shore to shore, is within the admiralty jurisdiction of the United States, and connects with the open waters of the lakes—high seas, as we hold them to be, within the meaning of the statute. From the boundary line, near its center, to the Canadian shore it is out of the jurisdiction of the state of Michigan. The case presented is therefore directly within its provisions. The act of Congress of September 4, 1890, 26 Stat. 424, c. 874 (1 Sup. to the Rev. Stat. c. 874, p. 799 [Comp. St. § 10445]), providing for the punishment of crimes subsequently committed on the Great Lakes, does not, of course, affect the construction of the law previously existing. \* \* \*

As we have before stated, a vessel is deemed part of the territory of the country to which she belongs. Upon that subject we quote the language of Mr. Webster, while Secretary of State, in his letter to Lord Ashburton of August, 1842. Speaking for the government of the United States, he stated with great clearness and force the doctrine which is now recognized by all countries. He said: "It is natural to consider the vessels of a nation as parts of its territory, though at sea, as the state retains its jurisdiction over them; and, according to the commonly received custom, this jurisdiction is preserved over the vessels even in parts of the sea subject to a foreign dominion. This is the doctrine of the law of nations, clearly laid down by writers of received authority, and entirely conformable, as it is supposed, with the practice of modern nations. If a murder be committed on board of an American vessel by one of the crew upon another or upon a passenger, or by a passenger on one of the crew or another passenger, while such vessel is lying in a port within the jurisdiction of a foreign state or sovereignty, the offence is cognizable and punishable by the proper court of the United States in the same manner as if

such offence had been committed on board the vessel on the high seas. The law of England is supposed to be the same. It is true that the jurisdiction of a nation over a vessel belonging to it while lying in the port of another is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port and for all contracts entered into while there by her master or owners, she and they must, doubtless, be answerable to the laws of the place. Nor if her master or crew while on board in such port, break the peace of the community by the commission of crimes, can exemption be claimed for them. But, nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be water-borne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself." 6 Webster's Works, 306, 307. \* \* \*

In our judgment the District Court of the Eastern District of Michigan had jurisdiction to try the defendant upon the indictment found, and it having been transferred to the Circuit Court, that court had jurisdiction to proceed with the trial, and the demurrer to its jurisdiction should have been overruled. Our opinion, in answer to the certificate, is that—

The courts of the United States have jurisdiction, under section 5346 of the Revised Statutes, to try a person for an assault, with a dangerous weapon, committed on a vessel belonging to a citizen of the United States, when such vessel is in the Detroit river, out of the jurisdiction of any particular state, and within the territorial limits of the Dominion of Canada, and it will be returned to the Circuit Court of the United States for the Sixth Circuit and Eastern District of Michigan; and it is so ordered.<sup>25</sup>

<sup>25</sup> Dissenting opinions of Mr. Justice Gray and Mr. Justice Brown omitted. Distinguished in *United States v. Peterson* (D. C.) 64 Fed. 145 (1894); *Bigelow v. Nickerson*, 70 Fed. 118, 17 C. C. A. 1, 30 L. R. A. 336 (1896).

For international controversies concerning sounds and straits, see the Danish Claim to sound dues (Richard Henry Dana's edition of Wheaton, 264-267 (1866); Freeman Snow's *Treaties and Topics in American Diplomacy*, pp. 124-127 (1894). For some of the controversies concerning the Bosphorus and Dardanelles, see Dana's Wheaton, 263-264, 273-274, Dana's note No. 111; Eugene Schuyler's *American Diplomacy and the Furtherance of Commerce*, 317 (1886).

See, also, John Bassett Moore's *Digest of International Law*, vol. 1, 658-668 (1906).

In the *Matter of Certain Craft Captured on the Victoria Nyanza*, Law Reports, 1919, Probate Division, 83 (1918), it is held, according to the headnote, that:

"Captures on inland waters are not excluded from the operation of the law of maritime prize, and enemy craft captured on an inland lake (The Victoria Nyanza) by His Majesty's armed ships are subject to condemnation as prize."

## III. BAYS

## SCHOONER WASHINGTON CASE.

(American and British Claims Commission, 1852-55. Report of Decisions, 170.)

To settle and finally determine any and all claims between Great Britain and the United States not arising "out of any transaction of a date prior to the 24th of December, 1814," Great Britain and the United States concluded the Claims Convention of February 8, 1853, providing for the settlement of such claims by a commission of three members, one to be appointed by each government and the umpire to be selected by the commissioners, to hear and to pass finally upon any and all claims upon which the commissioners should not agree. Pursuant to this convention the following case was submitted to the commissioners:

The schooner Washington, while employed in fishing in the Bay of Fundy, ten miles distant from the shore, was seized by her Britannic Majesty's cruiser, and taken to Yarmouth, in Nova Scotia, and condemned on the ground of being engaged in fishing in British waters, in violation of the provisions of the treaty relative to the fisheries, entered into between the United States and the British government on October 20, 1818.

Claim of damage was made before the commission on the ground that the seizure was in violation of the provisions of that treaty and of the law of nations.

It was contended by the British government that—

1. That the Bay of Fundy was an indentation of the sea, extending up into the land, both shores of which belonged to Great Britain, and that for this reason she had, by virtue of the law of nations, the exclusive jurisdiction over this sheet of water, and the sole right of taking fish within it.

2. It was contended that, by a fair construction of the treaty of October 20, 1818, between Great Britain and the United States, the United States had renounced the liberty, heretofore enjoyed or claimed, to take fish on certain bays, creeks, or harbors, including, as was contended, the Bay of Fundy, and other similar waters with certain limits described by the treaty.

BATES, Umpire. The schooner Washington was seized by the revenue schooner Julia, Captain Darby, while fishing in the Bay of Fundy, ten miles from the shore, on the 10th day of May, 1843, on the charge of violating the treaty of 1818. She was carried to Yarmouth, Nova Scotia, and there decreed to be forfeited to the crown by the judge of the vice admiralty court, and with her stores ordered to be sold. The owners of the Washington claim for the value of the vessel and appurtenances, outfits, and damages, \$2,483, and for eleven years'

interest, \$1,638, amounting together to \$4,121. By the recent reciprocity treaty, happily concluded between the United States and Great Britain, there seems no chance for any future disputes in regard to the fisheries. It is to be regretted, that in that treaty, provision was not made for settling a few small claims of no importance in a pecuniary sense, which were then existing, but as they have not been settled, they are now brought before this commission.

The Washington fishing schooner was seized, as before stated, in the Bay of Fundy, ten miles from the shore, off Annapolis, Nova Scotia.

It will be seen by the treaty of 1783, between Great Britain and the United States, that the citizens of the latter, in common with the subjects of the former, enjoyed the right to take and cure fish on the shores of all parts of her Majesty's dominions in America, used by British fishermen; but not to dry fish on the island of Newfoundland, which latter privilege was confined to the shores of Nova Scotia in the following words: "And American fishermen shall have liberty to dry and cure fish on any of the unsettled bays, harbors, and creeks of Nova Scotia, but as soon as said shores shall become settled, it shall not be lawful to dry or cure fish at such settlement, without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground."

The treaty of 1818 contains the following stipulations in relation to the fishery: "Whereas, differences have arisen respecting the liberty claimed by the United States to take, dry, and cure fish on certain coasts, bays, harbors, and creeks of his Britannic Majesty's dominions in America, it is agreed that the inhabitants of the United States shall have, in common with the subjects of his Britannic Majesty, the liberty to fish on certain portions of the southern, western, and northern coast of Newfoundland; and, also, on the coasts, bays, harbors, and creeks, from Mount Joly, on the southern coast of Labrador, to and through the straits of Belle Isle; and thence northwardly indefinitely along the coast, and that American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors, and creeks of said described coasts, until the same become settled, and the United States renounce the liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbors of his Britannic Majesty's dominions in America, not included in the above mentioned limits: Provided, however, that the American fishermen shall be admitted to enter such bays or harbors, for the purpose of shelter, and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

The question turns, so far as relates to the treaty stipulations on the meaning given to the word "bays" in the treaty of 1783. By that treaty the Americans had no right to dry and cure fish on the shores and bays of Newfoundland, but they had that right on the coasts, bays, harbors, and creeks of Nova Scotia; and as they must land to cure fish on the shores, bays, and creeks, they were evidently admitted to the shores of the bays, etc. By the treaty of 1818, the same right is granted to cure fish on the coasts, bays, etc., of Newfoundland, but the Americans relinquished that right, and the right to fish within three miles of the coasts, bays, etc., of Nova Scotia. Taking it for granted that the framers of the treaty intended that the word "bay" or "bays" should have the same meaning in all cases, and no mention being made of headlands, there appears no doubt that the Washington, in fishing ten miles from the shore, violated no stipulations of the treaty.

It was urged on behalf of the British government, that by coasts, bays, etc., is understood an imaginary line, drawn along the coast from headland to headland, and that the jurisdiction of her Majesty extends three marine miles outside of this line; thus closing all the bays on the coast or shore, and that great body of water called the Bay of Fundy against Americans and others, making the latter a British bay. This doctrine of headlands is new, and has received a proper limit in the convention between France and Great Britain of 2d August, 1839, in which "it is agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland."

The Bay of Fundy is from 65 to 75 miles wide, and 130 to 140 miles long, it has several bays on its coasts; thus the word bay, as applied to this great body of water, has the same meaning as that applied to the Bay of Biscay, the Bay of Bengal, over which no nation can have the right to assume the sovereignty. One of the headlands of the Bay of Fundy is in the United States, and ships bound to Passamaquoddy must sail through a large space of it. The island of Grand Menan (British) and Little Menan (American) are situated nearly on a line from headland to headland. These islands, as represented in all geographies, are situate in the Atlantic Ocean. The conclusion is, therefore, in my mind irresistible, that the Bay of Fundy is not a British bay, nor a bay within the meaning of the word, as used in the treaties of 1783 and 1818.

The owners of the Washington, or their legal representatives, are therefore entitled to compensation, and are hereby awarded not the amount of their claim, which is excessive, but the sum of three thousand dollars, due on the 15th January, 1855.

## STETSON v. UNITED STATES.

## THE ALLEGANEAN.

(Court of Commissioners of Alabama Claims, 1885. 32 Albany Law J. 484.)<sup>20</sup>

Claim to recover damages for destruction of a vessel. The opinion states the facts.

Henry M. Baker, for claimants.

John H. A. Creswell, for United States.

DRAPER, J., delivered the opinion of the court.

The facts upon which a judgment to the amount of \$69,334.80 is prayed for in this case are substantially as follows:

The ship *Alleganean*, duly registered at the port of New York, and being recently repaired and well equipped, and entitled to the protection of the United States, cleared with a cargo from the port of Baltimore on the 22d of October, 1862, upon a voyage to London. Six days later, at about 10:30 o'clock in the evening, being at anchor, through rough water in Chesapeake Bay, south of the mouth of the Rappahannock river, and opposite Guinn's Island, she was boarded by some eighteen officers and men of the Confederate navy, commanded by Lieutenants John Taylor Wood and S. Smith Lee. These leaders were commissioned officers in the Confederate navy, and in the attack upon the *Alleganean* they were acting under the special orders of the Secretary of the Navy of the Confederate States, and the men accompanying them had been specially detailed from the James river squadron, for the purpose of preying upon United States merchant vessels in Chesapeake Bay. They came overland to Chesapeake Bay from the *Patrick Henry*, an armed and commissioned Confederate vessel, and securing two or three small vessels—the largest being of fifteen or twenty tons burden—had been cruising about two or three nights before the attack. \* \* \*

This force boarded the *Alleganean*, as stated, speedily reduced the crew of that vessel to subjection and the state of prisoners of war, and then burned the ship, totally destroying her, except that some few remnants were afterwards picked up and disposed of, the proceeds of which the owners account for in making up their claim.

The value of the *Alleganean* at the time of loss is placed by the marine experts on behalf of the government at \$52,591.03, and by the witnesses for the claimants at amounts varying from \$60,000 to \$75,000. The evidence seems to establish beyond question the fact that the vessel was more than four miles from any shore at the time of capture and destruction. \* \* \*

The term "high seas" as used by legislative bodies, the courts and text-writers, has been construed to express a widely different meaning. As used to define the jurisdiction of admiralty courts, it is held to

<sup>20</sup> See, also, 4 Moore's International Arbitrations, 432; 5 Id. 4675.

mean the waters of the ocean exterior to low-water mark. As used in international law, to fix the limits of the open ocean, upon which all peoples possess common rights, the "great highway of nations," it has been held to mean only so much of the ocean as is exterior to a line running parallel with the shore, and some distance therefrom, commonly such distance as can be defended by artillery upon the shore, and, therefore, a cannon-shot or a marine league (three nautical or four statute miles). This court, after very able argument by learned counsel, and after much deliberation, has held that the term was used in the act of June 5, 1882, in the same sense in which it is employed by the international law writers. *Rich v. United States*.

From this it necessarily follows that such portions of the waters of Chesapeake Bay as are within four miles of either shore form no part of the high seas. But much of the bay is more than four miles from shore, and is accessible from the ocean without coming within that distance of the land. The distance between Cape Henry and Cape Charles, at the entrance of the bay, is said to be twelve miles, and it is stated that lines starting from points between the Capes, four miles from each and running up the bay that distance from either shore, would not intercept each other within 125 miles from the starting points. The evidence shows that the *Alleganean* was anchored between such lines at the time of destruction. Was she upon the high seas as the court defines the statutory term?

By common agreement all the authorities assert that there are arms or inlets of the ocean, which are within territorial jurisdiction, and are not high seas. Sir R. Phillimore (1 Int. Law, § 200), says: "Besides the rights of property and jurisdiction within the limit of cannon-shot from the shore, there are certain portions of the sea which, though they exceed this verge, may under special circumstances be prescribed for. Maritime territorial rights extend, as a general rule, over arms of the sea, bays, gulfs, estuaries, which are inclosed, but not entirely surrounded, by lands belonging to one and the same state. \* \* \* Thus Great Britain has immemorially claimed and exercised exclusive property and jurisdiction over the bays or portions of the sea cut off by lines drawn from one promontory to another, and called the King's Chambers." Grotius (bk. 11, ch. 3, §§ 7, 8), and Vattel (vol. 1, bk. 1, ch. 23, § 291) assert substantially the same doctrine, and the later writers follow them. Wheat. Int. Law (Dana's 8th Ed.) p. 255, says:

"The maritime territory of every state extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea, inclosed by headlands, belonging to the same state. The usage of nations super-adds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon-shot will reach from the shore, along the coasts of the state. Within these limits its right of property and territorial jurisdiction are absolute, and exclude those of every other nation." Chancellor Kent avows the general doctrine and makes very

much broader claims in reference to the jurisdiction of the United States over adjacent waters, and says (Com., vol. 1, pp. 29, 30):

"Considering the great line of the American coasts, we have a right to claim for fiscal and defensive regulations a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of waters on our coasts, though included within lands stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the Capes of the Delaware, and from the South Cape of Florida to the Mississippi."

Dr. Woolsey (Int. Law, § 60) upholds the general doctrine, but thinks the claims of Chancellor Kent are too broad, and rather "out of character for a nation that has ever asserted the freedom of doubtful waters, as well as contrary to the spirit of more recent times."

Dr. Wharton (Int. Law, § 192) finishes the subject with the conclusion: "That it would seem more proper to adopt the test of cannon-shot, \* \* \* which would, in case of waters whose headlands belong to the same sovereign, exclude all bays more than eighteen miles in diameter, assuming the range of cannon-shot to be nine miles. But this should be made to yield to usage. If a particular nation has exercised dominion over a bay, and this has been acquiesced in by other nations, then the bay is to be regarded as belonging to such nation."

We are quite certain that none of the American courts have passed upon this subject, although decisions holding that specified waters are within or without the jurisdiction of the admiralty courts are numerous. The question has, however, been before the English courts upon two occasions at least.

Reg. v. Cunningham, Bell, Crown Cas. 72, was the case of a crime committed upon an American vessel lying in the Bristol Channel, about three-quarters of a mile off the shores of the county of Glamorgan, in Wales, but below or exterior to low-water mark, and perhaps ten miles from the shores of the county of Somerset, in England. The prisoners were indicted and tried in Glamorgan. The question was whether the crime was committed within the county of Glamorgan or upon the high seas. It was held that it was within the county. This crime was committed, it is true, within the marine league from shore, but the court did not rest its conclusion upon that ground. Lord Chief Justice Cockburn, delivering the opinion of the court, said:

"Looking at the local situation of this sea, it must be taken to belong to the counties, respectively, by the shores of which it is bounded. \* \* \* The whole of this inland sea, between the counties of Somerset and Glamorgan, is to be considered as within the counties by the shores of which its several ports are respectively bounded."



But perhaps the most thoroughly considered and important case is that of *Direct U. S. Cable Co. v. Anglo-American Tel. Co.* (in the House of Lords) 2 App. Cas. 349. It came up on an appeal from the Supreme Court of Newfoundland, against an order confirming an injunction preventing the Direct Cable Company from landing their wire upon the soil of Newfoundland, on the ground that it would be an infringement of the rights of the Anglo-American Company. The cable, as a matter of fact, was buoyed in Conception Bay, more than a marine league from shore, and it nowhere came within that distance from the shore, purposely to avoid coming within territorial jurisdiction. But it was asserted that the whole of Conception Bay was within the territory and jurisdiction of Newfoundland. The Supreme Court of the province so held, and the determination was upheld by the House of Lords in a somewhat elaborate opinion.

This opinion states that Conception Bay is a body of water having an average width of fifteen miles, a distance of forty miles from the head to one of the capes at the entrance, and fifty miles to the other, and a distance of twenty miles between the headlands. Coming to the question, the Lords say (page 419):

"We find an universal agreement that harbors, estuaries, and bays landlocked, belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is 'a bay' for this purpose.

"It seems generally agreed that where the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay, it is part of the territory, and with this idea, most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting, therefore, a width of one cannon-shot from shore to shore, or three miles; some a cannon-shot from each shore, or six miles; some an arbitrary distance of ten miles. All of these are rules which, if adopted, would exclude Conception Bay from the territory of Newfoundland, but also would have excluded from the territory of Great Britain that part of the Bristol Channel which in *Rcg. v. Cunningham* was decided to be in the county of Glamorgan. It does not appear to their lordships that jurists and text-writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the state possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination. If it were necessary in this case to lay down a rule the difficulty of the task would not deter their lordships from attempting to fulfill it. But in their opinion it is not necessary. It seems to them that, in point of fact, the British government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations. \* \* \* This would be very strong in the tribunals

of any country to show that by prescription this bay is a part of the exclusive territory of Great Britain. In a British tribunal it is decisive."

We must now examine the local circumstance, touching the status of Chesapeake Bay, and then determine whether those waters should be held to be the open ocean or jurisdictional waters of the United States in the light of these authorities.

The headlands are about twelve miles apart, and the bay is probably nowhere more than twenty miles in width. The length may be two hundred miles. To call it a bay is almost a misnomer. It is more a mighty river than an arm or inlet of the ocean. It is entirely encompassed about by our own territory, and all of its numerous branches and feeders have their rise and their progress wholly in and through our own soil. It cannot become an international commercial highway; it is not and cannot be made a roadway from one nation to another. \* \* \*

The legislation of Congress has assumed Chesapeake Bay to be within the territorial limits of the United States. \* \* \*

The position taken by this government and by England and France in the matter of the British brig *Grange*, captured in Delaware Bay in 1793 by the French vessel [privateer] *l'Embuscade* (1 Am. State Papers, 147, 149), has, it seems to us, an important bearing upon the question under discussion. The brig was seized and the crew made prisoners, the two foreign governments being at war. The British government must have demanded that the United States compel France to release the captured vessel on the ground that the seizure was unlawful as having been made in our territorial and neutral waters. The State Papers do not show this demand, but it is not material. The opinion of the Attorney General was asked, and was given somewhat elaborately by Mr. Randolph. 1 Op. Attys. Gen. 32. It quotes the text-writers, and concludes that the whole of Delaware Bay is within the territorial jurisdiction of the United States, regardless of the marine league or cannon-shot limit from the shore. The learned Attorney General says: "In like manner is excluded every consideration of how far the spot of seizure was capable of being defended by the United States; for although it will not be conceded that this could not be done, yet will it rather appear that the mutual rights of the states of New Jersey and Delaware up to the middle of the river supersede the necessity of such an investigation. No. The corner-stone of our claim is that the United States are proprietors of the lands on both sides of the Delaware from its head to its entrance into the sea."

Acting upon the opinion of the Attorney General, the Secretary of State, Mr. Jefferson, demanded that France should make restitution of the *Grange*, and set the prisoners taken upon her at liberty, which demand was promptly and cheerfully complied with by the French government.

If it be said that the mere claims of a nation to jurisdiction over adjacent waters are to be accepted with some degree of hesitation, then the action in reference to the *Grange* is of much weight, for there the claim made by the United States was promptly acquiesced in by two great foreign powers, when passions were excited, and when such acquiescence was greatly against the immediate interest of one of the combatants, as well as against the general interest of both.

It will hardly be said that Delaware Bay is any the less an inland sea than Chesapeake Bay. Its configuration is not such as to make it so, and the distance from Cape May to Cape Henlopen is apparently as great as that between Cape Henry and Cape Charles.

Reflection upon the subject has caused the court to consider this question of very considerable national importance. Contingencies might arise which would make it of very grave import. The "high sea" belongs to all alike. It is the great highway of nations. One cannot lawfully do anything upon it which any other has not the right to do. One cannot exercise sovereignty over it. Can an American court concede as much as to Chesapeake Bay? Other nations, by common consent of all, have well-recognized peaceable rights even in our territorial waters. Ought we to admit that they have any rights hostile to the United States, or can we permit belligerent operations between foreign nations within the shores of this bay? What injustice can be done to any other nation by the United States exercising sovereign control over these waters? What annoyance and what injury may not come to the United States through a failure to do so?

Considering therefore the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked, and but twelve miles apart; that it and its tributaries are wholly within our own territory; that the boundary lines of adjacent states encompass it; that from the earliest history of the country it has been claimed to be territorial waters, and that the claim has never been questioned; that it cannot become the pathway from one nation to another, and remembering the doctrines of the recognized authorities upon international law, as well as the holdings of the English courts as to the Bristol Channel and Conception Bay, and bearing in mind the matter of the brig *Grange* and the position taken by the government as to Delaware Bay, we are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the government of the United States, and no part of the "high seas" within the meaning of the term as used in section 5 of the act of June 5, 1872. \* \* \*

Judgment will be entered for the United States.

All concur.<sup>27</sup>

<sup>27</sup> In the case of *Dunham v. Lamphere*, 3 Gray, 268 (1855) before the Supreme Judicial Court of Massachusetts, Shaw, C. J., said: "We suppose the rule to be that these limits extend a marine league, or three geographical miles, from the shore; and in ascertaining the line of shore this limit does not follow each narrow inlet or arm of the sea, but when the inlet is so nar-

## UNITED STATES v. GREAT BRITAIN.

AWARD OF THE TRIBUNAL OF ARBITRATION IN THE QUESTION RELATING TO THE NORTH ATLANTIC COAST FISHERIES, THE HAGUE, SEPTEMBER 7, 1910.

(Final Report of the Agent of the United States, 1912. Vol. 1, p. 64.)

Preamble: Whereas, a special agreement between the United States of America and Great Britain, signed at Washington the 27th January, 1909, and confirmed by interchange of notes dated the 4th March, 1909, was concluded in conformity with the provisions of the general arbitration treaty between the United States of America and Great Britain, signed the 4th April, 1908, and ratified the 4th June, 1908;

And whereas, the said special agreement for the submission of questions relating to fisheries on the North Atlantic coast under the general treaty of arbitration concluded between the United States and Great Britain on the 4th day of April, 1908, is as follows:

Article 1. Whereas, by article 1 of the convention signed at London on the 20th day of October, 1818, between Great Britain and the United States, it was agreed as follows:

[For the material portion of the text of this article, see *The Schooner Washington*, ante, p. 229.]

"And whereas, differences have arisen as to the scope and meaning of the said article, and of the liberties therein referred to, and otherwise in respect of the rights and liberties which the inhabitants of the United States have or claim to have in the waters or on the shores therein referred to:

"It is agreed that the following questions shall be submitted for decision to a tribunal of arbitration constituted as hereinafter provided: \* \* \*

row that persons and objects can be discerned across it by the naked eye, the line of territorial jurisdiction stretches across from one headland to the other of such inlet."

In *Manchester v. Massachusetts*, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159 (1890), the court held, after an elaborate survey of English and American authorities, that the jurisdiction of Massachusetts included the marine belt surrounding it; that Buzzard's Bay, falling within the principle of *Dunham v. Lamphere*, should be and is governed by it, thereby making Buzzard's Bay for jurisdictional purposes part of Massachusetts; that, such bay being within Massachusetts, that commonwealth rightfully exercises all rights of ownership and possession, including fishing rights and privileges, therein; that in the absence of affirmative legislation on the part of Congress, vesting the regulation of fishing in such bays, state regulations, as in cases of pilot legislation, must remain with the state. Such bays therefore are not high seas in the sense of international law, and the apportionment of jurisdiction over such bodies of water between the respective states and the United States is a matter of municipal, not of international, law.

*Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331 (1893), is a remarkable case—unfortunately too long to print—in which the origin, nature, and extent of jurisdiction of the United States and the states over navigable waters are carefully and exhaustively discussed. As it is in large part a digest case, no short note of it can well be given.

"Question 5. From where must be measured the 'three marine miles of any of the coasts, bays, creeks, or harbors' referred to in the said article? \* \* \*"

And whereas, the parties to the said agreement have by common accord, in accordance with article 5, constituted as a tribunal of arbitration the following members of the Permanent Court at The Hague: Mr. H. Lammasch, Doctor of Law, professor of the University of Vienna, Aulic Councilor, member of the Upper House of the Austrian Parliament; his Excellency Jonkheer A. F. de Savornin Lohman, Doctor of Law, Minister of State, former Minister of the Interior, member of the Second Chamber of the Netherlands; the Honorable George Gray, Doctor of Laws, Judge of the United States Circuit Court of Appeals, former United States Senator; the Right Honorable Sir Charles Fitzpatrick, member of the Privy Council, Doctor of Laws, Chief Justice of Canada; the Honorable Luis Maria Drago, Doctor of Law, former Minister of Foreign Affairs of the Argentine Republic, member of the Law Academy of Buenos Aires;

And whereas, the agents of the parties to the said agreement have duly and in accordance with the terms of the agreement communicated to this tribunal their cases, counter-cases, printed arguments, and other documents;

And whereas, counsel for the parties have fully presented to this tribunal their oral arguments in the sittings held between the first assembling of the tribunal on 1st June, 1910, to the close of the hearings on 12th August, 1910;

Now, therefore, this tribunal having carefully considered the said agreement, cases, counter-cases, printed and oral arguments, and the documents presented by either side, after due deliberation makes the following decisions and awards: \* \* \*

Question 5. From where must be measured the "three marine miles of any of the coasts, bays, creeks, or harbors" referred to in the said article?

In regard to this question, Great Britain claims that the renunciation applies to all bays generally and

The United States contend that it applies to bays of a certain class or condition.

Now, considering that the treaty used the general term "bays" without qualification, the tribunal is of opinion that these words of the treaty must be interpreted in a general sense as applying to every bay on the coast in question that might be reasonably supposed to have been considered as a bay by the negotiators of the treaty under the general conditions then prevailing, unless the United States can adduce satisfactory proof that any restrictions or qualifications of the general use of the term were or should have been present to their minds.

And for the purpose of such proof the United States contend: \* \* \*

Second. That by the use of the term "liberty to fish" the United States manifested the intention to renounce the liberty in the waters

referred to only in so far as that liberty was dependent upon or derived from a concession on the part of Great Britain, and not to renounce the right to fish in those waters where it was enjoyed by virtue of their natural right as an independent state.

But the tribunal is unable to agree with this contention:

(a) Because the term "liberty to fish" was used in the renunciatory clause of the treaty of 1818 because the same term had been previously used in the treaty of 1783 which gave the liberty; and it was proper to use in the renunciation clause the same term that was used in the grant with respect to the object of the grant; and in view of the terms of the grant, it would have been improper to use the term "right" in the renunciation. Therefore the conclusion drawn from the use of the term "liberty" instead of the term "right" is not justified;

(b) Because the term "liberty" was a term properly applicable to the renunciation which referred not only to fishing in the territorial waters but also to drying and curing on the shore. This latter right was undoubtedly held under the provisions of the treaty and was not a right accruing to the United States by virtue of any principle of international law.

Third. The United States also contend that the term "bays of His Britannic Majesty's dominions" in the renunciatory clause must be read as including only those bays which were under the territorial sovereignty of Great Britain.

But the tribunal is unable to accept this contention:

(a) Because the description of the coast on which the fishery is to be exercised by the inhabitants of the United States is expressed throughout the treaty of 1818 in geographical terms and not by reference to political control; the treaty describes the coast as contained between capes;

(b) Because to express the political concept of dominion as equivalent to sovereignty, the word "dominion" in the singular would have been an adequate term and not "dominions" in the plural; this latter term having a recognized and well-settled meaning as descriptive of those portions of the earth which owe political allegiance to His Majesty; e. g., "His Britannic Majesty's dominions beyond the seas."

Fourth. It has been further contended by the United States that the renunciation applies only to bays six miles or less in width inter fauces terræ, those bays only being territorial bays, because the three-mile rule is, as shown by this treaty, a principle of international law applicable to coasts and should be strictly and systematically applied to bays.

But the tribunal is unable to agree with this contention:

(a) Because admittedly the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity,

of defense, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coast line. This interest varies, speaking generally in proportion to the penetration inland of the bay; but as no principle of international law recognizes any specified relation between the concavity of the bay and the requirements for control by the territorial sovereignty, this tribunal is unable to qualify by the application of any new principle its interpretation of the treaty of 1818 as excluding bays in general from the strict and systematic application of the three-mile rule; nor can this tribunal take cognizance in this connection of other principles concerning the territorial sovereignty over bays such as ten-mile or twelve-mile limits of exclusion based on international acts subsequent to the treaty of 1818 and relating to coasts of a different configuration and conditions of a different character;

(b) Because the opinion of jurists and publicists quoted in the proceedings conduce to the opinion that speaking generally the three-mile rule should not be strictly and systematically applied to bays; \* \* \*

(f) Because from the information before this tribunal it is evident that the three-mile rule is not applied to bays strictly or systematically either by the United States or by any other power;

(g) It has been recognized by the United States that bays stand apart, and that in respect of them territorial jurisdiction may be exercised farther than the marginal belt in the case of Delaware Bay by the report of the United States Attorney General of May 19, 1793; and the letter of Mr. Jefferson to Mr. Genet of November 8, 1793, declares the bays of the United States generally to be, "as being land-locked, within the body of the United States."

Fifth. In this latter regard it is further contended by the United States, that such exceptions only should be made from the application of the three-mile rule to bays as are sanctioned by conventions and established usage; that all exceptions for which the United States of America were responsible are so sanctioned; and that His Majesty's government are unable to provide evidence to show that the bays concerned by the treaty of 1818 could be claimed as exceptions on these grounds either generally, or except possibly in one or two cases, specifically.

But the tribunal, while recognizing that conventions and established usage might be considered as the basis for claiming as territorial those bays which on this ground might be called historic bays, and that such claims should be held valid in the absence of any principle of international law on the subject; nevertheless is unable to apply this, a contrario, so as to subject the bays in question to the three-mile rule, as desired by the United States:

(a) Because Great Britain has during this controversy asserted a claim to these bays generally, and has enforced such claim specific-

ally in statutes or otherwise, in regard to the more important bays such as Chaleurs, Conception and Miramichi; \* \* \*

Sixth. It has been contended by the United States that the words "coasts, bays, creeks or harbors" are here used only to express different parts of the coast and are intended to express and be equivalent to the word "coast," whereby the three marine miles would be measured from the sinuosities of the coast and the renunciation would apply only to the waters of bays within three miles.

But the tribunal is unable to agree with this contention: \* \* \*

(f) Because the tribunal is unable to understand the term "bays" in the renunciatory clause in other than its geographical sense, by which a bay is to be considered as an indentation of the coast, bearing a configuration of a particular character easy to determine specifically, but difficult to describe generally.

The negotiators of the treaty of 1818 did probably not trouble themselves with subtle theories concerning the notion of "bays"; they most probably thought that everybody would know what was a bay. In this popular sense the term must be interpreted in the treaty. The interpretation must take into account all the individual circumstances which for any one of the different bays are to be appreciated, the relation of its width to the length of penetration inland, the possibility and the necessity of its being defended by the state in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general.

For these reasons the tribunal decides and awards:

In case of bays the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast. \* \* \*

It is understood that nothing in these rules refers either to the Bay of Fundy considered as a whole apart from its bays and creeks or as to the innocent passage through the Gut of Canso, which were excluded by the agreement made by exchange of notes between Mr. Bacon and Mr. Bryce dated February 21, 1909, and March 4, 1909; or to Conception Bay, which was provided for by the decision of the Privy Council in the case of the Direct United States Cable Company v. The Anglo American Telegraph Company, in which decision the United States have acquiesced.

SCOTT INT.LAW



## IV. MARGINAL SEAS—THREE-MILE LIMIT

## THE QUEEN v. KEYN.

(Court of Crown Cases Reserved, 1876. L. R. 2 Exch. Div., 63.)

Case stated by Pollock, B.

Ferdinand Keyn was tried at the April sittings of the Central Criminal Court for the manslaughter of Jessie Dorcas Young.

On the part of the prosecution it was proved that Jessie Dorcas Young was a passenger by a British steamer called the *Strathclyde*, from London to Bombay, and that when off Dover the *Strathclyde* was run into by a steamer called the *Franconia*, whilst she was under the command and immediate direction of the prisoner, whereby the *Strathclyde* was sunk, and Jessie Dorcas Young was drowned.

The *Franconia* was a German vessel, carrying the German flag. She sailed from Hamburg with the prisoner, who is a German, in command, and a crew of seventy-three, nearly all of whom were Germans, and a French pilot. She was carrying the mail from Hamburg to St. Thomas in the West Indies, and put into Grimsby to take on board an English pilot, whose duty it was to conduct her down channel as far as the South Sand light, after which she would proceed to and touch at Havre, where she would land the English pilot and the French pilot, whose duty it was to conduct her from off Dungeness to Havre, and thence go to St. Thomas.

The *Franconia* had performed the same voyage six times.

The point at which the *Strathclyde* was run down by the *Franconia* was one mile and nine tenths of a mile S. S. E. from Dover pier-head, and within two and a half miles from Dover beach.

At the close of the case for the prosecution, the counsel for the prisoner objected that the Court had no jurisdiction. The learned judge, without expressing any opinion, ruled that the Court had jurisdiction.

Witnesses were called for the prisoner. The jury found him guilty.

The question for the opinion for the Court for Crown Cases Reserved was whether the Central Criminal Court had jurisdiction.

May 6, 13. The case was argued before Kelly, C. B., Sir R. Phillimore, Lush, Field, and Lindley, JJ., and Pollock, B., by Benjamin, Q. C. (Cohen, Q. C., Phillimore, and Stubbs with him), for the prisoner, and by Sir H. Giffard, S. G. (Poland, C. Bowen, and Straight with him), for the prosecution.

The Court being divided, the case was directed to be reargued.

June 16, 17, 21, 22, 23. The case was again argued before Cockburn, C. J., Lord Coleridge, C. J., Kelly, C. B., Sir R. Phillimore, Bramwell, Pollock, and Amphlett, BB., and Lush, Brett, Grove, Denman, Archibald (1), Field and Lindley, JJ.

The arguments and the authorities cited sufficiently appear from the judgments.

Cur. adv. vult.

Nov. 11, 13. The following judgments were delivered: \* \* \*

Lord COLERIDGE, C. J.<sup>22</sup> I have had the advantage of reading and considering the judgments which have been already delivered, and that also which will be delivered after mine by the head of this Court. \* \* \* I agree in thinking it clear that unless the place where the offense was committed was part of the realm of England locally, or unless the offense itself was committed on board a British ship, whether the British ship was locally within the realm of England, or without it, the conviction cannot stand.

But, first, I think the offense was committed within the realm of England; and if so, there was jurisdiction to try it. \* \* \* Now the offense was committed much nearer to the line of low-water mark than three miles; and therefore, in my opinion, upon English territory. I pass by for the moment the question of the exact limit of the realm of England beyond low-water mark, I am of opinion that it does go beyond low-water mark; and if it does, no limit has ever been suggested which would exclude from the realm the place where this offense was committed. But for the difference of opinion upon the Bench, and for the great deference which is due to those who differ from me, I should have said it was impossible to hold that England ended with low-water mark. I do not of course forget that it is freely admitted to be within the competency of Parliament to extend the realm how far soever it pleases to extend it by enactments, at least so as to bind the tribunals of the country; and I admit equally freely that no statute has in plain terms, or by definite limits, so extended it.

But, in my judgment, no Act of Parliament was required. The proposition contended for, as I understand, is that for any act of violence committed by a foreigner upon an English subject within a few feet of low-water mark, unless it happens on board a British ship, the foreigner cannot be tried, and is dispensable. \* \* \*

By a consensus of writers, without one single authority to the contrary, some portion of the coast-waters of a country is considered for some purposes to belong to the country the coast of which they wash. \* \* \* This is established as solidly, as, by the very nature of the case, any proposition of international law can be. Strictly speaking, international law is an inexact expression and it is apt to mislead if its inexactness is not kept in mind. Law implies a law-giver, and a tribunal capable of enforcing it and coercing its transgressors. But there is no common law-giver to sovereign states and no tribunal has the power to bind them by decrees or coerce them if they

<sup>22</sup> Parts of the opinion of Lord Chief Justice Coleridge and the opinions of Brett and Amphlett, J. A., Grove, Denman, and Lindley, JJ., to the same effect as the opinion of Lord Chief Justice Coleridge, are omitted.

transgress. The law of nations is that collection of usages which civilized states have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be matter of evidence. Treaties and acts of state are but evidence of the agreement of nations, and do not in this country at least per se bind the tribunals. Neither, certainly does a consensus of jurists; but it is evidence of the agreement of nations on international points; and on such points, when they arise, the English courts give effect, as part of English law, to such agreement. \* \* \*

We find a number of men of education, of many different nations, most of them quite uninterested in maintaining any particular thesis as to the matter now in question, agreeing generally for nearly three centuries in the proposition that the territory of a maritime country extends beyond low-water mark. I can hardly myself conceive stronger evidence to show that, as far as it depends on the agreement of nations, the territory of maritime countries does so extend. \* \* \* If the matter were to be determined for the first time, I should not hesitate to hold that civilized nations had agreed to this prolongation of the territory of maritime states, upon the authority of the writers who have been cited in this argument as laying down the affirmative of this proposition. \* \* \*

Furthermore, it has been shown that English judges have held repeatedly that these coast-waters are portions of the realm. It is true that this particular point does not seem ever distinctly to have arisen. But Lord Coke, Lord Stowell, Dr. Lushington, Lord Hatherley, L. C., Erle, C. J., and Lord Wensleydale (and the catalogue might be largely extended) have all, not hastily, but in writing, in prepared and deliberate judgments, as part of the reasoning necessary to support their conclusions, used language, some of them repeatedly, which I am unable to construe, except as asserting, on the part of these eminent persons, that the realm of England, the territory of England, the property of the state and Crown of England over the water and the land beneath it, extends at least so far beyond the line of low water on the English coast, as to include the place where this offense was committed. \* \* \* The English and American text writers, and two at least of the most eminent American judges, Marshall and Story, have held the same thing.

Further—at least in one remarkable instance—the British Parliament has declared and enacted this to be the law. In the present reign two questions arose between Her Majesty and the Prince of Wales as to the property in minerals below high-water mark around the coast of Cornwall. The first question was as to the property in minerals between high- and low-water mark around the coasts of that country; and as to the property in minerals below low-water mark won by an extension of workings begun above low-water mark. \* \* \* The whole argument on the part of the Crown was founded on the proposition

that the fundus maris below low-water mark, and therefore beyond the limits of the county of Cornwall, belonged in property to the Crown. The Prince was in possession of the disputed mines; he had worked them from land undoubtedly his own; and, therefore, unless the Crown had a right of property in the bed of the sea, not as first occupier—for the Prince was first occupier, and was in occupation—the Crown must have failed. \* \* \* Sir John Patterson \* \* \* thus expressed himself: "I am of opinion, and so decide, that the right to the minerals below low-water mark remains and is vested in the Crown, although those minerals may be won by workings commenced above low-water mark and extended below it," and he recommended the passing of an Act of Parliament to give practical effect to his decision, so far as it was in favor of the Crown. The Act of Parliament accordingly was passed, the 21 and 22 Vict. c. 109. \* \* \*

We have therefore, it seems, the express and definite authority of Parliament for the proposition that the realm does not end with low-water mark, but that the open sea and the bed of it are part of the realm and of the territory of the sovereign. If so, it follows that British law is supreme over it, and that the law must be administered by some tribunal. It cannot, for the reasons assigned by my Brother Brett, be administered by the judges of oyer and terminer; it can be, and always could be, by the Admiralty, and if by the Admiralty, then by the Central Criminal Court. \* \* \*

LUSH, J.<sup>29</sup> I have already announced that, although I had prepared a separate judgment, I did not feel it necessary to deliver it, because, having since perused the judgment which the Lord Chief Justice has just read, I found that we agreed entirely in our conclusions, and that I agreed in the main with the reasons upon which those conclusions are founded. I wish, however, to guard myself from being supposed to adopt any words or expressions which may seem to imply a doubt as to the competency of Parliament to legislate as it may think fit for these waters. I think that usage and the common consent of nations, which constitute international law, have appropriated these waters to the adjacent State to deal with them as the State may deem expedient for its own interests. They are, therefore, in the language of diplomacy and of international law, termed by a convenient metaphor the territorial waters of Great Britain, and the same or equivalent phrases are used in some of our statutes denoting that this belt of sea is under the exclusive dominion of the State. But the dominion is the dominion of Parliament, not the dominion of the common law. That extends no further than the limits of the realm. In the reign of Richard II, the realm consisted of the land within the body of the counties. All beyond low-water mark was part of the high seas. At that period

<sup>29</sup> The opinion of Cockburn, C. J., and the concurring opinions of Kelly, C. B., Bramwell, J. A., Field, J., Sir B. Phillimore and Pollock, B., are omitted.

the three-mile radius had not been thought of. International law, which, upon this subject at least, has grown up since that period, cannot enlarge the area of our municipal law, nor could treaties with all the nations of the world have that effect. That can only be done by Act of Parliament. As no such act has been passed, it follows that what was out of the realm then is out of the realm now, and what was part of the high seas then is part of the high seas now; and upon the high seas the Admiralty jurisdiction was confined to British ships. Therefore, although, as between nation and nation, these waters are British territory, as being under the exclusive dominion of Great Britain, in judicial language they are out of the realm, and any exercise of criminal jurisdiction over a foreign ship in these waters must in my judgment be authorized by an Act of Parliament. Conviction quashed.<sup>80</sup>

<sup>80</sup> The *Franconia* was really decided, as pointed out by W. E. Hall, *International Law* (4th Ed. 1895) 213, note, "upon grounds of municipal and not of international law."

In consequence of this decision the Territorial Waters Jurisdiction Act of 1878 (41 and 42 Vict. c. 73) was passed, which would seem to adopt the opinion of the minority judges. The preamble to this important statute declares that "the rightful jurisdiction of her majesty, her heirs and successors extends and has always extended over the open seas adjacent to the coasts of the United Kingdom, and of all other parts of her majesty's dominions to such a distance as is necessary for the defence and security of such dominions," and that "it is expedient that all offenses committed on the open sea within a certain distance of the coasts of the United Kingdom and of all other parts of her majesty's dominions, by whomsoever committed, should be dealt with according to law."

For the proper exercise of jurisdiction in such cases it is provided by the act that,

"An offense committed by a person, whether he is or is not a subject of her majesty, on the open sea within the territorial waters of her majesty's dominions, is an offense within the jurisdiction of the admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offense may be arrested, tried, and punished accordingly."

But no proceedings under this act are to be instituted against a foreigner, without the consent and certificate of a secretary of state, or in the case of a colony, the certificate of the governor.

"The territorial waters of her majesty's dominions,' in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of her majesty's dominions, as is deemed by international law to be within the territorial sovereignty of her majesty; and for the purpose of any offense declared by this act to be within the jurisdiction of the admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of her majesty's dominions."

See *Mortensen v. Peters*, 14 Scots L. T. R. 227 (1906), 1 *American Journal of International Law*, 526 (1907), in which it was held, according to A. Pearce Higgins' note to Hall's *International Law* (7th Ed. 1917) 160, that: "An alien could be convicted of fishing in a manner contrary to 52 & 53 Vict. c. 23, § 6, which prohibits beam and other trawling within specified areas, one of which is the Moray Firth; and that it was no defence that the act had been committed beyond the three-mile limit though within the limits of the Moray Firth. On diplomatic representations being made to the Foreign Office, the fine was remitted. The Trawling in Prohibited Areas Prevention Act, 1909 (9 Ed. VII, c. 8), to some extent meets the difficulty raised in the before-mentioned case. *Oppenheim*, I, § 192. Cf. *Westlake*, *Peace*, 203."

## GREAT BRITAIN v. UNITED STATES.

## BEHRING SEA ARBITRATION.

*Award of the Tribunal of Arbitration Constituted under the Treaty Concluded at Washington, February 29, 1892, 1893. 1 Malloy's Treaties, Conventions, International Acts, Protocols, and Agreements between the United States and Other Powers, 1776-1900, 751.)*

Whereas, by a Treaty between the United States of America and Great Britain, signed at Washington, February 29, 1892, the ratifications of which by the governments of the two countries were exchanged at London on May 7, 1892, it was, amongst other things, agreed and concluded that the questions which had arisen between the government of the United States of America and the government of Her Britannic Majesty, concerning the jurisdictional rights of the United States in the waters of Behring's Sea, and concerning also the preservation of the fur-seal in or habitually resorting to the said sea, and the rights of the citizens and subjects of either country as regards the taking of fur-seals in or habitually resorting to the said waters, should be submitted to a Tribunal of Arbitration to be composed of seven arbitrators, who should be appointed in the following manner, that is to say: Two should be named by the President of the United States; two should be named by Her Britannic Majesty; His Excellency the President of the French Republic should be jointly requested by the high contracting parties to name one; His Majesty the King of Italy should be so requested to name one; His Majesty the King of Sweden and Norway should be so requested to name one; the seven arbitrators to be so named should be jurists of distinguished reputation in their respective countries, and the selecting powers should be requested to choose, if possible, jurists who are acquainted with the English language.

And whereas, it was further agreed by article II of the said Treaty that the arbitrators should meet at Paris within twenty days after the delivery of the counter-cases mentioned in article IV, and should proceed impartially and carefully to examine and decide the questions which had been or should be laid before them as in the said Treaty provided on the part of the governments of the United States and of Her Britannic Majesty respectively, and that all questions considered by the tribunal, including the final decision, should be determined by a majority of all the arbitrators;

And whereas, by article VI of the said Treaty, it was further provided as follows: "In deciding the matters submitted to the said arbitrators, it is agreed that the following five points shall be submitted to them in order that their award shall embrace a distinct decision upon each of said five points, to wit:

"1. What exclusive jurisdiction in the sea now known as the Behring's Sea, and what exclusive rights in the seal fisheries therein, did

Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

"2. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

"3. Was the body of water now known as Behring's Sea included in the phrase Pacific Ocean, as used in the Treaty of 1825 between Great Britain and Russia; and what rights, if any in the Behring's Sea were held and exclusively exercised by Russia after said Treaty?

"4. Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in Behring's Sea east of the water boundary, in the Treaty between the United States and Russia of the 30th of March, 1867, pass unimpaired to the United States under that Treaty?

"5. Has the United States any right, and, if so, what right, of protection or property in the fur-seals frequenting the islands of the United States in Behring's Sea when such seals are found outside the ordinary three-mile limit?"

"And whereas, by article VII of the said Treaty, it was further agreed as follows:

"If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to the Behring's Sea, the arbitrators shall then determine what concurrent regulations, outside the jurisdictional limits of the respective governments, are necessary, and over what waters such regulations should extend.

"The high contracting parties furthermore agree to co-operate in securing the adhesion of other powers to such regulations;"

And whereas, by article VIII of the said Treaty, after reciting that the high contracting parties had found themselves unable to agree upon a reference which should include the question of the liability of each for the injuries alleged to have been sustained by the other, or by its citizens, in connection with the claims presented and urged by it, and that "they were solicitous that this subordinate question should not interrupt or longer delay the submission and determination of the main questions," the high contracting parties agreed that "either of them might submit to the arbitrators any question of fact involved in said claims and ask for a finding thereon, the question of the liability of either government upon the facts found, to be the subject of further negotiation";

And whereas, the President of the United States of America named the Honorable John M. Harlan, Justice of the Supreme Court of the United States, and the Honorable John T. Morgan, Senator of the United States, to be two of the said arbitrators, and Her Britannic Majesty named the Right Honorable Lord Hannen and the Honorable Sir John Thompson, Minister of Justice and Attorney General for Canada, to be two of the said arbitrators, and His Excellency the

President of the French Republic named the Baron De Courcel, Senator, Ambassador of France, to be one of the said arbitrators, and His Majesty the King of Italy named the Marquis Emilio Visconti Venosta, former Minister of Foreign Affairs and Senator of the Kingdom of Italy, to be one of the said arbitrators, and His Majesty the King of Sweden and Norway named Mr. Gregers Gram, Minister of State, to be one of the said arbitrators;

And whereas, we, the said arbitrators so named and appointed, having taken upon ourselves the burden of the said arbitration, and having duly met at Paris, proceeded impartially and carefully to examine and decide all the questions submitted to us the said arbitrators, under the said Treaty, or laid before us as provided in the said Treaty on the part of the governments of Her Britannic Majesty and the United States respectively:

Now we, the said arbitrators, having impartially and carefully examined the said questions, do in like manner by this our award decide and determine the said questions in the manner following, that is to say: We decide and determine as to the five points mentioned in article VI as to which our award is to embrace a distinct decision upon each of them:

As to the first of the said five points, we, the said Baron De Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine as follows:

By the Ukase of 1821, Russia claimed jurisdiction in the sea now known as the Behring's Sea, to the extent of 100 Italian miles from the coasts and islands belonging to her, but, in the course of the negotiations which led to the conclusion of the Treaties of 1824 with the United States and of 1825 with Great Britain, Russia admitted that her jurisdiction in the said sea should be restricted to the reach of cannon shot from shore, and it appears that, from that time up to the time of the cession of Alaska to the United States, Russia never asserted in fact or exercised any exclusive jurisdiction in Behring's Sea or any exclusive rights in the seal fisheries therein beyond the ordinary limit of territorial waters.

As to the second of the said five points, we, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine that Great Britain did not recognize or concede any claim, upon the part of Russia, to exclusive jurisdiction as to the seal fisheries in Behring Sea, outside of ordinary territorial waters.

As to the third of the said five points, as to so much thereof as requires us to decide whether the body of water now known as Behring Sea was included in the phrase "Pacific Ocean" as used in the Treaty of 1825 between Great Britain and Russia, we, the said arbitrators, do unanimously decide and determine that the body of water now



known as the Behring Sea was included in the phrase "Pacific Ocean" as used in the said Treaty.

And as to so much of the said third point as requires us to decide what rights, if any, in the Behring Sea were held and exclusively exercised by Russia after the said Treaty of 1825, we, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine that no exclusive rights of jurisdiction in Behring Sea and no exclusive rights as to the seal fisheries therein, were held or exercised by Russia outside of ordinary territorial waters after the Treaty of 1825.

As to the fourth of the said five points, we, the said arbitrators, do unanimously decide and determine that all the rights of Russia as to jurisdiction and as to the seal fisheries in Behring Sea, east of the water boundary, in the Treaty between the United States and Russia of the 30th of March, 1867, did pass unimpaired to the United States under the said Treaty.

As to the fifth of the said five points, we, the said Baron de Courcel, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine that the United States has not any right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit. \* \* \* 31

<sup>31</sup> In *United States v. Bull*, 15 Philippine Reports, 7, 15 (1910), the Supreme Court of the Philippine Islands sustained an indictment under a statute of the Philippine Islands for failure to provide suitable means for securing animals, although transported from Formosa upon a foreign vessel to the Philippine Islands.

Mr. Justice Elliott held, for the court, that the statute was not applicable until the vessel came within American jurisdiction, but that it began to apply the moment the vessel entered American jurisdiction. In the course of his opinion the learned Justice said:

"The United States has adhered consistently to the view that when a merchant vessel enters a foreign port it is subject to the jurisdiction of the local authorities, unless the local sovereignty has by act of acquiescence or through treaty arrangements consented to waive a portion of such jurisdiction. 15 Op. Atty. Gen. U. S. 178; 2 Moore, Int. Law Dig. § 204; article by Dean Gregory, Mich. Law Review, vol. II, No. 5."

See, *The Elida*, Supreme Prize Court of Berlin, 1915, *Entscheidungen des Oberprisengerichts in Berlin*, 1918, 9, holding that jurisdiction universally exercised within three miles from low-water mark cannot be extended without the consent of the nation sought to be affected, and that the general rule can only be varied by general agreement.

V. PRESCRIPTION <sup>82</sup>

VIRGINIA v. TENNESSEE.

Supreme Court of the United States, 1892. 148 U. S. 508, 18 Sup. Ct. 728, 37 L. Ed. 537.)

In 1802 the states of Tennessee and Virginia settled a protracted boundary dispute between the two states which had lasted over a century between them or their predecessors in interest. A line was run by the commissioners of both states and solemnly ratified in 1803 by both Legislatures. In 1856, on account of the old marks being somewhat effaced, duly authorized commissioners of the two states re-marked the old line, which action was approved by Tennessee. Virginia withdrew her approval, and demanded that a new set of commissioners re-run and re-mark the line.

Virginia in the bill filed in this court asked that the agreement of 1803 be declared null and void, as being made without the consent of Congress, and claimed that it ran too far north, so as unjustly to include a strip of land varying from two to eight miles in width and one hundred and thirteen miles in length. The bill of complaint prays that this court establish the true boundary line in accordance with the ancient chartered rights of the commonwealth.

Mr. Justice FIELD delivered the opinion of the court.<sup>83</sup>

This is a suit to establish by judicial decree the true boundary line between the states of Virginia and Tennessee. It embraces a controversy of which this court has original jurisdiction, and in this respect the judicial department of our government is distinguished from the ordinary department of any other country, drawing to itself by the ordinary modes of peaceful procedure the settlement of questions as to boundaries and consequent rights of soil and jurisdiction between states, possessed, for purposes of internal government, of the powers of independent communities, which otherwise might be the fruitful cause of prolonged and harassing conflicts. \* \* \*

Independently of any effect due to the compact as such, a boundary line between states or provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary. Lord Hardwicke, in *Penn v. Lord Baltimore*,

<sup>82</sup> For a consideration of the doctrine of prescription and laches, and their application to the relations of nations, see the opinion of Ralston, Umpire of the Italian-Venezuelan Arbitration Commission of 1903 in the *Gentini Case*, Ralston's *Venezuelan Arbitrations* of 1903, p. 720.

<sup>83</sup> The statement of facts is rewritten and parts of the opinion are omitted.

1 Vesey, Sen. 444, 448; *Boyd v. Graves*, 4 Wheat. 513, 4 L. Ed. 628; *Rhode Island v. Massachusetts*, 12 Pet. 657, 734, 9 L. Ed. 1233; *United States v. Stone*, 2 Wall. 525, 537, 17 L. Ed. 765; *Kellogg v. Smith*, 7 Cush. (Mass.) 375, 382; *Chenery v. Waltham*, 8 Cush. (Mass.) 327; *Hunt on Boundaries* (3d Ed.) 306.

As said by this court in the recent case of the *State of Indiana v. Kentucky*, 136 U. S. 479, 510, 10 Sup. Ct. 1051, 34 L. Ed. 329: "It is a principle of public law, universally recognized, that long acquiescence in the possession of territory, and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority." In the case of *Rhode Island v. Massachusetts*, 4 How. 591, 639, 11 L. Ed. 1116, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies, said: "Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary."

Vattel, in his *Law of Nations*, speaking on this subject, says: "The tranquillity of the people, the safety of states, the happiness of the human race, do not allow that the possessions, empire, and other rights of nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title." Book II, c. 11, § 149. And Wheaton, in his *International Law*, says: "The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called 'prescription,' is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one state excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question." Part II, c. 4, § 164.

There are also moral considerations which should prevent any disturbance of long recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to country, to home and to family, on which is based all that is dearest and most valuable in life.

Notwithstanding the legislative declaration of Virginia in 1803 that the line marked by the joint commissioners of the two states was ratified as the true and real boundary between them, and the repeated reaffirmation of the same declaration in her laws since that date, notably in the Code of 1858, in the Code of 1860 and in the Code of 1887; notwithstanding that the state has in various modes attested to the correctness of the boundary—by solemn affirmation in terms, by legislation, in the administration of its government, in the levy of taxes and the election of officers, and in its acquiescence for over eighty-five years, embracing nearly the lives of three generations, she now, by her bill, seeks to throw aside the obligation from her legislative declaration, because, as alleged, not made upon the express consent, in terms, of Congress, although such consent has been indicated by long acquiescence in the assumption of the validity of the proceedings resulting in the establishment of the boundary, and to have a new boundary line between Virginia and Tennessee established running due east and west on latitude thirty-six degrees thirty minutes north. But to this position there is, in addition to what has already been said, a conclusive answer in the language of this court in *Poole v. Fleege*, 11 Pet. 185, 209, 9 L. Ed. 680. In that case Mr. Justice Story, after observing that "it is a part of the general right of sovereignty belonging to independent nations to establish and fix the disputed boundaries between their respective territories, and the boundaries so established and fixed by compact between nations become conclusive upon all the subjects and citizens thereof, and bind their rights and are to be treated to all intents and purposes, as the true and real boundary," adds: "This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the states of this Union, unless it has been surrendered under the Constitution of the United States. So far from there being any pretence of such a general surrender of the right, it is expressly recognized by the Constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress." The Constitution in imposing this limitation plainly admits that with such consent a compact as to boundaries may be made between two states; and it follows that when thus made it has full validity, and all the terms and conditions of it are equally obligatory upon the citizens of both states.

The compact in this case having received the consent of Congress, though not in express terms, yet impliedly, and subsequently, which is equally effective, became obligatory and binding upon all the citizens of both Virginia and Tennessee. Nor is it any objection that there may have been errors in the demarcation of the line which the states thus by their compact sanctioned. After such compacts have been adhered to for years, neither party can be absolved from them upon showing errors, mistakes or misapprehension of their terms, or in the line

established; and this is a complete and perfect answer to the complainant's position in this case. \* \* \*

Our judgment, therefore, is that the boundary line established by the states of Virginia and Tennessee by the compact of 1803 is the true boundary between them, and that on a proper application, based upon a showing that any marks for the identification of that line have been obliterated or have become indistinct, an order may be made, at any time during the present term, for the restoration of such marks without any change of the line. \* \* \*

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### SECTION 3.—SERVITUDES

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#### UNITED STATES v. WINANS.

(Supreme Court of the United States, 1905. 198 U. S. 371, 25 Sup. Ct. 662, 49 L. Ed. 1089.)

The facts are stated in the opinion.

Mr. Justice McKENNA delivered the opinion of the court.

This suit was brought to enjoin the respondents from obstructing certain Indians of the Yakima Nation in the state of Washington from exercising fishing rights and privileges on the Columbia river in that state, claimed under the provisions of the treaty between the United States and the Indians, made in 1859.

There is no substantial dispute of facts, or none that is important to our inquiry.

The treaty is as follows:

"Article I. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them. \* \* \*

"Article II. There is, however, reserved from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries: \* \* \*

"All of which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the mean-

time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

"Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named. \* \* \*

"Article III. And provided, that, if necessary for the public convenience, roads may be run through the said reservation; and, on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

"The exclusive right of taking fish in all the streams where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land. \* \* \*

"Article X. And provided, that there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisuouse or Wenatshapam river, and known as the "Wenatshapam fishery," which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations." 12 Stat. 951.

The respondents or their predecessors in title claim under patents of the United States the lands bordering on the Columbia river and under grants from the state of Washington to the shore land which, it is alleged, fronts on the patented land. They also introduced in evidence licenses from the state to maintain devices for taking fish, called fish wheels.

At the time the treaty was made the fishing places were part of the Indian country, subject to the occupancy of the Indians, with all the rights such occupancy gave. The object of the treaty was to limit the occupancy to certain lands and to define rights outside of them.

The pivot of the controversy is the construction of the second paragraph. Respondents contend that the words "the right of taking fish at all usual and accustomed places in common with the citizens of the territory" confer only such rights as a white man would have under the conditions of ownership of the lands bordering on the river, and under the laws of the state, and, such being the rights conferred, the respondents further contend that they have the power to exclude the Indians

from the river by reason of such ownership. Before filing their answer respondents demurred to the bill. The court overruled the demurrer, holding that the bill stated facts sufficient to show that the Indians were excluded from the exercise of the rights given them by the treaty. The court further found, however, that it would "not be justified in issuing process to compel the defendants to permit the Indians to make a camping ground of their property while engaged in fishing." *United States v. Winans* (C. C.) 73 Fed. 72. The injunction that had been granted upon the filing of the bill was modified by stipulation in accordance with the view of the court.

Testimony was taken on the issues made by the bill and answer, and upon the submission of the case the bill was dismissed, the court applying the doctrine expressed by it in the *United States v. Alaska Packers' Ass'n* (C. C.) 79 Fed. 152; *The James G. Swan* (D. C.) 50 Fed. 108, expressing its views as follows:

"After the ruling on the demurrer the only issue left for determination in this case is as to whether the defendants have interfered or threatened to interfere with the rights of the Indians to share in the common right of the public of taking fish from the Columbia river, and I have given careful consideration to the testimony bearing upon this question. I find from the evidence that the defendants have excluded the Indians from their own lands, to which a perfect absolute title has been acquired from the United States government by patents, and they have more than once instituted legal proceedings against the Indians for trespassing, and the defendants have placed in the river in front of their lands fishing wheels for which licenses were granted to them by the state of Washington, and they claim the right to operate these fishing wheels, which necessitates the exclusive possession of the space occupied by the wheels. Otherwise the defendants have not molested the Indians nor threatened to do so. The Indians are at the present time on an equal footing with the citizens of the United States who have not acquired exclusive proprietary rights, and this it seems to me is all that they can legally demand with respect to fishing privileges in waters outside the limits of Indian reservations under the terms of their treaty with the United States."

The remarks of the court clearly stated the issue and the grounds of decision. The contention of the respondents was sustained. In other words, it was decided that the Indians acquired no rights but what any inhabitant of the territory or state would have; indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the nation for more. And we have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand in all cases where power is exerted by the strong over those

to whom they owe care and protection," and counterpoise the inequality "by the superior justice which looks only to the substance of the right without regard to technical rules." *Choctaw Nation v. United States*, 119 U. S. 1, 7 Sup. Ct. 75, 30 L. Ed. 306; *Jones v. Meehan*, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49. How the treaty in question was understood may be gathered from the circumstances.

The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds as dealings between private individuals. The reservations were in large areas of territory and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved "in common with citizens of the territory." As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given "the right of taking fish at all usual and accustomed places," and the right "of erecting temporary buildings for curing them." The contingency of the future ownership of the lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the state and its grantees.

The respondents urge an argument based upon the different capacities of white men and Indians to devise and make use of instrumentalities to enjoy the common right. Counsel say: "The fishing right was in common, and aside from the right of the state to license fish wheels the wheel fishing is one of the civilized man's methods, as legitimate as the substitution of the modern combined harvester for the ancient sickle and flail." But the result does not follow that the Indians may be absolutely excluded. It needs no argument to show that the superiority of a combined harvester over the ancient sickle neither increased nor decreased rights to the use of land held in com-



mon. In the actual taking of fish white men may not be confined to a spear or crude net, but it does not follow that they may construct and use a device which gives them exclusive possession of the fishing places, as it is admitted a fish wheel does. Besides, the fish wheel is not relied on alone. Its monopoly is made complete by a license from the state. The argument based on the inferiority of the Indians is peculiar. If the Indians had not been inferior in capacity and power, what the treaty would have been, or that there would have been any treaty, would be hard to guess.

The construction of the treaty disposes of certain subsidiary contentions of respondents. The Land Department could grant no exemptions from its provisions. It makes no difference, therefore, that the patents issued by the department are absolute in form. They are subject to the treaty as to the other laws of the land.

It is further contended that the rights conferred upon the Indians are subordinate to the powers acquired by the state upon its admission into the Union. In other words, it is contended that the state acquired, by its admission into the Union "upon an equal footing with the original states," the power to grant rights in or to dispose of the shore lands upon navigable streams, and such power is subject only to the paramount authority of Congress with regard to public navigation and commerce. The United States, therefore, it is contended, could neither grant nor retain rights in the shore or to the lands under water.

The elements of this contention and the answer to it are expressed in *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331. It is unnecessary, and it would be difficult, to add anything to the reasoning of that case. The power and rights of the states in and over shore lands were carefully defined, but the power of the United States, while it held the country as a territory, to create rights which would be binding on the states was also announced, opposing the dicta scattered through the cases, which seemed to assert a contrary view. It was said by the court, through Mr. Justice Gray:

"Notwithstanding the dicta contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high water mark of navigable waters in a Territory of the United States, it is evident that this is not strictly true. \* \* \* By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only Government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a territorial condition. *American Ins. Co. v. Canter*, 1 Pet. 511, 542 [7 L. Ed. 242]; *Benner v. Porter*, 9 How. 235, 242 [13 L. Ed. 119]; *Cross v. Harrison*, 16 How. 164, 193 [14 L. Ed. 889]; *National Bank v. Yankton County*, 101 U. S. 129, 133 [25 L. Ed. 1046]; *Murphy v. Ramsey*, 114 U. S. 15, 44 [5 Sup. Ct. 747, 29 L. Ed. 47]; *Mormon Church v. United States*,

136 U. S. 1, 42, 43 [10 Sup. Ct. 792, 34 L. Ed. 478]; *McAllister v. United States*, 141 U. S. 174, 181 [11 Sup. Ct. 949, 35 L. Ed. 693]."

Many cases were cited. And it was further said:

"We cannot doubt, therefore, that Congress has the power to make grants of land below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territory."

The extinguishment of the Indian title, opening the land for settlement and preparing the way for future states, were appropriate to the objects for which the United States held the territory. And surely it was within the competency of the nation to secure to the Indians such a remnant of the great rights they possessed as "taking fish at all usual and accustomed places." Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised.

The license from the state, which respondents plead to maintain a fishing wheel, gives no power to them to exclude the Indians, nor was it intended to give such power. It was the permission of the state to use a particular device. What rights the Indians had were not determined or limited. This was a matter for judicial determination regarding the rights of the Indians and rights of the respondents. And that there may be an adjustment and accommodation of them the Solicitor General concedes and points out the way. We think, however, that such adjustment and accommodation are more within the province of the Circuit Court in the first instance than of this court.

Decree reversed and the case remanded for further proceedings in accordance with this opinion.

Mr. Justice WHITE dissents.

### UNITED STATES v. GREAT BRITAIN.

(Award of the Tribunal of Arbitration in the Question Relating to the North Atlantic Coast Fisheries, The Hague, September 7, 1910. Final Report of the Agent of the United States, 1912, vol. 1, p. 64.)

By a special agreement between the two countries, dated January 27, 1909, the following question was submitted for their determination:<sup>84</sup> Is the exercise of the fishing liberty, under the convention of October 20, 1818,<sup>85</sup> subject, "without the consent of the United States, to reasonable regulation by Great Britain, Canada, or Newfoundland

<sup>84</sup> For a statement of the agreement to submit this phase of the North Atlantic Coast Fisheries dispute to arbitration, see ante, p. 238.

<sup>85</sup> For the text of the convention of October 20, 1818, and the composition of the Tribunal, see ante, p. 238.

in the form of municipal laws, ordinances, or rules, as, for example, to regulations in respect of (1) the hours, days, or seasons when fish may be taken on the treaty coasts; (2) the method, means and implements to be used in the taking of fish or in the carrying on of fishing operations on such coasts; (3) any other matters of a similar character relating to fishing; such regulations being reasonable? \* \* \*

Counsel for the United States contended that the fishing liberty in question was an international servitude and that as such its exercise was not subject to local legislation without the consent of the United States had and received. Counsel for Great Britain denied that the liberty in question was an international servitude and that, if it were, its exercise was subject to the local laws of Great Britain or its colonies. On the question of an international servitude the tribunal delivered the following award on September 7, 1910:

Question I, thus submitted to the Tribunal, resolves itself into two main contentions:

First. Whether the right of regulating reasonably the liberties conferred by the Treaty of 1818 resides in Great Britain;

Second. And, if such right does so exist, whether such reasonable exercise of the right is permitted to Great Britain without the accord and concurrence of the United States.

The Treaty of 1818 contains no explicit disposition in regard to the right of regulation, reasonable or otherwise; it neither reserves that right in express terms, nor refers to it in any way. It is therefore incumbent on this Tribunal to answer the two questions above indicated by interpreting the general terms of article I of the Treaty, and more especially the words "the inhabitants of the United States shall have, for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind." This interpretation must be conformable to the general import of the instrument, the general intention of the parties to it, the subject matter of the contract, the expressions actually used and the evidence submitted.

Now in regard to the preliminary question as to whether the right of reasonable regulation resides in Great Britain:

Considering that the right to regulate the liberties conferred by the Treaty of 1818 is an attribute of sovereignty, and as such must be held to reside in the territorial sovereign, unless the contrary be provided; and considering that one of the essential elements of sovereignty is that it is to be exercised within territorial limits, and that, failing proof to the contrary, the territory is coterminous with the sovereignty, it follows that the burden of the assertion involved in the contention of the United States (viz. that the right to regulate does not reside independently in Great Britain, the territorial sovereign) must fall on the United States. And for the purpose of sustaining this burden, the United States have put forward the following series of propositions, each one of which must be singly considered.

It is contended by the United States:

(1) That the French right of fishery under the treaty of 1713 designated also as a liberty, was never subjected to regulation by Great Britain, and therefore the inference is warranted that the American liberties of fishery are similarly exempted.

The Tribunal is unable to agree with this contention. \* \* \*

For the further purpose of such proof it is contended by the United States:

(2) That the liberties of fishery, being accorded to the inhabitants of the United States "forever," acquire, by being in perpetuity and unilateral, a character exempting them from local legislation.

The Tribunal is unable to agree with this contention: \* \* \*

For the further purpose of such proof, the United States allege:

(3) That the liberties of fishery granted to the United States constitute an International servitude in their favour over the territory of Great Britain, thereby involving a derogation from the sovereignty of Great Britain, the servient state, and that therefore Great Britain is deprived, by reason of the grant, of its independent right to regulate the fishery.

The Tribunal is unable to agree with this contention:

(a) Because there is no evidence that the doctrine of international servitudes was one with which either American or British statesmen were conversant in 1818, no English publicists employing the term before 1818, and the mention of it in Mr. Gallatin's report being insufficient;

(b) Because a servitude in the French law, referred to by Mr. Gallatin, can, since the Code, be only real and cannot be personal (Code Civil, art. 686);

(c) Because a servitude in international law predicates an express grant of a sovereign right and involves an analogy to the relation of a *prædium dominans* and a *prædium serviens*; whereas by the Treaty of 1818 one state grants a liberty to fish, which is not a sovereign right, but a purely economic right, to the inhabitants of another state;

(d) Because the doctrine of international servitude in the sense which is now sought to be attributed to it originated in the peculiar and now obsolete conditions prevailing in the Holy Roman Empire of which the *domini terræ* were not fully sovereigns; they holding territory under the Roman empire, subject at least theoretically, and in some respects also practically, to the courts of that Empire; their right being, moreover, rather of a civil than of a public nature, partaking more of the character of dominium than of imperium, and therefore certainly not a complete sovereignty. And because in contradistinction to this quasi sovereignty with its incoherent attributes acquired at various times, by various means, and not impaired in its character by being incomplete in any one respect or by being limited in favour of another territory and its possessor, the modern state, and particularly Great Britain, has never admitted partition of sovereignty,

owing to the constitution of a modern state requiring essential sovereignty and independence;

(e) Because this doctrine being but little suited to the principle of sovereignty which prevails in states under a system of constitutional government such as Great Britain and the United States, and to the present international relations of sovereign states, has found little, if any, support from modern publicists. It could therefore in the general interest of the community of nations, and of the parties to this Treaty, be affirmed by this Tribunal only on the express evidence of an international contract;

(f) Because, even if these liberties of fishery constituted an international servitude, the servitude would derogate from the sovereignty of the servient state only in so far as the exercise of the rights of sovereignty by the servient state would be contrary to the exercise of the servitude right by the dominant state; whereas it is evident that, though every regulation of the fishery is to some extent a limitation, as it puts limits to the exercise of the fishery at will, yet such regulations as are reasonable and made for the purpose of securing and preserving the fishery and its exercise for the common benefit, are clearly to be distinguished from those restrictions and "molestations," the annulment of which was the purpose of the American demands formulated by Mr. Adams in 1782, and such regulations consequently cannot be held to be inconsistent with a servitude;

(g) Because the fishery to which the inhabitants of the United States were admitted in 1783, and again in 1818, was a regulated fishery, as is evidenced by the following regulations: \* \* \*

(h) Because the fact that Great Britain rarely exercised the right of regulation in the period immediately succeeding 1818 is to be explained by various circumstances and is not evidence of the non-existence of the right;

(i) Because the words "in common with British subjects" tend to confirm the opinion that the inhabitants of the United States were admitted to a regulated fishery;

(j) Because the statute of Great Britain, 1819, which gives legislative sanction to the Treaty of 1818, provides for the making of "regulations with relation to the taking, drying and curing of fish by inhabitants of the United States in 'common.'" \* \* \*

In the course of the argument it has also been alleged by the United States:

(5) That the Treaty of 1818 should be held to have entailed a transfer or partition of sovereignty, in that it must in respect to the liberties of fishery be interpreted in its relation to the Treaty of 1783; and that this latter Treaty was an act of partition of sovereignty and of separation, and as such was not annulled by the War of 1812.

Although the Tribunal is not called upon to decide the issue whether the Treaty of 1783 was a treaty of partition or not, the questions involved therein having been set at rest by the subsequent Treaty of

1818, nevertheless the Tribunal could not forbear to consider the contention on account of the important bearing the controversy has upon the true interpretation of the Treaty of 1818. In that respect the Tribunal is of opinion:

(a) That the right to take fish was accorded as a condition of peace to a foreign people; wherefore the British negotiators refused to place the right of British subjects on the same footing with those of American inhabitants; and further, refused to insert the words also proposed by Mr. Adams—"continue to enjoy"—in the second branch of article III of the Treaty of 1783;

(b) That the Treaty of 1818 was in different terms, and very different in extent, from that of 1783, and was made for different considerations. It was, in other words, a new grant. \* \* \*

Now therefore this Tribunal decides and awards as follows:

The right of Great Britain to make regulations without the consent of the United States, as to the exercise of the liberty to take fish referred to in article I of the Treaty of October 20, 1818, in the form of municipal laws, ordinances or rules of Great Britain, Canada or Newfoundland is inherent to the sovereignty of Great Britain. \* \* \*\*

\*\* Notwithstanding the rule in the principal case, the Oberlandesgericht of Cologne decided in 1914, in *Aix la Chapelle-Maastricht Railroad Company v. Thewis* (Royal Netherland Government, Intervener), that the treaty of June 28, 1816, between Prussia and the Netherlands created a servitude in favor of the Netherland government. In the course of its opinion, the court said:

"The opinion of the judge of first instance, to the effect that the authority of the Netherlands government, herewith defined, must be regarded as a mining concession which has been transferred to the defendant, is incorrect. The plea of the intervener, that in conformity with all the circumstances in the case, this boundary treaty between Prussia and the Netherlands bears the character of an agreement in international law, whereby the territorial sovereignty of the two neighboring states has been mutually delimited, must be accepted. Parts of the communes of Kerkrade and Rolduc fall to Prussia, but the Netherlands government retains the right to carry on mining in these ceded parts. This means, as the intervener correctly argues, not what might be termed a mining concession of the Netherland state granted by Prussia in accordance with private law, but the exclusion of certain rights of sovereignty over the ceded parts emanating from the possession of territorial sovereignty. In this case a portion of the territorial sovereignty over the ceded parts has remained in the possession of Holland, namely, in so far as the right to mine coal and other minerals contained in this coal field comes into question. Hereby a species of international servitude has arisen, whereby Holland, as a lawfully entitled state, has the right to exercise its own legislative jurisdiction and police supervision with regard to this mine, now as previously; that is, it has real sovereign rights with regard to the object situated within the territory of the foreign state. See Ullmann, *Völkerrecht*, p. 320ff."

For the text of this case, see 8 *Zeitschrift für Völkerrecht*, 437, English translation, 8 *American Journal of International Law*, 907 (1914).

CHAPTER IV  
JURISDICTION OF STATES

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SECTION 1.—IN GENERAL

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CALDWELL v. VANVLISSENGEN.

SAME v. VERBECK.

SAME v. ROLFE.

(Court of Chancery, 1851. 9 Hare. 415.)

These were motions on the part of the plaintiffs in three several causes, for injunctions to restrain the respective defendants from using or exercising, within the limits of that part of the United Kingdom called England, the dominion of Wales, and the town of Berwick-upon-Tweed, including the seas, rivers and havens thereof, the invention of James Lowe, or any mode of process for the propulsion of vessels merely colourably differing therefrom, and from using or employing, or permitting to be used and employed, within the limits aforesaid, any vessel fitted or provided with a propeller constructed and applied, without the license of the plaintiffs, according to the form and mode respectively described in the specification of James Lowe's patent, or merely colourably differing therefrom, and particularly from permitting certain vessels mentioned in the several notices of motion, or any other vessel or vessels within the limits aforesaid, under the command or control of the defendants, and fitted or provided with a propeller or propellers constructed and applied, without the license of the plaintiffs, according to the form and mode aforesaid, or merely colourably differing therefrom, to proceed on any voyage or voyages.

The plaintiffs were the assignees of James Lowe's patent (which was granted in the year 1838) for a mode of propelling vessels by means of one or more curved blades, set or affixed on a revolving shaft below the water-line of the vessel, and running from stem to stern of the vessel. The defendants in the two first causes were the owners of vessels called the "Burgemeester Huidekoper" and "Stad Dordrecht," trading between Holland and this country; and the defendant in the third cause was or had been the captain of a vessel called the "Fyenoord," engaged in the same trade. \* \* \*

The VICE-CHANCELLOR [Sir G. J. TURNER].<sup>1</sup> \* \* \* It was in-

<sup>1</sup> The statement of facts is abridged and part of the opinion is omitted.

sisted, on the part of the defendants, that there was in each of these cases a sufficient ground for the interference of the Court being withheld. \* \* \* It is to be observed that in none of these cases is it attempted to be denied, on the part of the defendants, that the screw propellers used in their respective vessels fall within the invention claimed by this patent; and, after anxiously considering the case, I am of opinion that I cannot withhold these injunctions upon the grounds which are stated.

I take the rule to be universal that foreigners are in all cases subject to the laws of the country in which they may happen to be; and if in any case, when they are out of their own country, their rights are regulated and governed by their own laws, I take it to be not by force of those laws themselves, but by the law of the country in which they may be adopting those laws as part of their own law for the purpose of determining such rights. Mr. Justice Story, in his treatise on the Conflict of Laws, addressing himself to this subject (s. 541), says: "In regard to foreigners resident in a country, although some jurists deny the right of a nation generally to legislate over them, it would seem clear, upon general principles of international law, that such a right does exist, and the extent to which it should be exercised is a matter purely of municipal arrangement and policy. Huberus lays down the doctrine in his second axiom: 'All persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subject thereof.' Boullenois says: 'That the sovereign has a right to make laws to bind foreigners in relation to his property within his domains, in relation to contracts and acts done therein, and in relation to judicial proceedings if they implead before his tribunals. And, further, that he may of strict right make laws for all foreigners who merely pass through his domains, although commonly this authority is exercised only as to matters of police.' Vattel asserts the same general doctrine, and says that foreigners are subject to the laws of a state while they reside in it" (page 789, 2d Edit. Lond.). In this country, indeed, the position of foreigners is not left to rest upon this general law, but is provided for by statute; for, by the 32 Hen. 8, c. 16, s. 9, it is enacted: "That every alien and stranger born out of the King's obeisance, not being denizen, which now or hereafter shall come in or to this realm or elsewhere within the King's dominions shall, after the 1st of September next coming, be bounden by and unto the laws and statutes of this realm, and to all and singular the contents of the same." Natural justice, indeed, seems to require that this should be the case: when countries extend to foreigners the protection of their laws they may well require obedience to those laws as the price of that protection. These defendants, therefore, whilst in this country, must, I think, be subject to its laws. \* \* \*



We must consider, then, what is the effect of this grant? It purports to give to the grantee, his executors, administrators and assigns, special license, full power, sole privilege and authority, that he, his executors, administrators and assigns, and every of them, by himself and themselves, or by his and their deputy and deputies, servants or agents, or such others as he, his executors, administrators or assigns shall at any time agree with, and no others, from time to time, and at all times thereafter, during the term of years therein expressed, lawfully to make, use, exercise and vend his said invention, within that part of the United Kingdom of Great Britain and Ireland called England, the dominion of Wales, and the town of Berwick-upon-Tweed. And undoubtedly this grant gives to the grantee a right of action against persons who infringe upon the sole and exclusive right purported to be granted by it. Foreigners coming into this country are, as I apprehend, subject to actions for injuries done by them whilst here to the subjects of the Crown. Why then are they not to be subject to actions for the injury done by their infringing upon the sole and exclusive right, which I have shewn to be granted in conformity with the laws and constitution of this country? And if they are subject to such actions, why is not the power of this Court, which is founded upon the insufficiency of the legal remedy, to be applied against them as well as against the subjects of the Crown. It was said that the prohibitory words of the patent were addressed only to the subjects of the Crown; but these prohibitory words are in aid of the grant and not in derogation of it; and they were probably introduced at a time when the prohibition of the Crown could be enforced personally against parties who ventured to disobey it. The language of this part of the patent, therefore, does not appear to me to alter the case. \* \* \*

In the argument on the part of the defendants much was said on the hardship of this Court's interfering against them, and upon the inconveniences which would result from it; and some reference was made to the policy of this country: but it must be remembered that British ships certainly cannot use this invention without the license of the patentees, and the burthens incident to such license; and foreigners cannot, I think, justly complain that their ships are not permitted to enjoy, without license and without payment, advantages which the ships of this country cannot enjoy otherwise than under license and upon payment. It must be remembered that foreigners may take out patents in this country, and thus secure to themselves the exclusive use of their inventions within Her Majesty's dominions; and that, if they neglect to do so, they, to this extent, withhold their invention from the subjects of this country. It is to be observed also that the enforcement of the exclusive right under a patent does not take away from foreigners any privilege which they ever enjoyed in this country; for, if the invention was used by them in this country before the granting of the patent, the patent, I apprehend, would be invalid.

One principal ground of inconvenience suggested was that, if foreign ships were restrained from using this invention in these dominions, English ships might equally be restrained from using it in foreign dominions; but I think this argument resolves itself into a question of national policy, and it is for the Legislature, and not for the Courts, to deal with that question: my duty is to administer the law and not to make it.

Upon the grounds which I have referred to I think that the facts stated in the affidavits and answer do not furnish sufficient grounds for refusing these injunctions. \* \* \*

### THE BETSEY.

GLASS et al. v. THE BETSEY et al.

(Supreme Court of the United States, 1794. 3 Dall. 6, 1 L. Ed. 485.)

Captain Pierre Arcade Johannene, the commander of a French privateer, called the Citizen Genet, having captured as prize, on the high seas, the sloop Betsey, sent the vessel into Baltimore; but upon her arrival there, the owners of the sloop and her cargo filed a libel in the District Court of Maryland, claiming restitution, because the vessel belonged to subjects of the king of Sweden, a neutral power, and the cargo was owned jointly by Swedes and Americans. The captor filed a plea to the jurisdiction of the court, which, after argument, was allowed; the Circuit Court affirmed the decree; and thereupon, the present appeal was instituted.

The general question was—Whether under the circumstances of this case, an American Court of Admiralty, had jurisdiction to entertain the complaint, or libel of the owners, and to decree restitution of the property? \* \* \*

The Court, having kept the cause under advisement for several days, informed the counsel, that besides the question of jurisdiction as to the District Court, another question fairly arose upon the record,—whether

<sup>2</sup> "The case of *Caldwell v. Vlassengen*, 9 Hare, 416, 9 Eng. L. and Eq. Rep. 51, and the statute passed by the British Parliament in consequence of that decision, have been referred to and relied on in the argument. The reasoning of the Vice Chancellor is certainly entitled to much respect, and it is not for this court to question the correctness of the decision, or the construction given to the statute of Henry VIII.

"But we must interpret our patent laws with reference to our own Constitution and laws and judicial decisions. And the court are of opinion that the rights of property and exclusive use granted to a patentee does not extend to a foreign vessel lawfully entering one of our ports; and that the use of such improvement, in the construction, fitting out, or equipment of such vessel, while she is coming into or going out of a port of the United States, is not an infringement of the rights of an American patentee, provided it was placed upon her in a foreign port, and authorized by the laws of the country to which she belongs." Per Mr. Chief Justice Taney in *Brown v. Duchesne*, 19 How. 183, 198, 199, 15 L. Ed. 593 (1856).

any foreign nation had a right, without the positive stipulations of a treaty, to establish in this country, an admiralty jurisdiction for taking cognizance of prizes captured on the high seas, by its subjects or citizens, from its enemies? Though this question had not been agitated, the court deemed it of great public importance to be decided; and, meaning to decide it, they declared a desire to hear it discussed. Du Ponceau, however, observed, that the parties to the appeal did not conceive themselves interested in the point; and that the French minister had given no instructions for arguing it. Upon which JAY, Chief Justice, proceeded to deliver the following unanimous opinion.

By THE COURT: The Judges being decidedly of opinion, that every District Court in the United States, possesses all the powers of a court of Admiralty, whether considered as an instance, or as a prize court, and that the plea of the aforesaid appellee, Pierre Arcade Johannene, to the jurisdiction of the District Court of Maryland, is insufficient: Therefore it is considered by the Supreme Court aforesaid, and now finally decreed and adjudged by the same, that the said plea be, and the same is hereby overruled and dismissed, and that the decree of the said District Court of Maryland, founded thereon, be, and the same is hereby revoked, reversed and annulled.

And the said Supreme Court being further clearly of opinion, that the District Court of Maryland aforesaid, has jurisdiction competent to inquire, and to decide, whether, in the present case, restitution ought to be made to the claimants, or either of them, in whole or in part (that is whether such restitution can be made consistently with the laws of nations and the treaties and laws of the United States) therefore it is ordered and adjudged that the said District Court of Maryland do proceed to determine upon the libel of the said Alexander S. Glass, and others, agreeably to law and right, the said plea to the jurisdiction of the said court, notwithstanding.

And the said Supreme Court being further of opinion, that no foreign power can of right institute, or erect, any court of judicature of any kind, within the jurisdiction of the United States, but such only as may be warranted by, and be in pursuance of treaties, it is therefore decreed and adjudged that the admiralty jurisdiction, which has been exercised in the United States by the Consuls of France, not being so warranted, is not of right.

It is further ordered by the said Supreme Court, that this cause be, and it is hereby, remanded to the District Court, for the Maryland District, for a final decision, and that the several parties to the same do each pay their own costs.

## STRATHEARN S. S. CO., Limited, v. DILLON.

(Supreme Court of the United States, 1920. 252 U. S. 348, 40 Sup. Ct. 350, 64 L. Ed. 607.)

Mr. Justice DAY delivered the opinion of the court.\*

This case presents questions arising under the Seamen's Act of March 4, 1915, c. 153, 38 Stat. 1164. It appears that Dillon, the respondent, was a British subject, and shipped at Liverpool on the eighth of May, 1916, on a British vessel. The shipping articles provided for a voyage of not exceeding three years, commencing at Liverpool and ending at such port in the United Kingdom as might be required by the master, the voyage including ports of the United States. The wages which were fixed by the articles were made payable at the end of the voyage. At the time of the demand for one-half wages, and at the time of the beginning of the action, the period of the voyage had not been reached. The articles provided that no cash should be advanced abroad or liberty granted other than at the pleasure of the master. This, it is admitted, was a valid contract for the payment of wages under the laws of Great Britain. The ship arrived at the Port of Pensacola, Florida, on July 31, 1916, and while she was in that port, Dillon, still in the employ of the ship, demanded from her master one-half part of the wages theretofore earned, and payment was refused. Dillon had received nothing for about two months, and after the refusal of the master to comply with his demand for one-half wages, he filed in the District Court of the United States a libel against the ship, claiming \$125.00, the amount of wages earned at the time of demand and refusal.

The District Court found against Dillon upon the ground that his demand was premature. The Circuit Court of Appeals reversed this decision, and held that Dillon was entitled to recover. 256 Fed. 631, 168 C. C. A. 25. A writ of certiorari brings before us for review the decree of the Circuit Court of Appeals.

In *Sandberg v. McDonald*, 248 U. S. 185, 39 Sup. Ct. 84, 63 L. Ed. 200, and *Neilson v. Rhine Shipping Co.*, 248 U. S. 205, 39 Sup. Ct. 89, 63 L. Ed. 208, we had occasion to deal with section 11 of the Seamen's Act (Comp. St. § 8323), and held that it did not invalidate advancement of seamen's wages in foreign countries when legal where made. The instant case requires us to consider now section 4 of the same act (Comp. St. § 8322). That section amends section 4530, Rev. Stats. (Comp. St. § 8322), and so far as pertinent provides:

"Sec. 4530. Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced,

\* Part of the opinion is omitted.

shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void: Provided, such a demand shall not be made before the expiration of, nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract, and he shall be entitled to full payment of wages earned. \* \* \* And provided further, that this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

This section has to do with the recovery of wages by seamen, and by its terms gives to every seaman on a vessel of the United States the right to demand one-half the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the end of the voyage, and stipulations in the contract to the contrary are declared to be void. A failure of the master to comply with the demand releases the seaman from his contract and entitles him to recover full payment of the wages, and the section is made applicable to seamen on foreign vessels while in harbors of the United States, and the courts of the United States are open to such seamen for enforcement of the act.

This section is an amendment of section 4530 of the Revised Statutes, it was intended to supplant that section, as amended by the Act of December 21, 1898, c. 28, 30 Stat. 756, which provided: "Every seaman on a vessel of the United States shall be entitled to receive from the master of the vessel to which he belongs one-half part of the wages which shall be due him at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended unless the contrary be expressly stipulated in the contract," etc.

The section, of which the statute now under consideration is an amendment, expressly excepted from the right to recover one-half of the wages those cases in which the contract otherwise provided. In the amended section all such contract provisions are expressly rendered void, and the right to recover is given the seamen notwithstanding contractual obligations to the contrary. The language applies to all seamen on vessels of the United States, and the second proviso of the section as it now reads makes it applicable to seamen on foreign vessels while in harbors of the United States. The proviso does not stop there, for it contains the express provision that the courts of the United States shall be open to seamen on foreign vessels for its enforcement. The latter provision is of the utmost importance in determining the proper construction of this section of the act. It manifests the purpose of Congress to give the benefit of the act to seamen on foreign vessels, and to open the doors of the federal courts to foreign seamen. No such provision was necessary as to American seamen for they had the right independently of this statute to seek redress in the courts of the United States, and, if it were the intention of

Congress to limit the provision of the act to American seamen, this feature would have been wholly superfluous.

It is said that it is the purpose to limit the benefit of the act to American seamen, notwithstanding this provision giving access to seamen on foreign vessels to the courts of the United States, because of the title of the act in which its purpose is expressed "to promote the welfare of American seamen in the merchant marine of the United States." But the title is more than this, and not only declares the purposes to promote the welfare of American seamen but further to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea. But the title of an act cannot limit the plain meaning of its text, although it may be looked to to aid in construction in cases of doubt. *Cornell v. Coyne*, 192 U. S. 418, 530, 24 Sup. Ct. 383, 48 L. Ed. 504, and cases cited. Apart from the text, which we think plain, it is by no means clear that if the act were given a construction to limit its application to American seamen only, the purposes of Congress would be subserved, for such limited construction would have a tendency to prevent the employment of American seamen, and to promote the engagement of those who were not entitled to sue for one-half wages under the provisions of the law. But, taking the provisions of the act as the same are written, we think it plain that it manifests the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this section are concerned, with equal opportunity to resort to the courts of the United States for the enforcement of the act. Before the amendment, as we have already pointed out, the right to recover one-half the wages could not be enforced in face of a contractual obligation to the contrary. Congress, for reasons which it deemed sufficient, amended the act so as to permit the recovery upon the conditions named in the statute. In the case of *Sandberg v. McDonald*, 248 U. S. 185, 39 Sup. Ct. 84, 63 L. Ed. 200, *supra*, we found no purpose manifested by Congress in section 11 to interfere with wages advanced in foreign ports under contracts legal where made. That section dealt with advancements, and contained no provision such as we find in section 4. Under section 4 all contracts are avoided which run counter to the purposes of the statute. Whether consideration for contractual rights under engagements legally made in foreign countries would suggest a different course is not our province to inquire. It is sufficient to say that Congress has otherwise declared by the positive terms of this enactment, and if it had authority to do so, the law is enforceable in the courts.

We come then to consider the contention that this construction renders the statute unconstitutional as being destructive of contract rights. But we think this contention must be decided adversely to the petitioner upon the authority of previous cases in this court. The matter was fully considered in *Patterson v. Bark Eudora*, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002, in which the previous decisions of this court

were reviewed, and the conclusion reached that the jurisdiction of this Government over foreign merchant vessels in our ports was such as to give authority to Congress to make provisions of the character now under consideration; that it was for this Government to determine upon what terms and conditions vessels of other countries might be permitted to enter our harbors, and to impose conditions upon the shipment of sailors in our own ports, and make them applicable to foreign as well as domestic vessels. Upon the authority of that case, and others cited in the opinion therein, we have no doubt as to the authority of Congress to pass a statute of this sort, applicable to foreign vessels in our ports and controlling the employment and payment of seamen as a condition of the right of such foreign vessels to enter and use the ports of the United States.

But, it is insisted, that Dillon's action was premature as he made a demand upon the master within less than five days after the vessel arrived in an American port. This contention was sustained in the District Court, but it was ruled otherwise in the Court of Appeals. \* \* \*

We agree with the Circuit Court of Appeals of the Fifth Circuit, whose judgment we are now reviewing, that the demand was not premature. It is true that the Circuit Court of Appeals for the Second Circuit held in the case of *The Italier*, 257 Fed. 712, 168 C. C. A. 662, that demand, made before the vessel had been in port for five days, was premature; this was upon the theory that the law was not in force until the vessel had arrived in a port of the United States. But, the limitation upon demand has no reference to the length of stay in the domestic port. The right to recover wages is controlled by the provisions of the statute and includes wages earned from the beginning of the voyage. It is the right to demand and recover such wages with the limitation of the intervals of demand as laid down in the statute, which is given to the seaman while the ship is in a harbor of the United States.

We find no error in the decree of the Circuit Court of Appeals and the same is affirmed.

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### THE CREOLE.

(*American-British Claims Commission*, 1855. *Rep. Decisions of Com'n*, 241.)

BATES, Umpire. This case having been submitted to the umpire for his decision, he hereby reports that the claim has grown out of the following circumstances:

The American brig *Creole*, Captain Ensor, sailed from Hampton Roads, in the State of Virginia, on the 27th October, 1841, having on board one hundred and thirty-five slaves bound for New Orleans. On the 7th of November, at nine o'clock in the evening, a portion of

the slaves rose against the officers, crew, and passengers, wounding severely the captain, the chief mate and two of the crew, and murdering one of the passengers; the mutineers, having got complete possession of the vessel, ordered the mate, under threat of instant death should he disobey or deceive them, to steer for Nassau, in the island of New Providence, where the brig arrived on the 9th November, 1841.

The American consul was apprised of the situation of the vessel, and requested the governor to take measures to prevent the escape of the slaves, and to have the murderers secured. The consul received reply from the governor, stating that under the circumstances he would comply with the request.

The consul went on board the brig, placed the mate in command in place of the disabled master, and found the slaves all quiet.

About noon twenty African soldiers, with an African sergeant and corporal, commanded by a white officer, came on board. The officer was introduced by the consul to the mate as commanding officer of the vessel.

The consul, on returning to the shore, was summoned to attend the governor and council, who were in session, who informed the consul that they had come to the following decision:

"1st. That the courts of law have no jurisdiction over the alleged offences.

"2d. That, as an information had been lodged before the governor, charging that the crime of murder had been committed on board said vessel while on the high seas, it was expedient that the parties, implicated in so grave a charge, should not be allowed to go at large, and that an investigation ought therefore to be made into the charges, and examinations taken on oath; when, if it should appear that the original information was correct, and that a murder had actually been committed, that all the parties implicated in such crime, or other acts of violence, should be detained here until reference could be made to the Secretary of State to ascertain whether the parties should be delivered over to the United States government; if not, how otherwise to dispose of them.

"3d. That as soon as such examinations should be taken, all persons on board the Creole, not implicated in any of the offences alleged to have been committed on board that vessel, must be released from further restraint."

Then two magistrates were sent on board. The American consul went also. The examination was commenced on Tuesday, the 9th, and was continued on Wednesday, the 10th, and then postponed until Friday, on account of the illness of Captain Ensor. On Friday morning it was abruptly, and without any explanation, terminated.

On the same day, a large number of boats assembled near the Creole, filled with colored persons armed with bludgeons. They were under



the immediate command of the pilot who took the vessel into the port, who was an officer of the government, and a colored man. A sloop or larger launch was also towed from the shore and anchored near the brig. The sloop was filled with men armed with clubs, and clubs were passed from her to the persons in the boats. A vast concourse of people were collected on shore opposite the brig.

During the whole time the officers of the government were on board they encouraged the insubordination of the slaves.

The Americans in port determined to unite and furnish the necessary aid to forward the vessel and negroes to New Orleans. The consul and the officers and crews of two other American vessels had, in fact, united with the officers, men, and passengers of the *Creole* to effect this. They were to conduct her first to Indian quay, Florida, where there was a vessel of war of the United States.

On Friday morning, the consul was informed that attempts would be made to liberate the slaves by force, and from the mate he received information of the threatening state of things. The result was, the attorney general and other officers went on board the *Creole*. The slaves, identified as on board the vessel concerned in the mutiny, were sent on shore, and the residue of the slaves were called on deck by direction of the attorney general, who addressed them in the following terms: "My friends," or "my men, you have been detained a short time on board the *Creole* for the purpose of ascertaining what individuals were concerned in the murder. They have been identified, and will be detained. The rest of you are free, and at liberty to go on shore, and wherever you please."

The liberated slaves, assisted by the magistrates, were then taken on board the boats, and when landed were conducted by a vast assemblage to the superintendent of police, by whom their names were registered. They were thus forcibly taken from the custody of the master of the *Creole*, and lost to the claimants.

I need not refer to authorities to show that slavery, however odious and contrary to the principles of justice and humanity may be established by law in any country; and, having been so established in many countries, it cannot be contrary to the law of nations.

The *Creole* was on a voyage, sanctioned and protected by the laws of the United States, and by the law of nations. Her right to navigate the ocean could not be questioned, and as growing out of that right, the right to seek shelter or enter the ports of a friendly power in case of distress or any unavoidable necessity.

A vessel navigating the ocean carries with her the laws of her own country, so far as relates to the persons and property on board, and to a certain extent, retains those rights even in the ports of the foreign nations she may visit. Now, this being the state of the law of nations, what were the duties of the authorities at Nassau in regard to the *Creole*? It is submitted that mutineers could not be tried by the courts

of that island, the crime having been committed on the high seas. All that the authorities could lawfully do, was to comply with the request of the American consul, and keep the mutineers in custody until a conveyance could be found for sending them to the United States.

The other slaves, being perfectly quiet, and under the command of the captain and owners, and on board an American ship, the authorities should have seen that they<sup>4</sup> were protected by the law of nations; their rights under which cannot be abrogated or varied, either by the emancipation act or any other act of the British Parliament.

Blackstone, 4th volume, speaking of the law of nations, states: "Whenever any question arises, which is properly the object of its jurisdiction, such law is here adopted in its full extent by the common law."

The municipal law of England cannot authorize a magistrate to violate the law of nations by invading with an armed force the vessel of a friendly nation that has committed no offence, and forcibly dissolving the relations which by the laws of his country the captain is bound to preserve and enforce on board.

These rights, sanctioned by the law of nations—viz. the right to navigate the ocean, and to seek shelter in case of distress or other unavoidable circumstances, and to retain over the ship, her cargo, and passengers, the laws of her own country—must be respected by all nations; for no independent nation would submit to their violation.

Having read all the authorities referred to in the arguments on both sides, I have come to the conclusion that the conduct of the authorities at Nassau was in violation of the established law of nations, and that the claimants are justly entitled to compensation for their losses. I therefore award to the undermentioned parties, their assigns, or legal representatives, the sums set opposite their names, due on the 15th of January, 1855.<sup>5</sup>

<sup>4</sup> Meaning the owners.

<sup>5</sup> See elaborate opinion on the same subject in *The Brig Enterprise*, pp. 187-237, and the shorter one in *The Hermosa*, pp. 238-240, Report of the Commission. Compare *In re Moncan* (C. C.) 14 Fed. 44 (1882), and *In re Ah Kee* (D. C.) 22 Fed. 519 (1884).

In an action to recover insurance effected on the slaves and cargo of the *Creole*, the same doctrine was enforced. The Supreme Court of Louisiana held *inter alia* that where slaves were shipped from one part of the United States to another, and they rose against the officer of the vessel, and took it into a British port, they were still slaves, though in a state of insurrection; that they did not cease to be the property of their owners, though the right of property could not be asserted in a British court, nor enjoyed within the exclusive influence of British law. *McCargo v. N. O. Ins. Co.*, 10 Rob. (La.) 202, 312-332, 43 Am. Dec. 180 (1845).

"In obedience to your Lordship's commands, we have taken the papers into consideration, and have the honor to report that, assuming the *Industria* to have come into Black river, in the island of Jamaica, through distress, we apprehend that she could not be deemed to have thereby committed any offence against the laws of Great Britain, and therefore think that she was not liable to seizure and confiscation by the civil authorities of the island. We are, however, of opinion, that she might have been seized by a British cruiser,

duly commissioned, under the treaty with Spain for the abolition of the slave-trade and carried before a court of mixed commission for adjudication.

"The prior release of a vessel does not prevent a subsequent lawful seizure."

Joint Opinion of the Queen's Advocate, Sir John Dodson, and the Attorney and Solicitor General, Sir John Campbell, and Sir Thomas Wilde, on the seizure of a Spanish vessel which had put into a port of Jamaica in distress with five slaves on board. Opinion dated March 2, 1841, addressed to the right Honorable Lord J. Russell. *William Forsyth's Cases and Opinions on Constitutional Law*, 399, 400 (1869).

To the same effect is the opinion of Hugh S. Legaré, Attorney General of the United States, in the case of *The Creole*, under date of July 20, 1842:

"The principle is, that if a vessel be driven by stress of weather, or forced by vis major, or, in short, be compelled by any overruling necessity, to take refuge in the ports of another, she is not considered as subject to the municipal law of that other, so far as concerns any penalty, prohibition, tax, or incapacity that would otherwise be incurred by entering the ports: Provided she do nothing further to violate the municipal law during her stay. The comity of nations—which is the usage, the common law, of civilized nations, and a breach of which would now be justly regarded as a grave offence—has gone very far on this point. \* \* \* When a ship is driven into port by stress of weather, and then there unloads her cargo, she is not bound to pay duties or customs in that place, because she came there by force; nor is she liable to forfeiture; neither are duties to be paid on goods forcibly driven into port. If there is a case in which the excuse of necessity would be regarded with suspicion, and received with disfavor, it is undoubtedly a breach of blockade, one of the extreme cases of the law of war, involving in its own nature a necessity that would seem to supersede all others. Yet Sir William Scott admits it to be a good plea when the facts fully support it. See 5 Rob. 27, *The Fortune* (1803)." Mr. Legaré to Lord Ashburton, 4 Op. Attys. Gen. 98, 104 (1842).

"But despite these opinions, and notwithstanding that this principle is frequently cited with approval, it would seem that such an immunity is not well founded, or in any sense obligatory, and that whilst putting into port under constraint might be a good ground in comity for excusing such infringements of local regulations as were due to the exigencies of her position (such as harbour or quarantine rules), it would certainly not carry any legal right to exemption from the local law or local jurisdiction. Nor would such an excuse, in any case, serve to exempt a vessel from the consequences of offences previously committed in violation of the law of nations. The *Carlo Alberto*, *Sirey*, Recueil, part 1, 1852, 578." Pitt Cobbett's *Cases and Opinions on International Law*, part. 1, Peace (3d edition, 1909) 283.

Mr. Dana, in his edition of *Wheaton's International Law*, (1866) p. 167, note, thus criticises the decision of the umpire in *The Creole*: "It may be conceded, as a general statement, that local authorities ought to give active aid to a master in defending and enforcing, against the inmates of his vessel, the rights with which his own nation has intrusted him, if these rights are of a character generally recognized among all nations, and not prohibited by the law of the place. But it may well admit of doubt, whether the local authorities must give active aid to the master against persons on board his vessel who are doing no more than peacefully and quietly dissolving, or refusing to recognize, a relation which exists only by force of the law of the nation to which the vessel belongs, if the law is peculiar to that nation, and one which the law of the other country regards as against common right and public morals. The local authorities might not interfere to dissolve such relations, where the peace of the port or the public morals are not put in peril; but they might, it would seem, decline to lend force to, or compel their continuance."

See, also, the adverse criticism of William E. Hall in his *International Law* (4th edition, 1895) p. 209, and note.

## SECTION 2.—IMMUNITY FROM JURISDICTION

## I. STATES AND CHIEFS OF STATE

## DE HABER v. THE QUEEN OF PORTUGAL

(Queen's Bench, 1851. 17 Q. B. 196.)

The plaintiff commenced an action of debt in the court of the Lord Mayor of London against the Queen of Portugal. It appears that he brought action for £12,136 sterling which he had left in the hands of Ferreiri, a Lisbon banker and which Ferreiri paid over to the Portuguese government. The plaintiff, proceeding according to the custom of foreign attachment in London, sent out a summons for the defendant to appear. The defendant being called and not appearing, the plaintiff alleged that Senhor Guilherme Candida Xavier De Brito, of London, the garnishee had money and effects of the defendant in his hands, and prayed to attach the defendant by that money. The judge awarded an attachment as prayed.

Thereupon the award was obtained to show cause why a writ of prohibition should not issue to the Lord Mayor's Court.\*

LORD CAMPBELL, C. J., in this term (May 28th), delivered the judgment of the Court in both cases.

We are of opinion that the rule for a prohibition in this case ought to be made absolute. \* \* \*

In the first place, it is quite certain, upon general principles, and upon the authority of the case of *The Duke of Brunswick v. The King of Hanover*, 2 H. L. Cas. 1 [affirming the decree of the Master of the Rolls in s. c., 6 Beav. 1], recently decided in the House of Lords, that an action cannot be maintained in any English Court against a foreign potentate, for anything done or omitted to be done by him in his public capacity as representative of the nation of which he is the head; and that no English court has jurisdiction to entertain any complaints against him in that capacity. Redress for such complaints affecting a British subject is only to be obtained by the laws and tribunals of the country which the foreign potentate rules, or by the representations, remonstrances or acts of the British Government. To cite a foreign potentate in a municipal court, for any complaint against him in his public capacity, is contrary to the law of nations, and an insult which he is entitled to resent.

The statute 7 Anne, c. 12, passed on the arrest of the Russian Ambassador, to appease the Czar, has always been said to be merely declaratory of the law of nations, recognised and enforced by our mu-

\* A shortened statement of the case is substituted for that of the original report and part of the opinion is omitted.

nicipal law ; and it provides (section 3) that all process, whereby the person of any ambassador, or of his domestic servant, may be arrested, or his goods distrained or seized, shall be utterly null and void. On the occasion of the outrage which gave rise to the statute, Lord Holt was present as a Privy Councillor to advise the Government as to the fit steps to be taken ; and, with his sanction, seventeen persons, who had been concerned in arresting the ambassador, were committed to prison that they might be prosecuted by information at the suit of the Attorney General. Can we doubt that, in the opinion of that great Judge, the Sovereign himself would have been considered entitled to the same protection, immunity and privilege as the minister who represents him? \* \* \*

We have now to consider whether we can grant the prohibition on the application of the Queen of Portugal before she appears in the Lord Mayor's Court. The plaintiff's counsel argue that, before she can be heard, she must appear and be put in bail, in the alternative, to pay or to render. It would be very much to be lamented if, before doing justice to her, we were obliged to impose a condition upon her which would be a further indignity, and a further violation of the law of nations. If the rule were that the application for a prohibition can only be by the defendant after appearance, we should have had little scruple in making this an exception to the rule. But we find it laid down in books of the highest authority that, where the court to which the prohibition is to go has no jurisdiction, a prohibition may be granted upon the request of a stranger, as well as of the defendant himself. \* \* \* Therefore this court, vested with the power of preventing all inferior courts from exceeding their jurisdiction to the prejudice of the Queen or her subjects, is bound to interfere when duly informed of such an excess of jurisdiction. What has been done in this case by the Lord Mayor's Court must be considered as peculiarly in contempt of the Crown, it being an insult to an independent sovereign, giving that sovereign just cause of complaint to the British Government, and having a tendency to bring about a misunderstanding between our own gracious Sovereign and her ally the Queen of Portugal.

Therefore, upon the information and complaint of the Queen of Portugal, either as the party grieved, or as a stranger, we think we are bound to correct the excess of jurisdiction brought to our notice, and to prohibit the Lord Mayor's Court from proceeding further in this suit.

Rule absolute for a prohibition.

## MIGHELL v. SULTAN OF JOHORE.

(Court of Appeal, 1893. L. R. [1894] 1 Q. B. 149.)

Motion to set aside an order for substituted service of a writ of summons in an action for breach of promise of marriage, and to stay all proceedings therein, on the ground that the Court had no jurisdiction over the defendant, who was described in the writ as "the Sultan of the State and Territory of Johore, otherwise known as Albert Baker."

The order for substituted service was obtained *ex parte* from a master in chambers on August 30, 1893. The motion to set aside that order having come before Wright, J., sitting as vacation judge, on September 7, 1893, the learned judge adjourned the hearing of the motion, and caused a communication to be made to the Secretary of State for the Colonies, in order to ascertain the status of the defendant. In answer to that communication a letter was written to Wright, J., by an official at the Colonial Office, purporting to be written by direction of the Secretary of State for the Colonies, and informing him that Johore was an independent state and territory in the Malay Peninsula, and that the defendant was the present sovereign ruler thereof; that the relations between the Sultan and Her Majesty the Queen, which were relations of alliance and not of suzerainty and dependence, were regulated by a treaty made on December 11, 1885, of which a copy was enclosed; that the Sultan had raised and maintains armed forces by sea and land, had organized a postal system, dispenses justice through regularly constituted courts, had founded orders of knighthood, confers titles of honour; and, generally speaking, exercised without question the usual attributes of a sovereign ruler. By the treaty it was agreed that the Governor of the Straits Settlements should protect the Sultan's territory from external hostile attack, and for that purpose Her Majesty's officers were to have access at all times to the waters of the State of Johore; and by art. 6 of the treaty the Sultan bound himself not to negotiate treaties or to enter into any engagement with any foreign state.

The motion was referred by Wright, J., to the Divisional Court, who were furnished with the letter from the Colonial Office. An affidavit made by the plaintiff, and used on the hearing of the motion, contained the following material statements: The plaintiff was introduced to the defendant in August, 1885, as "Mr. Baker," and she had known him by the name of "Albert Baker," under which name he passed and was generally known, ever since. The defendant promised her marriage in 1885. About September, 1885, he took a furnished house at Goring in the name of Albert Baker, and was known by that name, and no other, in the district and neighborhood. He always represented himself as a private individual and an ordinary subject of the Queen, and was always treated as such. In October, 1885, the plaintiff accidentally dis-

covered that the defendant was the Sultan of Johore, and thereupon he made her promise never to reveal who he was, nor to call him by any other name than that of Albert Baker, saying that he wished to conceal his real position, and to preserve his incognito. He remained in this country, living at various places, for some time, and always represented himself, and was treated by servants, tradesmen, and others, as a private individual and a subject of the Queen, and always passed under the name of Albert Baker. He returned to this country, after several years absence, in 1891, and again passed, represented himself, and was treated as "Mr. Baker," and as a private individual and subject of the Queen, living incognito as before in a private house in the Isle of Wight. \* \* \*

WILLS, J.<sup>1</sup> I entertain no doubt in this case. In the first place it is clear that the proper mode of obtaining information with respect to the status of the defendant was adopted by Wright, J., who communicated with and obtained a letter from the Colonial Office. We are told by that letter that the Sultan, "generally speaking, exercises without question the usual attributes of a sovereign ruler." It is true, as appears from the copy of the treaty annexed to that letter, that he has bound himself not to exercise some of the rights of a sovereign ruler except in certain particular ways; but that does not deprive him of his character as an independent sovereign. There can be no doubt that he is still an independent ruling sovereign, and this case must be decided upon exactly the same considerations as if the ruler of some undoubted great Power—such as the King of Italy, or the President of the French Republic—had been sued in the Courts of this country. To begin with, there is no precedent for saying that an independent sovereign ruler can be sued in our Courts. On the contrary, the proposition is opposed to every principle of international law as applied to the persons of sovereigns or those who represent them. The ground upon which the immunity of sovereign rulers from process in our Courts is recognised by our law is that it would be absolutely inconsistent with the status of an independent sovereign that he should be subject to the process of a foreign tribunal. \* \* \*

No authority of any kind to qualify that broad principle laid down by the Court of Appeal has been brought to our notice; but we have been referred to certain dicta of authors of treatises on international law. One of those dicta suggests that if an independent sovereign ruler comes into this country incognito, he is amenable to the jurisdiction of our Courts, although he chooses to claim his immunity. That dictum has never been acted upon, and the suggestion has probably arisen from a loose way of looking at the case of *Duke of Brunswick v. King of Hanover*, 6 Beav. 1, 2 H. L. 1. That was a very peculiar case, because the King of Hanover was not only a foreign sovereign, but also a British peer. He was sued in his character of a British peer, and it was

<sup>1</sup> Parts of the opinions of Wills, J., and Kay, L. J., and the opinion of Lord Esher, M. R., are omitted.

alleged that the transactions, in respect of which it was sought to make him amenable to the jurisdiction of the Courts here, had nothing to do with his character of King of Hanover. It was said by the Court that, inasmuch as he had two distinct capacities, one of which did not touch his character and attributes as a ruling sovereign, he might be sued in the Courts of this country, in respect of transactions done by him in his capacity as a subject. But the Sultan of Johore is in no sense a British subject.

It is said that he came to this country incognito. I do not know that he did. The affidavit says that he was passing under the name of Albert Baker. Unquestionably the plaintiff was under no misapprehension on the subject. According to her own affidavit she knew who and what he was in October, 1885. If anything turned upon the question of fact, I should say that it was not shewn that in August, 1893, when this writ was issued, he was here otherwise than as a sovereign prince. That seems to me, however, immaterial, because I am of opinion that, if he was in fact a sovereign prince when the action was brought, he was not, and is not subject to the jurisdiction of the Courts of this country simply because he was here incognito. I think that *Munden v. Duke of Brunswick*, 10 Q. B. 656, is a strong authority against the proposition contended for by the plaintiff's counsel. To say that it is an authority in the plaintiff's favour is the result of a confusion of thought in respect of two propositions which ought to be kept distinct. It is one thing to say that a foreign sovereign is capable of making an effectual contract in this country; it is quite another thing to say that he can be sued in the Courts of this country. In *Munden v. Duke of Brunswick*, 10 Q. B. 656, the Duke was sued for a debt due on an annuity deed. He pleaded that at the time of making the deed he was the reigning sovereign Duke of Brunswick and Lüneburg, and that "from the time of the making thereof continually, and at the time of the commencement of this suit, defendant has been and still is justly entitled to all the rights, prerogatives, and privileges appertaining to him as the Duke of Brunswick and Lüneburg." The Court held the plea bad for not stating that the defendant was reigning sovereign Duke at the time when he was sued. They said that he might have been deposed, or have abdicated, before the action was brought. But the decision assumes that, if the plea had been drawn otherwise, and had contained all the material allegations, it would have been a good plea, and that view seems to me consistent with every authority on the subject. For these reasons, I am of opinion that the order for substituted service of the writ should be set aside, and that the order for a stay of proceedings should be made.

LAWRENCE, J. I am entirely of the same opinion, on the grounds which have been already given. I will only add that, in the same year in which the decision in *The Parlement Belge*, 5 P. D. 197, was given, James, L. J., one of the judges who decided that case, pointed out in



*Strousberg v. Republic of Costa Rica*, 44 L. T. Rep. 199, the only two exceptions to the rule with respect to actions against foreign sovereigns. One is that, "where a foreign sovereign or state comes into the municipal courts of this country for the purpose of obtaining a remedy, then by way of defence to that proceeding—by way of counter-claim, if necessary, to the extent of defeating that claim—the person sued here may file a crossclaim, or take any other proceeding against that sovereign or state for the purpose of enabling complete justice to be done between them." The other exception is, "the case in which a foreign sovereign may be named as a defendant for the purpose of giving him notice of the claim which the plaintiff makes to funds in the hands of a third person or trustee over whom this Court has jurisdiction."

Motion granted.

The plaintiff appealed. \* \* \*

LOPES, L. J. It was contended for the plaintiff that the status of the defendant had not been satisfactorily established; but I am clearly of opinion that it was, and that the defendant is an independent sovereign. That such a sovereign is entitled to immunity from the jurisdiction of our Courts is beyond all question. That proposition was established, if it needed to be further established, by the case of *The Parlement Belge*, 5 P. D. 197. The law on the subject is clearly laid down by Vattel. He says (*Law of Nations—Translation by J. Chitty—Ed. 1834*, p. 485): "We cannot introduce in any more proper place an important question of the law of nations which is nearly allied to the right of embassies. It is asked what are the rights of a sovereign, who happens to be in a foreign country, and how is the master of that country to treat him? If that prince be come to negotiate, or to treat about some public affair, he is doubtless entitled, in a more eminent degree, to enjoy all the rights of ambassadors. If he be come as a traveller, his dignity alone, and the regard due to the nation which he represents and governs, shelters him from all insult, gives him a claim to respect and attention of every kind, and exempts him from all jurisdiction." But there is no doubt that a foreign sovereign may submit to the jurisdiction of the Courts of this country, and it was contended that in this particular case he had so submitted, because he had taken an assumed name and acted as a private individual. We are asked from that to infer the fact of submission to the jurisdiction. I am of opinion that no such inference can be drawn. In my judgment, the only mode in which a sovereign can submit to the jurisdiction is by a submission in the face of the Court, as, for example, by appearance to a writ. That he intends to waive his rights by taking an assumed name cannot be inferred. On this point I will again refer to Vattel's *Law of Nations*, p. 485, where he says: "On his making himself known, he cannot be treated as subject to the common laws; for it is not to be presumed that he has consented to such a subjection; and, if a prince will not

suffer him in his dominions on that footing, he should give him notice of his intentions."

It seems to me clear, therefore, that in this case there was no submission to the jurisdiction, and nothing from which such submission could be inferred. For these reasons I agree that the appeal should be dismissed. ●

KAY, L. J. The status of a foreign sovereign is a matter of which the Courts of this country take judicial cognisance—that is to say, a matter which the Court is either assumed to know or to have the means of discovering, without a contentious inquiry as to whether the person cited is or is not in the position of an independent sovereign. Of course, the Court will take the best means of informing itself on the subject, if there is any kind of doubt, and the matter is not as notorious as the status of some great monarch such as the Emperor of Germany. Here the person cited was the Sultan of Johore, and the means which the judge took of informing himself as to his status was by inquiry at the Colonial Office. \* \* \* I confess I cannot conceive a more satisfactory mode of obtaining information on the subject than such a letter. Proceeding as it does from the office of one of the principal secretaries of state, and purporting to be written by his direction, I think it must be treated as equivalent to a statement by Her Majesty herself, and, if Her Majesty condescends to state to one of her Courts of Justice, that an individual cited before it is an independent sovereign, I think that statement must be taken as conclusive. But it was argued that the letter itself contains, by reference, a confutation of its statements; that it refers to a treaty, and, on looking to that treaty, it appears that its terms are, in effect, that the Sultan should have certain protection, he on his part engaging not to enter into treaties with any foreign Powers; and that such a treaty amounts to an abnegation of his sovereign powers which destroyed his position as an independent sovereign. But, if he is not an independent sovereign, he must be a dependent one. I asked during the argument on whom he was dependent, and failed to get a satisfactory answer. The agreement by the Sultan not to enter into treaties with other Powers does not seem to me to be an abnegation of his right to enter into such treaties, but only a condition upon which the protection stipulated for is to be given. If the Sultan disregards it, the consequence may be the loss of that protection, or possibly other difficulties with this country; but I do not think that there is anything in the treaty which qualifies or disproves the statement in the letter that the Sultan of Johore is an independent sovereign.

The next point is this. It is said that an independent sovereign may waive his right to immunity, and may treat himself as subject to the jurisdiction. I agree; but how is that to be done? This seems to me, in the first place, quite clear. Supposing, by way of illustration, that some well-known potentate, such as one of the great European emper-

ors, were to be sued in a court of this country, and took no kind of notice of the proceeding; it would be the duty of the Court to recognise his position, and to say at once that the person cited was an independent foreign sovereign over whom it had no jurisdiction. Therefore it is not right to say that such a sovereign must come forward and assert his right. I do not think that he need. I think the Court itself would be bound to take notice of the fact that it had no jurisdiction. \* \* \*

The passage cited from Vattel by Lopes, L. J., is emphatic on this very point, and shews that the time at which the immunity is to be waived must be when an action is brought against the foreign sovereign, and when it is brought to the attention of the Court by reason of its judicial knowledge or from other information that the person sued is a foreign sovereign. I should put it thus: the foreign sovereign is entitled to immunity from civil proceedings in the Courts of any other country, unless upon being sued he actively elects to waive his privilege and to submit to the jurisdiction. Here the defendant has not done that, but just the contrary. \* \* \*

<sup>3</sup> In *Vavasseur v. Krupp*, L. R. 9 Ch. Div. 351 (1878), it was held, according to the headnote of the case, that:

"The court has no jurisdiction to prevent a foreign sovereign [in this case the Mikado of Japan] from removing his property in this country.

"A foreign sovereign who, for the purpose of obtaining his property, submits to be made a defendant in an action, does not thereby lose his rights.

"There is a right of property in an article made in infringement of a patent although the court would order the article to be destroyed.

"A foreign sovereign bought in Germany shells made there, but said to be infringements of an English patent. They were brought to this country in order to be put on board a ship of war belonging to the foreign sovereign, and the patentee obtained an injunction against the agents of the foreign sovereign and the persons in whose custody the shells were, restraining them from removing the shells. The foreign sovereign then applied to be and was made a defendant to the suit. An order was then made by the Master of the Rolls, and affirmed on appeal, that notwithstanding the injunction he should be at liberty to remove the shells."

See, also, *Doss v. Secretary of State for India*, L. R. 19 Eq. 509 (1875).

In the comparatively recent case of *So. African Rep. v. La Compagnie Franco-Belge*, etc., L. R. 1 Ch. 190 (1897), a foreign sovereign brought suit in England to restrain defendants from using a fund in their hands in certain ways. Defendants set up a claim for damages, upon which it was held, that while a sovereign suing in England submits to the jurisdiction for the purposes of allowing discovery in aid of the defendant in his action he does not submit to what is in its real nature a cross action. Another claim arising from another and distinct matter may not be set up.

The recent cases are all in accord with the principal cases and those cited in the notes.

The rule may be thus expressed, "once a sovereign, always a sovereign," at least for anything done while and in the capacity of a sovereign. See *Hatch v. Baez*, 7 Hun, 596 (1876); *Duke of Brunswick v. King of Hanover*, 2 H. L. Cas. 1 (1848).

In *Nathan v. Virginia*, 1 Dall. (Pa.) 77, note, 1 L. Ed. 44, note (1781), it was held by the court of common pleas of Philadelphia county that property of a sister state—in this case the commonwealth of Virginia—was not liable to attachment in Pennsylvania, on the theory that Virginia, being a free, sovereign, and independent state, was not suable according to the law of nations.

In *Beers v. Arkansas*, 20 How. 527, 529, 15 L. Ed. 991 (1857), Chief Justice Taney, speaking for the court, said:

"It is an established principle of jurisprudence in all civilized nations that

## II. DIPLOMATIC AGENTS

The CASE OF ANDREW ARTEMONOWITZ MATTUEOF,  
Ambassador of Muscovy.

(Queen's Bench, 8 Queen Anne, 1710. 10 Mod. 4.)

The question was, whether an ambassador, could by law be arrested for debt.

Sir JAMES MOUNTAGUE, Attorney General. He cannot. If the privileges of an ambassador may by law be broken in upon and invaded for the preservation of the property of a private subject, princes will be cautious of sending ambassadors to us; ours must expect the like treatment; and few will be prevailed with to take that character upon them. Should an ambassador be liable to the restraints of the law of the land to which he goes, how easy would it be, upon an emergency, to take off his attendance upon his master's business? Does the law of England privilege the body of a member of Parliament, and of a soldier, and shall it not that of an ambassador? The person of an ambassador has ever been held sacred and inviolable by the law of nations. The goods of an ambassador are not liable to distress, a fortiori, not his person. An ambassador must be intreated, and upon refusal sent back to his master. If an ambassador commit a crime of a transcendent nature, the King a quo, non ad quem, must punish him. Lord Coke says, *legatos violari contra jus gentium*; nor does he add, as certainly he would, had he thought so, that though this be so in the civil law, it is not so in ours. An ambassador does by fiction of law represent the person of his master; thus Coke, upon the statute 25 Edw. 3, c. 2, affirms, that it is high treason at the common law to kill an ambassador. Now certainly nobody will say the Czar himself might have been arrested. The same fiction of law that makes

the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it."

In *Nichols v. United States*, 7 Wall. 122, 126, 19 L. Ed. 125 (1868), Mr. Justice Davis, speaking for the court, said: "The immunity of the United States from suit is one of the main elements to be considered in determining the merits of this controversy. Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, applies to every sovereign power, and but for the protection which it affords, the government would be unable to perform the various duties for which it was created. It would be impossible for it to collect revenue for its support, without infinite embarrassments and delays, if it was subject to civil processes the same as a private person."

him represent the person of his master, makes him extraparochial, and quasi, in the dominions of his master. The ill treatment of ambassadors is a thing of dangerous consequence, for it may involve the nation in a war, and it would be very inconvenient that this should be in the power of any private person whatsoever.

Contra, it was said, if this be so, a subject may be left without remedy for the recovery of his debt, which would be a defect in law. Justice ought always to be reciprocal, but an ambassador may arrest, ergo, etc. It is a maxim in law that the royal prerogative does no wrong, and shall the prerogative of an ambassador surmount that of the Crown? Such a law as this would be a nullity, because contrary to Magna Charta, cap. 29, "*nulli vendemus, nulli negabimus, aut differeamus justitiam, vel rectum.*" An ambassador by his contract renounces his privilege as far as to subject himself to the laws in force in that country where the contract was made.\*

\* The persons who were concerned in this arrest were examined before the Privy Council, and seventeen were committed to prison; most of whom were prosecuted by information in the Court of Queen's Bench at the suit of the Attorney General, and at their trial before Lord Chief Justice Holt, were convicted of the *facts* by the jury; reserving the question of law, how far those facts were criminal, to be afterwards argued before the Judges; which question was never determined. 1 Bl. Com. 255. Boyer's Annals of Queen Anne. But to satisfy the clamours of the foreign ministers, who made it a common cause, as well as to appease the Ozar, all the proceedings, etc., against the said ambassador are, by 7 Anne, c. 12, declared void, and it is enacted, "that all writs and processes that shall at any time afterwards be sued forth or prosecuted, whereby the person of any ambassador or other public minister of any foreign prince or State, authorised and received as such by Her Majesty, or the domestic or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed null and void; but it is provided, that no merchant or other trader whatsoever, within the Statutes of Bankrupts, who shall put himself into the service of such ambassador, etc., shall have any inanner of benefit by this act; and also that no person shall be proceeded against for having arrested the servant of any ambassador, etc., unless the name of such servant be first registered in the Secretary of State's office; and transmitted by such Secretary to the Sheriff of London, etc., who shall hang up the same in some public place in their offices, whereto all persons may resort and take copies thereof, without fee or reward."

For judicial decisions on this statute see *Barbult's Case*, Cases T. T. 281; *Triquet v. Bath*, 3 Burr. 1748; *Seacomb v. Bowlney*, 1 Wils. 20; *Heathfield v. Chilton*, 4 Burr. 2015; *Pottier v. Croza*, 1 Black. Rep. 48; *Wedmore v. Alvares*, Stra. 797; *Ld. Ray*, 1594; *Carolino's Case*, 1 Wils. 78; *Holmes v. Gordon*, Annally's Rep. 2; *Masters v. Manby*, 1 Burr. 401; *Lockwood v. Coysgarne*, 3 Burr. 1676; *Hopkins v. De Roebuck*, 3 Term Rep. 79.

## HEATHFIELD v. CHILTON.

(Court of King's Bench, 1767. 4 Burr. 2015.)

On showing cause why the defendant should not be discharged out of the custody of the marshall (upon 7 Anne, c. 12) as a domestic servant to Paul Pierre Russell, minister from the Prince Bishop of Liege—he swore himself to be bona fide English secretary to him; and to have been bona fide hired by him as such; and to have bona fide received wages as they became due, at the rate of £30 per annum. Both the minister himself and the relation of this man to him were objected to.

But Chilton's own affidavit was positive, as to the service, and that it was real and not colorable; and it was confirmed by a Mr. Chamberlayne, who called himself Secretary. He also swore that he was not an object of the bankrupt laws. He had been house-steward to Lord Northington. No certificate was produced, under the hand and seal of the minister; though the application was made (as the attorney alleged) on the part of the minister; nor was it sufficiently sworn that the defendant was in the service of the minister, at the time when he was arrested.

Lord MANSFIELD. The privileges of public ministers and their retinue depend upon the law of nations; which is part of the common law of England. And the act of Parliament of 7 Anne, c. 12, did not intend to alter, nor can alter the law of nations. His lordship recited the history of that act, and the occasion of it, and referred to the annals of that time. He said there is not one of the provisions in that act which is not warranted by the law of nations.

The law of nations will be carried as far in England as anywhere, because the Crown can do no particular favors, affecting the rights of suitors, in compliment to public ministers, or to satisfy their points of honor.

The law of nations, though it be liberal, yet does not give protections to screen persons who are not bona fide servants to public ministers, but only make use of that pretence in order to prevent their being liable to pay their just debts.

The law of nations does not take in consuls, or agents of commerce; though received as such by the courts to which they are employed. This was determined in *Barbuit's Case* in Canc. which was solemnly argued before and determined by Lord Talbot on considering and well-weighing *Barbeyrac*, *Binkershoek*, *Grotius*, *Wincquefort*, and all the foreign authorities (for there is little said by our own writers on this subject). In that case several curious questions were debated.

If I did not think there was enough in the present case, already appearing to the court, to enable us to form an opinion, I should desire to know in what manner this minister was accredited. Certainly he is not an ambassador, which is the first rank. Envoy, indeed, is

a second class; but he is not shown to be even an envoy. He is called "minister," 'tis true, but minister (alone) is an equivocal term.

I find this is not an application by the attorney-general by the direction and at the expense of the Crown. That, indeed, would have shown that the Crown thought this person entitled to the character of a public minister. It now remains uncertain what his proper character is.

But supposing him to be a minister of such a kind as entitles him to privilege; yet I think this is not a case of privilege by the law of nations, for the defendant does not appear to have been in the service of the minister at the time of the arrest.

A public minister shall not take a man from the custody of the law; though the process of the law shall not take his menial servant out of his service.

Here it is not sworn when the defendant came into the service. And upon the manner of swearing here used, the court must take it "that he was not in the minister's service at the time of the arrest."

Mr. Justice YATES was not in court.

Mr. Justice ASHTON concurred. The rule laid down by Lord MANSFIELD is a very right one. The process of the law shall not, indeed, take a person out of the service of a public minister; but, on the other hand, a public minister cannot take a person out of the custody of the law. If a man has no such privilege at the time of his being arrested, no subsequent privilege can be given him, by being afterwards taken into the service of a public minister.

Therefore, as it does not appear here that the defendant was then in the service, he cannot be entitled to this privilege.

This is a true and right principle, and the establishing it may prevent many of these applications.

Mr. Justice HEWITT concurred, and repeated and confirmed the principle; and agreed that it does not here appear that the defendant was, at the time of the arrest, in the service of this minister.

Lord MANSFIELD took occasion to observe that the registering the name of the defendant in the Secretary of State's office, and transmitting it to the sheriff's office (mentioned in the fifth section), relates only to the bailiff who arrested him and is no condition precedent to the being entitled to the privilege of a public minister's servant. In this, Mr. Justice ASHTON also concurred.

PER CUR. unanimously:

Rule discharged.<sup>10</sup>

<sup>10</sup> See the early case of *Crosse v. Talbot*, 8 Mod. 288 (1724); and see ante, p. 2, for *Triquet v. Bath*, 8 Burr. 1478 (1764).

The following are famous cases from the text-books cited incidentally, but not decided in the law reports: A. Cases of criminal jurisdiction: Case of *Leslie*, Bishop of Ross, 1571, to the effect that the ambassador of a deposed sovereign is entitled to diplomatic immunity, 2 Ward's Law of Nations, 486; *Mendoza's Case*, 1584, holding that an ambassador should not be punished, but may be sent out of the country, Id. 522; Case of *Da Sa*, 1653, in which

## The DUKE DE MONTELLANO v. CHRISTIN.

(Court of King's Bench, 1816. 5 Maule &amp; S. 503.)

The plaintiff, who was the ambassador from the Court of Spain, brought assumpsit against the defendant for money had and received, to which the defendant appeared, and was served with a declaration *de bene esse*. And now it was moved by Scarlett, for the defendant, that the plaintiff might give security for costs, upon an affidavit that the plaintiff had been applied to for this purpose, and had given no answer thereto. And it was said, in support of the motion that the plaintiff, being a privileged person by Act of Parliament (7 Anne, c. 12), it was the same as if he were beyond sea, or out of the jurisdiction of the Court, there being no remedy against him to recover the costs; and *Goodwin v. Archer*, 2 Peere Williams, 452, 1 Eq. Ca. Abr. 350, pl. 4, was cited.

But, per Lord ELLENBOROUGH, C. J. The case in Peere Williams was that of a servant of an ambassador, and no precedent has been mentioned of a like proceeding in the case of an ambassador. The affidavit does not state that there is any intention on the part of the plaintiff to leave the country; and, considering that an ambassador is the immediate representative of the crowned head, whose servant he is, it would hardly be respectful, in the first instance, to exact such a security, unless there were pregnant reasons for believing it to be necessary.

PER CURIAM. Rule refused.<sup>11</sup>

the brother of an ambassador and a member of his suite was executed for sedition and murder, *Id.* 535; *Gyllenborg's Case*, 1717, deciding that an ambassador who conspires to overthrow the government to which he is accredited may be arrested and his papers seized, *Id.* 548; *Prince Cellamare's Case*, 1718, where an ambassador was arrested and conducted across the frontiers into his own country for conspiring against the accrediting state, 1 *Martens' Causes Célèbres*, 149. B. Civil jurisdiction: *Case of Peter the Great's Ambassador*, 1708, 1 *Black. Com.* c. VII; *Case of Baron de Wrech*, 1772, in which the French government withheld a minister's passports until his debts were paid, 2 *Martens' Causes Célèbres*, 282; *Wheaton's Case*, 1839, *Dana's Wheaton*, 307-318; 5 *Martens' C. O.* 295; *Byrne v. Herran*, 1 *Daly (N. Y.)* 344, 346 (1863); *Dillon's Case*, 1854, holding that a treaty stipulation exempting consul from appearing as witness in court yields to constitutional privilege of compulsory process to compel presence of witnesses, 1 *Wharton's Digest*, 665, *In re Dillon*, 7 *Sawyer*, 561, 7 *Fed. Cas.* No. 3,914, p. 710 [1854]; *Case of Dubois*, 1856, recognizing that a foreign minister cannot be compelled to appear in court as a witness, *Sen. Ex. Doc.* No. 21, 34th Cong., 3d Sess.

<sup>11</sup> In *Parkinson v. Potter*, L. R. 16 Q. B. Div. 152 (1885), the rule of immunity from suit was held to extend to rent for premises occupied by the diplomatic agent. The case is valuable in itself, and has an additional value for the precedents and authorities which it cites and approves.

In *Macartney v. Garbutt*, 24 Q. B. Div. 368 (1890), it was held that this immunity extended to a diplomatic agent, although a subject of the receiving country, unless the immunity were specifically limited before receiving such agent.

Where, however, a British subject in debt was appointed honorary attaché

SCOTT INT. LAW



## DUPONT v. PICHON.

(Supreme Court of Pennsylvania, 1805. 4 Dall. 321, 1 L. Ed. 351.)

The plaintiff had issued a *capias* against the defendant, in an action upon the case, etc., and a citation was served upon him, in the following terms:

"Sir: You are hereby cited to show your cause of action, and why the defendant, claiming privilege as *chargé d'affaires* of the French republic, should not be discharged from the process issued against him, at the city hall, in the city of Philadelphia, at 10 o'clock, to-morrow forenoon.

"Philadelphia, 1st of March, 1805.

Edward Shippen."

The citation was returned to the judges of the Supreme Court, then holding a court of *nisi prius*; <sup>12</sup> and after argument by Du Ponceau and Dallas, for the defendant; and by Ingersoll and Wallace, for the plaintiff, the following order was made by the judges, who did not think, that individually, or sitting at *nisi prius*, they could quash the process:

"It is ordered, that the defendant be discharged on common bail; and that at the next supreme court, in bank, on the 4th day of this instant March, it may be considered by that court, whether the defendant should, or should not, be discharged from the process issued against him; or whether he should be held to bail, and the present order be discharged."

At the opening of the court, on the first day of the term (all the judges being present), Du Ponceau and Dallas moved, that the defendant be discharged absolutely from the process. They produced Mr. Pichon's credentials, by which it appeared, that he had not only been appointed commissary-general of commercial relations, but also *chargé d'affaires* of the French republic; his continuance in the latter character, however, being limited, until a minister plenipotentiary should arrive in the United States from France. It appeared by Mr. Pichon's deposition, that the minister, General Toureau, had arrived in the United States, about the 12th of November, 1804; that in compliance

of the Persian embassy for the purpose of escaping bankruptcy, diplomatic immunity from suit was disallowed. *In re Cloete*, 65 L. T. R. 102, 7 Times R. 585 (1891).

In other words, for the immunity to attach, the claimant must be actually and *bona fide* in the diplomatic service, either as agent or servant; if the claim be colorable merely it will be rejected. On this point the authorities are numerous and unanimous: *Lockwood v. Dr. Coysgarne*, 3 Burr. 1676 (1765); *Fisher v. Begrez*, 1 C. & M. 117 (1832); same case, 2 C. & M. 240, and cases cited in argument of case as reported in 1 C. & M. 117. While the diplomatic agent may waive immunity of his servant, he cannot in the United States waive his own immunity, as this is the privilege of his state, not a personal privilege. *U. S. v. Benner*, Bald. 234, Fed. Cas. No. 14,568 (1830), post, p. 297.

<sup>12</sup> Shippen, Chief Justice, and Smith and Brackenridge, Justices, composed the court.

with Mr. Pichon's instructions from his government, he had been anxiously making all the necessary arrangements for his return to France with his family; that his detention in the United States, since the arrival of General Toureau, had solely and exclusively been owing to the business of closing his official transactions as chargé d'affaires, and to the delay in receiving his public papers and documents, which were shipped in a vessel from Alexandria for Philadelphia, but were carried into New York in consequence of the obstructed navigation of the Delaware; and to the impracticability of obtaining a passage for Europe, at the port of Philadelphia, for considerable time past; that Mr. Pichon had never, in the slightest degree, abandoned or suspended his intention of returning to France; but on the contrary, was determined to go thither, with all possible dispatch, as soon as the obstacles, which he had stated, should be removed, and the condition of his family would permit. It was further stated in the deposition, that, during the time of Mr. Pichon's executing the functions of chargé d'affaires, and before the arrival of General Toureau, it became his official duty to superintend and direct the equipment and supply of certain French frigates, lying in the harbor of New York; that he employed the plaintiff in that business, to make the necessary advances of money; and for his reimbursement gave him certain bills of exchange on France, drawn, however, on his private bankers; that the plaintiff well knew that Mr. Pichon acted in the premises, merely as public agent of the French republic, and is not indebted to the plaintiff on his private account; nor in any other manner, than as the drawer of the bills of exchange, which were delivered to the plaintiff, by the French consul at New York; and the fate of which Mr. Pichon had not definitely heard.<sup>18</sup>

Upon these facts, it was urged: That although no privilege was claimed for Mr. Pichon, as consul, he was entitled to privilege, as chargé d'affaires, *eundo, morando et reduendo*. 1 U. S. Stat. 117, 118, § 25-27 [Comp. St. §§ 7611-7614]; Vatt. lib. 4, c. 6, § 74, 75, pp. 675, 676; Id. c. 7, § 83, p. 682; Id. c. 9, § 125, p. 726; Id. c. 8, § 111, p. 713; Mart. 206. That he was not bound to produce any testimonials of his diplomatic character, the notoriety of his reception by the President, being all that the nature of the case or uniform usage required. That a day's delay, in recognising the privilege of a public minister, to obtain certificates from our own government, must either compel him to give bail, or to submit to actual imprisonment; and that the precedent established on this occasion would attract the serious attention of every foreign minister and government.

<sup>18</sup> After Mr. Pichon was discharged from the process in this suit, the plaintiff issued another *capias* from the Circuit Court of the United States; but, before the writ was served, information arrived that the bills drawn in favor of the plaintiff had been paid by the French government, and the proceedings were suspended, after notice of a motion to quash the writ on the ground of privilege.

It, therefore, became highly important to claim and obtain the discharge, on the single ground of diplomatic privilege, without adverting to the official origin of the debt, for which the suit was instituted; and for which Mr. Pichon ought never to be deemed personally responsible. See *Jones v. Le Tombe*, 3 Dall. 384, 1 L. Ed. 647.

Ingersoll, Wallace and Binney disputed the extent of the privilege; and the sufficiency of the excuse for Mr. Pichon's protracted residence in the United States, after General Toureau's arrival. They insisted, that the appointment as *chargé d'affaires* was limited in its own terms; that his arrival and continuance in the United States were, principally, on account of his consular commission; and that, at least, proof should be produced from the secretary of state, of his reception as a minister, before he was discharged from the *capias*, upon the claim of privilege.

THE COURT were decidedly of opinion, that Mr. Pichon would be entitled to privilege as *chargé d'affaires*, until his return to France; but Chief Justice Shippen seemed inclined to wait for information, from the department of state, as to his actual reception by the President in that character. On its being intimated, however, that the attorney of the district had become responsible to the sheriff for Mr. Pichon's appearance, only until the sense of the court could be obtained; and that Mr. Pichon must now, probably, submit to imprisonment under the *capias*, the judges concurred in discharging him absolutely from the process.<sup>14</sup>

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#### WILSON v. BLANCO.

(Superior Court of the City of New York, 1889. 4 N. Y. Supp. 714.)

Appeal from an order of the special term vacating the judgment in this action and setting aside the service of the summons therein upon Guzman Blanco.

The following opinion was delivered by the court at special term:

O'GORMAN, J. Guzman Blanco, being an envoy extraordinary and minister plenipotentiary, duly accredited from Venezuela to France, and recognized as such by the government of the United States, and while in the city of New York, waiting to take early means of conveyance from this city to France, was served with a summons in this action. Failing to make any appearance in the action, judgment was recovered against him for the sum of \$2,194,535.34.

<sup>14</sup> In *Musurus Bey v. Gadban and Others*, L. R., 2 Q. B. Div. 352 (1894) it was held, according to the headnote, that:

"The immunity of an ambassador from process in the courts of this country extends not merely to the time during which he is accredited to the sovereign, but to such a reasonable period after he has presented his letters of recall as is necessary to enable him to wind up his official business and prepare for his return to his own country, and he is not deprived of the immunity by reason that his successor is duly accredited before that period has elapsed."

A motion is now made to set aside the judgment, and vacate the service of summons upon him, on the ground that he was, when so served, an ambassador, and as such, not amenable to any civil suit brought against him in this city or state.

It is conceded for the purposes of this motion that he could not lawfully have been arrested, while thus in the city of New York, and this concession is in accordance with the judgment of this court in *Holbrook v. Henderson*, 6 N. Y. Super. Ct. 626. The court there, however, went farther, and expressed the opinion that the privilege of an ambassador extended to immunity against all civil suits sought to be instituted against him in the courts of the country to which he was accredited, as well as in those of a friendly country through which he was passing on his way to the scene of his diplomatic labors, and to this privilege the learned court held that he was entitled, as representative of his sovereign, and also because it was necessary for his free and unimpeded exercise of his diplomatic duties.

This opinion of the Superior Court is in accord with that of Wheaton, as set forth in his book on the Law of Nations, in which he has collected and condensed the views of numerous jurists of recognized authority on the subject. Wheaton's Law of Nations, p. 240 et seq.

This rule of international law derives support from the legal fiction that an ambassador is not an inhabitant of the country to which he is accredited, but of the country of his origin and whose sovereign he represents, and within whose territory he, in contemplation of law, always abides.

When, therefore, a claim is made against him in the country to which he is sent, for payment of a debt incurred by him, the creditor must proceed against him exactly as if he were not resident there, and as if he had not contracted the debt there, and as if he had no property there, in his quality of ambassador. Wheaton's Law of Nations, p. 242.

If he has contracted debts, and has no real property in the country to which he is sent, he should be requested to make payment, and, in case of refusal, application should be made to his sovereign; and as a necessary consequence of this rule of extraterritorial residence, he is always considered as retaining his original domicile, and may be proceeded against in the competent court of his own country, and he cannot set up the plea of absence in the service of the state as a bar to a suit in the domestic forum, since the law supposes him still to be present there.

From these views, I am led to the conclusion that the service made on Guzman Blanco in this case, and the judgment entered against him, are of no force and void.

The fact, rather suggested than positively averred in the complaint, that he was connected as a partner in a mercantile business in New York, is not material.

It does not appear that the cause of action arose out of that mercantile relation, or business, or out of any contract or transaction which arose in the state of New York, or the United States.

The motion to vacate the judgment against Guzman Blanco, and to set aside the service of the summons upon him, is granted, with ten dollars costs.<sup>15</sup>

### III. PROTECTION TO DIPLOMATIC AGENTS

#### RESPUBLICA v. DE LONGCHAMPS.

(Court of Oyer and Terminer at Philadelphia, 1784. 1 Dall. 111, 1 L. Ed. 59.)

McKEAN, Chief Justice.<sup>16</sup> Charles-Julian De-Longchamps: You have been indicted for unlawfully and violently threatening and menacing bodily harm and violence to the person of the honorable Francis-Barbe de Marbois, Secretary to the Legation from France, and Consul General of France to the United States of America, in the mansion-house of the Minister Plenipotentiary of France; and for an assault and battery committed upon the said Secretary and Consul, in a public street in the City of Philadelphia. To this indictment you have pleaded that you were not guilty, and for trial put yourself upon the country,—an unbiased jury, upon a fair trial, and clear evidence, have found you guilty. \* \* \* It only remains for the Court to pronounce sentence upon you. This sentence must be governed by a due consideration of the enormity and dangerous tendency of the offenses you have committed, of the wilfulness, deliberation, and malice, wherewith they were done, of the quality and degree of the offended and offender, the provocation given, and all other circumstances which may in any way aggravate or extenuate the guilt.

The first crime in the indictment is an infraction of the law of Nations. This law, in its full extent, is part of the law of this State, and is to be collected from the practice of different Nations, and the authority of writers.

The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the Sovereign he represents, but also hurts the common safety and well-being of nations; he is guilty of a crime against the whole world.

All the reasons, which establish the independency and inviolability

<sup>15</sup> In the case of *New Chile Gold Mining Co. v. Blanco et al.*, 4 Times Law, 346 (1888), the court took time to consider its judgment and delivered it in favor of the defendants, on the ground that, in the exercise of their judicial discretion, they did not consider it right to allow a foreign minister (Blanco), resident at a foreign court (France), to be sued in the courts of England, at all events on a cause of action not arising in England. The case was, however, decided on another point.

<sup>16</sup> Only so much of the case is given in this connection as relates to the assault and battery committed upon the French Secretary of Legation. For the part of the case dealing with extradition, see *infra*, p. 404.

of the person of a Minister, apply likewise to secure the immunities of his house: It is to be defended from all outrage; it is under a peculiar protection of the laws; to invade its freedom is a crime against the State and all other nations. \* \* \*

The second offense charged in the indictment, namely the assault and battery, needs no observations.

Upon the whole the Court after a most attentive consideration of every circumstance in this case, do award, and direct me to pronounce the following sentence:

That you pay a fine of one hundred French crowns to the Commonwealth; that you be imprisoned until the 4th day of July, 1786, which will make a little more than two years' imprisonment in the whole; that you then give good security to keep the peace, and be of good behaviour to all public Ministers, Secretaries to Embassies, and Consuls, as well as to all the liege people of Pennsylvania, for the space of seven years, by entering into a recognizance, yourself in a thousand pounds, and two securities in five hundred pounds each; that you pay the costs of this prosecution, and remain committed until this sentence be complied with.<sup>17</sup>

<sup>17</sup> In *United States v. Liddle*, 2 Wash. C. C. 205, Fed. Cas. No. 15,598 (1808), the defendant was indicted for assault and battery upon one De Lima, attached to the legation of Spain, and executing the duties of secretary of legation. Mr. Justice Washington, before whom the case was tried, held, according to the headnote of the report, that "the law is the same in the case of a defendant charged with an assault of a minister, as when charged with the same offence against a citizen; and if the minister gave the first assault, the defendant will be excused for the subsequent battery, though he was a minister."

In *United States v. Hand*, 2 Wash. C. C. 435, Fed. Cas. No. 15,297 (1810), the defendant was indicted for assault upon the *Chargé d'Affaires* of Russia, and for infracting the law of nations, by offering violence to the person of the said minister. Mr. Justice Washington, before whom the case was tried at circuit, held, according to the headnote of the report, that: "The law of nations identifies the property of the foreign minister, attached to his person, or in his use, with his person. To insult them, is an attack on the minister and his sovereign; and it appears to have been the intention of the act of Congress, to punish offences of this kind. To constitute an offence against a foreign minister, the defendant must have known that the house on which the attack was made was the domicile of a minister; or otherwise, it is only an offence against the municipal laws of the state."

In *United States v. Ortega*, 4 Wash. C. C. 531, Fed. Cas. No. 15,971 (1825), the defendant was indicted for assaulting one Mr. Salmon, *Chargé d'Affaires* of Spain, and for infracting the law of nations by committing violence upon his person. This case was likewise tried before Mr. Justice Washington, at circuit, who said, in the course of his opinion: "A foreign minister, by committing the first assault, so far loses his privilege, that he cannot complain of an infraction of the law of nations; if in his turn, he should be assaulted by the party aggrieved. This was decided by this court in *Liddle's Case*."

## UNITED STATES v. BENNER.

(Circuit Court of the United States for the Eastern District of Pennsylvania, 1880. Baldw. 234, Fed. Cas. No. 14,568.)

The defendant was indicted under the twenty-fifth, twenty-sixth and twenty-seventh sections of the act of 1790,—1 Story's Laws, 88, 89 (1 Stat. 117, 118 [Comp. St. §§ 7611-7613]),—for arresting and imprisoning Louis Brandis, a minister of the king of Denmark. The indictment contained four counts: (1) Stating Mr. Brandis to be a public minister, to wit, a secretary of legation. (2) A public minister, to wit, an attaché to the legation of the king of Denmark. (3) A minister received as such by the President of the United States. (4) An attaché received as such, etc. \* \* \*

BALDWIN, Circuit Justice (charging jury). By the Constitution of the United States, the power of receiving ambassadors, and other public ministers, is vested in the president of the United States; this power is plenary and supreme, with which no other department of the government can interfere, and when exercised by the President, carries with it all the sanction which the constitution can give to an act done by its authority. In the reception of ambassadors and ministers, the President is the government, he judges of the mode of reception, and by the act of reception, the person so received becomes at once clothed with all the immunities which the law of nations and the United States attach to the diplomatic character.

The evidence of the reception of Mr. Brandis in the character, is the certificate from the secretary of state which has been read. By the law organizing the department of state, it is the special duty of this officer, to perform all such duties as shall be entrusted to him by the President, to conduct the business of the department in such manner as he shall order and instruct, also to take an oath for the faithful performance of his duties. He is denominated in the law, "the secretary of foreign affairs;" his appropriate duties are, correspondence and communication with foreign ministers under the orders of the President; he has the custody of all the papers and archives of the department in relation to the concerns of the United States with foreign nations. Whatever act then is done by that department must be taken to be done by the orders or instructions of the President; the certificate of the secretary, under the seal, oath, and responsibility of office, must also be taken as full evidence of the act certified. The President acts in that department through the secretary, the one directs, the other performs the duties assigned; the law makes that department with all its officers, the agent of the executive branch of the government, so that a certificate under its seal by the secretary is full evidence, that what has been done by the department has been done by it in that capacity. If the law imposed on that department any duties upon subjects over which the president had no control, or none

exclusive of the other branches of the government, a certificate from its chief officer would not be evidence that it was done by the President; but as it can act on no subject unless under his orders, its acts must be taken to be his, especially as to the reception of ministers, as to which Congress has no power to enjoin any duties on the department, or its officers.

You will therefore consider Mr. Brandis as having been recognized by the president in the character of attaché to the legation of Denmark in the United States; and that such recognition is, per se, an authorization and reception of him, within the meaning of the act of Congress, for we cannot presume, that the President would recognize a minister, without receiving him. In the case of *U. S. v. Liddle*, Fed. Cas. No. 15,598, it was held by this court that a certificate from the secretary of state, that a chargé d'affaires of Spain, had introduced a person to the President as an attaché and secretary to that legation, was evidence of his reception as such. *U. S. v. Liddle*, supra; *U. S. v. Ortega*, Fed. Cas. No. 15,971. Such recognition invests him with the immunities of a minister, in whatever form it may be done, and no court or jury can require any other evidence of a reception: we instruct you then, as a matter of law, that at the time of the alleged arrest, Mr. Brandis was a minister of Denmark in the character stated in the certificate.

The only remaining question is, whether he was arrested, imprisoned, or violence offered to his person by the defendant. An arrest is the taking, seizing or detaining the person of another, touching or putting hand upon him in the execution of process, or any act indicating an intention to arrest. Imprisonment is the detention of another against his will, depriving him of the power of locomotion; if you believe the witnesses, the evidence fully establishes these charges in the indictment. Whether Mr. Brandis submitted or consented to the arrest is not material. The privileges of a foreign minister are not personal, nor is their violation punished as an injury to himself, the immunity from arrest is the privilege of the sovereign who sends him, the injury is done to him, in the person of his representative. The laws of nations protect the minister, that he may not be obstructed in the business of his mission, his person is as inviolable as his sovereign, within whose territory he is presumed to reside.

Hence the laws of the country to which he is sent can no more be enforced against him, than in the country from whence he came; being considered as in the territory of his own sovereign, no other has any jurisdiction over him. The consent of the sovereign to the violation of the rights and privileges which belong to himself, either in person or in his representative, are equally necessary, whether the minister resides in a foreign country or his own. The general law of all nations, as well as the municipal laws of each, exempt ministers from all jurisdiction or control over their persons, so long as their



representative character is recognized by the government which sends or receives them; if they exercise the functions of ministers, or retain that character, their exemptions attach to their office whether they claim it or not. There is no principle of national law, or any word in the act of Congress, which justifies the arrest of a minister who waives the privileges of diplomatic character, you will therefore dismiss all considerations of this kind from your minds, but though the person of a minister is inviolable, yet he is not exempted from the law of self defense; if he unlawfully assaults another, the attack may be repelled by as much force as will prevent its continuance or repetition. The counsel for the defendant has endeavoured to bring his case within this principle, by evidence that he received a blow from Mr. Brandis; were the fact so, however, it would be no justification of the arrest on process, which is not a right of self defense.

It is objected to this prosecution, that the defendant was not an officer within the meaning of the law; but this objection cannot avail him, the warrant was directed "to the constable of ——— ward," the defendant assumed and acted in that character in the execution of the warrant, and must be considered as one *de facto* estopped by his acts from denying it.

It is next contended that it must be proved that the defendant knew Mr. Brandis to be a minister at the time of the arrest; the law does not make knowledge an ingredient in the offence, the case meets fully the definition of the offence prohibited by the act of Congress, which, as a general rule, is all that is requisite to find a verdict of guilty; this objection has been overruled by this court in other cases—*U. S. v. Liddle*, *supra*; *U. S. v. Ortega*, *supra*,—and, we think, very properly.

The jury found the defendant guilty on the second count, charging, "that the said Peter R. Benner, afterwards, to wit, etc., with force and arms, did imprison the said Louis R. Brandis, he, the said Louis R. Brandis, then and there being a public minister, to wit, an attaché to the legation of his majesty the king of Denmark, near the United States of America, in manifest infraction of the law of nations, contrary," etc. \* \* \* 18

<sup>18</sup> Part of the opinion of Baldwin, Circuit Justice, and the opinion of Hopkinson, District Judge, are omitted. Counsel for the defendant moved for a new trial, which was overruled, as was also his motion in arrest of judgment.

In the course of the principal case, Mr. Justice Baldwin stated that the immunity of a diplomatic agent is the right of his country, not the privilege of the diplomatic agent who represents it.

This view was followed to the letter in the trial of one Guiteau for the assassination of President Garfield, in the city of Washington on the 2d day of July, 1881.

The testimony of Señor Camacho, *chargé d'affaires* of Venezuela, was desired as a witness for the prosecution. The following extract from the official proceedings on this occasion sufficiently shows the course of action followed:

"Simon Camacho called.

"The District Attorney: If your honor please, before the gentleman is sworn, I desire to state, or rather I think it is due the witness to state, that he

## IV. PUBLIC VESSELS AND MILITARY FORCES

## THE EXCHANGE v. M'FADDON et al.

(Supreme Court of the United States, 1812. 7 Cranch, 116, 3 L. Ed. 237.)

This being a cause in which the sovereign right claimed by Napoleon, the reigning Emperor of the French, and the political relations between the United States and France, were involved, it was, upon the suggestion of the Attorney General, ordered to a hearing, in preference to other causes which stood before it on the docket.

Appeal from the sentence of the circuit court of the United States for the district of Pennsylvania.

The schooner *Exchange*, owned by John M'Faddon and William Greetham, sailed from Baltimore, October 27, 1809, for St. Sebastians, in Spain. On the 30th of December, 1810, she was seized by the order of Napoleon Bonaparte; and was then armed and commissioned as a public vessel of the French government, under the name of *Balaou*. On a voyage to the West Indies, she put into the port of Philadelphia, in July, 1811, and on the 24th of August was libelled by the original owners. As no claimant appeared, Mr. Dallas, the attorney of the United States for the district of Pennsylvania filed (at the suggestion of the executive department of the United States, it is believed) a suggestion that inasmuch as there was peace between France and the United States, the public vessels of the former may enter into the ports and harbors of the latter and depart at will without seizure or detention in any way.

The district judge dismissed the libel, on the ground that a public armed vessel of a foreign power at peace with the United States, is not subject to the ordinary judicial tribunals of the country, so far as regards the question of title, by which the foreign sovereign claims to hold her.

The libellants appealed to the circuit court, where the sentence was reversed—from the sentence of reversal, the district attorney appealed to this court.<sup>19</sup>

is the minister from Venezuela to this government, and entitled under the law governing diplomatic relations to be relieved from service by subpoena or sworn as a witness in any case. Under the instructions of his government, owing to the friendship of that government for the United States, and the great respect for the memory of the man who was assassinated, they have instructed him to waive his rights and appear as a witness in the case, the same as any witness who is a citizen of this country.

"Simon Camacho sworn and examined."

<sup>1</sup> Report of the Proceedings in the Case of the United States v. Charles J. Guiteau, 1881, Washington (1882) p. 136.

<sup>19</sup> The statement of the original report is omitted, and a shorter statement thereof is substituted.

The *Exchange* can be justly considered as the leading case for the right of a state to exercise exclusive jurisdiction within its territories. It notes the

March 3, 1812, all the judges being present.

MARSHALL, Chief Justice, delivered the opinion of the court, as follows:

This case involves the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States.

The question has been considered with an earnest solicitude, that the decision may conform to those principles of national and municipal law by which it ought to be regulated.

In exploring an unbeaten path, with few, if any aids, from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this.

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its own sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restrictions.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

exceptions which exist by virtue of treaty or practice and it is the leading case for these exceptions and the reasons by which they are justified.

The reasoning, as so often happens with Chief Justice Marshall, is so close and so connected that the entire text of his judgment is printed, without attempting to separate it into what might be considered its component parts.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory.

If he enters that territory with the knowledge and license of its sovereign, that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation.

Why has the whole civilized world concurred in this construction? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation, and it is to avoid this subjection that the license has been obtained. The character to whom it is given, and the object for which it is granted, equally require that it should be construed to impart full security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case. Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which is not necessary to any conclusion to which the court may come in the cause under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign, whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity has placed in their hands.

2d. A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers.

Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and therefore, in point of law, not within the jurisdiction of the sovereign

at whose court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed, his fiction of extra-territoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

This consent is not expressed. It is true that in some countries, and in this among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and therefore a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain, privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.

3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.

In such case, without any express declaration, waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free

passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

But if, without such express permit, an army should be led through the territories of a foreign prince, might the jurisdiction of the territory be rightfully exercised over the individuals composing this army?

Without doubt a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. But if his consent, instead of being expressed by a particular license, be expressed by a general declaration that foreign troops may pass through a specified tract of country, a distinction between such general permit and a particular license is not perceived. It would seem reasonable that every immunity which would be conferred by a special license, would be, in like manner conferred by such general permit. We have seen that a license to pass through a territory implies immunities not expressed, and it is material to inquire why the license itself may not be presumed.<sup>20</sup>

It is obvious that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominion it passed. Such a practice would break down some of the most decisive distinctions between peace and war, and would reduce a nation to the necessity of resisting by war an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like these that the general license to foreigners to enter the dominions of a friendly power, is never understood to extend to a military force; and an army marching into the dominions of another sovereign, may justly be considered as committing an act of hostility; and if not opposed by force, acquires no privileges by its irregular and improper conduct. It may, however, well be questioned whether any other than the sovereign power of the state be capable of deciding that such military commander is without a license.

But the rule which is applicable to armies, does not appear to be equally applicable to ships of war entering the ports of a friendly

<sup>20</sup> In *Neal Dow v. Johnson*, 100 U. S. 158, at 170, 25 L. Ed. 682 (1879), Field, J., speaking for the court, said: "The question here is, what is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country; it is not the civil law of the conquering country; it is military law—the law of war—and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home, and, in time of peace, is essential to the preservation of liberty." To the same effect, *Coleman v. Tennessee*, 97 U. S. 509, 24 L. Ed. 1118 (1878), per Field, J. In like manner, a State court may not exercise jurisdiction for violation of a State statute in a military reservation. *Wills v. State*, 3 Heisk. (Tenn.) 141 (1871).

power. The injury inseparable from the march of an army through an inhabited country and the dangers often, indeed generally, attending it, do not ensue from admitting a ship of war, without special license, into a friendly port. A different rule, therefore, with respect to this species of military force has been generally adopted. If, for reasons of state, the ports of a nation generally, or any particular ports be closed against vessels of war generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them while allowed to remain, under the protection of the government of the place.

In almost every instance, the treaties between civilized nations contain a stipulation to this effect in favor of vessels driven in by stress of weather or other urgent necessity. In such cases the sovereign is bound by compact to authorize foreign vessels to enter his ports. The treaty bids him to allow vessels in distress to find refuge and asylum in his ports, and this is a license which he is not at liberty to retract. It would be difficult to assign a reason for withholding from a license thus granted, any immunity from local jurisdiction which would be implied in a special license.

If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible, that they enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived by the court for distinguishing their case from that of vessels which enter by express assent. In all the cases of exemption which have been reviewed, much has been implied; but the obligation of what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war?

In this part of the subject a difficulty is to be encountered, the seriousness of which is acknowledged, but which the court will not attempt to evade.

These treaties which provide for the admission and safe departure of public vessels entering a port from stress of weather, or other urgent cause, provide in like manner for the private vessels of the nation; and where public vessels enter a port under the general license which is implied merely from the absence of a prohibition, they are, it may be urged, in the same condition with merchant vessels entering the same port for the purposes of trade who cannot thereby claim any exemption from the jurisdiction of the country. It may be contended, certainly with much plausibility if not correctness, that the same rule, and same principle are applicable to public and private

ships; and since it is admitted that private ships, entering without special license become subject to the local jurisdiction, it is demanded on what authority an exception is made in favor of ships of war.

It is by no means conceded, that a private vessel really availing herself of an asylum provided by treaty, and not attempting to trade, would become amenable to the local jurisdiction unless she committed some act forfeiting the protection she claims under compact. On the contrary, motives may be assigned for stipulating and according immunities to vessels in cases of distress, which would not be demanded for, or allowed to those which enter voluntarily, and for ordinary purposes. On this part of the subject, however, the court does not mean to indicate any opinion. The case itself may possibly occur, and ought not to be prejudiced.

Without deciding how far such stipulations in favor of distressed vessels, as are usual in treaties, may exempt private ships from the jurisdiction of the place, it may safely be asserted that the whole reasoning upon which such exemption has been implied in other cases, applies with full force to the exemption of ships of war in this.

"It is impossible to conceive," says Vattel, "that a prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power, and this consideration furnishes an additional argument, which completely establishes the independency of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independency; and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation."

Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.

To the court, it appears, that where, without treaty, the ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

The preceding reasoning, has maintained the propositions that all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory; that this consent may be



implied or expressed; and that, when implied, its extent must be regulated by the nature of the case and the views under which the parties requiring and conceding it must be supposed to act.

When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption. But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and, it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign, entering a port open for their reception.

Bynkershoek, a jurist of great reputation, has indeed maintained that the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual, and has quoted several cases in which courts have exercised jurisdiction over causes in which a foreign sovereign was made a party defendant.

Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individ-

ual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is intrusted to govern.

The only applicable case cited by Bynkershoek, is that of the Spanish ships of war, seized in Flushing for a debt due from the King of Spain. In that case the states generally interposed; and there is reason to believe, from the manner in which the transaction is stated, that, either by the interference of government, or the decision of the court, the vessels were released. This case of the Spanish vessels is, it is believed, the only case furnished by the history of the world, of an attempt made by an individual to assert a claim against a foreign prince, by seizing the armed vessels of the nation. That this proceeding was at once arrested by the government, in a nation which appears to have asserted the power of proceeding in the same manner against the private property of the prince, would seem to furnish no feeble argument in support of the universality of the opinion in favor of the exemption claimed for ships of war. The distinction made in our own laws between public and private ships would appear to proceed from the same opinion.

It seems, then, to the court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals. But, until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions, therefore, which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, ought not, in the opinion of this court, to be so construed as to give them jurisdiction in a case in which the sovereign power has impliedly consented to waive its jurisdiction.

The arguments in favor of this opinion which have been drawn from the general inability of the judicial power, to enforce its decisions in cases of this description, from the consideration that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention. But the argument has already been drawn to a length which forbids a particular examination of these points.

The principles which have been stated will now be applied to the case at bar.

In the present state of the evidence and proceedings, the Exchange must be considered as a vessel which was the property of the libellants, whose claim is repelled by the fact, that she is now a national armed vessel, commissioned by, and in the service of the Emperor of France. The evidence of this fact is not controverted. But it is contended that it constitutes no bar to an inquiry into the validity of the title, by which the emperor holds this vessel. Every person, it is alleged, who is entitled to property brought within the jurisdiction of our courts, has a right to assert his title in those courts, unless there be some law taking his case out of the general rule. It is therefore said to be the right, and if it be the right, it is the duty of the court, to inquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law.

If the preceding reasoning be correct, the Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.<sup>21</sup> If this opinion be correct, there seems to be a neces-

<sup>21</sup> "It appears by your communication of the 1st ult. that on the 25th of November last, a British man-of-war, the President, was lying in the Bay of San Francisco, in the state of California, wherein she had entered, accompanied with a Russian vessel, the Sitka, alleged to be prize of war to said ship President; that on board the Sitka was a prize crew, commanded by an officer of the British navy; that on the day aforesaid, a petition was presented to a competent judge of the state of California, in the name of one Nystrom and of one Blom, alleging that they were unlawfully confined and detained on board the Sitka by the prize officer and crew thereof, and praying for the issue of a writ of habeas corpus, directed to such prize officer and crew, for the purpose of having the legality of such confinement and detention inquired into, according to the laws of the state; that the court thereupon granted the writ, which was duly served by manual delivery of copy to the officer in command of the Sitka; and that thereupon, without obeying the order of said writ, and in disregard thereof, the commander of the Sitka immediately got under way, and departed from the jurisdiction of the state of California.

"It further appears that, on these facts being duly reported to the Governor of the state of California, he has communicated the same to the Executive of the United States, and asks redress in the premises, as for a public wrong to the judicial and political authorities of the state of California and of the United States.

"Whereupon you submit the question—Whether the conduct of the prize commander of the Sitka, under these circumstances, constitutes a just cause of complaint on the part of this government, under the law of nations or any treaty between the United States and a foreign power? \* \* \*

"It being thus demonstrated that the Sitka was rightfully within the port of San Francisco, it only remains to consider what jurisdiction, if any, the United States had over prisoners of war, if any there were, on board the Sitka. \* \* \*

"Our courts have also adopted unequivocally the doctrine that a public ship of war of a foreign sovereign, at peace with the United States, coming into

sity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States.

I am directed to deliver it, as the opinion of the court, that the sentence of the circuit court, reversing the sentence of the district court, in the case of the *Exchange* be reversed, and that of the district court, dismissing the libel, be affirmed.<sup>22</sup> •

our ports and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country. \* \* \*

"From all these premises, the consequences are inevitable in regard to the prisoners on board the *Sitka*. So long as they remained on board that ship, they were in the territory and jurisdiction of her sovereign. There the neutral has no right to meddle with them. If, indeed, they be landed, then they pass from the jurisdiction of the belligerent to that of the neutral; they become practically free, because their detention is forcible, and force cannot be exercised on the neutral territory, unless, indeed, the neutral consent to their being landed, and afterwards re-embarked, as it well might, from motives of humanity, for instance, to succor the sick or wounded, without any violation of its neutrality, or any derogation from its own rights of territorial sovereignty. *Hautefeuille*, tom. ii, p. 157.

"I conclude, for these reasons, that the courts of the state of California had no jurisdiction whatever as to these prisoners on board the *Sitka*."

Caleb Cushing, Attorney General, to Secretary of State Marcy, April 28, 1855, 7 Op. Attys. Gen. 123.

<sup>22</sup> In *The Constitution*, L. R. 4 Pro. Div. 89 (1879), the facts and the holding of the High Court of Admiralty were, according to the headnote, as follows:

"A vessel of war commissioned by the government of a foreign state, and engaged in the national service of her government, was stranded on the coast of England. She had a cargo of machinery on board her, alleged to belong to private individuals, of which her government had for public purposes charged itself with the care and protection. Important and efficient salvage services were rendered to the ship and her cargo. A suit was instituted on behalf of certain of the salvors against the ship and her cargo. The court refused to order a warrant to issue for the arrest of the ship or cargo, and held it had no jurisdiction to entertain the suit."

It is interesting to note that the vessel in this case was none other than the United States frigate *Constitution*, famous for its exploits in the earlier days of the Republic, and especially in the War of 1812. It had been sent to France to bring home certain exhibits of the United States to the Paris Exhibition of 1878. For another case involving the *Constitution*, see *Commodore Stewart's Case*, post, p. 1039.

In *The Parlement Belge*, L. R. 5 Prob. Div. 197 (1880), the facts and decision of the Court of Appeals are thus stated in the headnote to the case:

"As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each state declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory.

"Held, therefore, reversing the decision of the Admiralty Division, that an unarmed packet belonging to the sovereign of a foreign state, and in the hands of officers commissioned by him, and employed in carrying mails, is not liable to be seized in a suit in rem to recover redress for a collision, and this immunity is not lost by reason of the packet's also carrying merchandise and passengers for hire."

In the course of the opinion of this case, the principal case of *The Exchange*, 7 Cranch, 116, 3 L. Ed. 287 (1812), is cited, quoted, and relied upon.

## V. CONSULS MAY BE EXEMPT BY TREATY, NOT BY THE LAW OF NATIONS

## BARBUIT'S CASE.

(High Court of Chancery, 1737. *Cas. t. Talbot*, 281.)

Barbuit had a commission, as agent of commerce from the King of Prussia in Great Britain in the year 1717, which was accepted here by the Lords Justices when the King was abroad. After the late King's demise his commission was not renewed until 1735, and then it was, and allowed in a proper manner; but with the recital of the powers given him in the commission, and allowing him as such. These commissions were directed generally to all the persons whom the same should concern and not to the King: and his business described in the commissions was, to do and execute what his Prussian Majesty should think fit to order with regard to his subjects trading in Great Britain; to present letters, memorials, and instruments concerning trade, to such persons, and at such places as should be convenient, and to receive resolutions thereon; and thereby his Prussian Majesty required all persons to receive writings from his hands, and give him aid and assistance. Barbuit lived here near twenty years, and exercised the trade of a tallow-chandler, and claimed the privilege of an ambassador or foreign minister, to be free from arrests. After hearing counsel on this point:

LORD CHANCELLOR [TALBOT]. A bill was filed in this court against the defendant in 1725, upon which he exhibited his cross bill, styling himself merchant. On the hearing of these causes the cross bill was dismissed; and in the other, an account decreed against the defendant. The account being passed before the master, the defendant took exceptions to the master's report, which were overruled; and then the defendant was taken upon an attachment for non-payment, &c. And now, ten years after the commencement of the suit, he insists he is a public minister, and therefore all the proceedings against him null and void. Though this is a very unfavourable case, yet if the defendant is truly a public minister, I think he may now insist upon it; for the privilege of a public minister is to have his person sacred and free from arrests, not on his own account, but on account of those he represents, and this arises from the necessity of the thing, that nations may have intercourse with one another in the same manner as private persons, by agents, when they cannot meet themselves. And if the foundation of this privilege is for the sake of the prince by whom an ambassador is sent, and for sake of the business he is to do, it is impossible that he can renounce such privilege and protection: for, by his being thrown into prison the business must inevitably suffer. The question is, whether the defendant is such a person as

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7 Anne, cap. 10, describes, which is only declaratory of the antient universal *jus gentium*; the words of the statute are "ambassadors or other public ministers," and the exception of persons trading relates only, to their servants; the Parliament never imagining that the ministers themselves would trade. I do not think the words "ambassadors, or other public ministers," are synonymous. I think that the word "ambassadors" in the act of Parliament, was intended to signify ministers sent upon extraordinary occasions, which are commonly called "ambassadors extraordinary"; and "public ministers" in the act taken in all others who constantly reside here; and both are entitled to these privileges. The question is, whether the defendant is within the latter words? It has been objected that he is not a public minister, because he brings no credentials to the King. Now although it be true that this is the most common form, yet it would be carrying it too far to say, that these credentials are absolutely necessary; because all nations have not the same forms of appointment. It has been said, that to make him a public minister he must be employed about state affairs. In which case, if state affairs are used in opposition to commerce, it is wrong; but if only to signify the business between nation and nation the proposition is right: for, trade is a matter of state, and of a public nature, and consequently a proper subject for the employment of an ambassador. In treaties of commerce those employed are as much public ministers as any others; and the reason for their protection holds as strong: and it is of no weight with me that the defendant was not to concern himself about other matters of state, if he was authorised as a public minister to transact matters of trade. It is not necessary that a minister's commission should be general to entitle him to protection; but it is enough that he is to transact any one particular thing in that capacity, as every ambassador extraordinary is; or to remove some particular difficulties, which might otherwise occasion war. But what creates my difficulty is, that I do not think he is intrusted to transact affairs between the two crowns: the commission is, to assist his Prussian Majesty's subjects here in their commerce; and so is the allowance. Now this gives him no authority to intermeddle with the affairs of the King; which makes his employment to be in the nature of a consul. And although he is called only an agent of commerce, I do not think the name alters the case. Indeed there are some circumstances that put him below a consul; for, he wants the power of judicature, which is commonly given to consuls. Also their commission is usually directed to the prince of the country; which is not the present case: but at most he is only a consul.

It is the opinion of Barbeyrac, Wincquefort and others, that a consul is not entitled to the *jus gentium* belonging to ambassadors.

And as there is no authority to consider the defendant in any other

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view than as a consul, unless I can be satisfied that those acting in that capacity are entitled to the *jus gentium*, I cannot discharge him.<sup>22</sup>

NOTE—The person was after discharged by the secretary's office, satisfying the creditors.

### UNITED STATES v. RAVARA.

(Circuit Court of the United States, Pennsylvania District, 1794. 2 Dall. 299, 1 L. Ed. 888. note.)

The defendant, a consul from Genoa, was indicted for a misdemeanor, in sending anonymous and threatening letters to Mr. Hammond, the British minister, Mr. Holland, a citizen of Philadelphia, and several other persons, with a view to extort money. \* \* \*

The defendant was tried in April session, 1794, before JAY, Chief Justice, and PETERS, Justice; and was defended by the same advocates, on the following points: 1st. That the matter charged in the indictment was not a crime by the common law, nor is it made such by any positive law of the United States. \* \* \* 2d. That considering the official character of the defendant, such a proceeding ought not to be sustained, nor such a punishment inflicted. The law of nations is a part of the law of the United States; and the law of nations seems to require, that a consul should be independent of the ordinary criminal justice of the place where he resides. Vatt. lib. 2, c. 2, § 34. 3d. But that, exclusive of the legal exceptions, the prosecution had not been maintained in point of evidence; for it was all circumstantial and presumptive, and that too, in so slight a degree, as ought not to weigh with a jury on so important an issue. \* \* \*

Rawle, in reply, insisted, that the offence was indictable at common law; that the consular character of the defendant gave jurisdiction to the circuit court, and did not entitle him to an exemption from prosecution, agreeable to the law of nations; and that the proof was as strong as the nature of the case allowed, or the rules of evidence required. \* \* \*

<sup>22</sup> In the discussion of this case the court seems to have determined that a person residing in this country in the capacity of foreign minister cannot, by any act or acts of his own, waive that privilege or protection which the law of nations has annexed to a situation so important; that a foreign minister, being or becoming a trader, does not thereby lose or forfeit the privilege personally annexed to him, and therefore the only reason why the court in the present instance did not think the defendant entitled to the protection which he claimed was that the employment which he was invested with could at most be considered only as the same with or equal to that of consul, which according to the best writers upon the subject was not entitled to the *jus gentium*, or privilege belonging to ambassadors or ministers, who are intrusted to transact matters of state or other affairs between two nations; that the law of nations (which in its fullest extent was and formed part of the law of England) was the rule of decision in cases of this kind; and that the act of Parliament was declaratory of it, and occasioned by a particular incident.

THE COURT were of opinion, in the charge, that the offence was indictable, and that the defendant was not privileged from prosecution, in virtue of his consular appointment.

The jury, after a short consultation, pronounced the defendant guilty; but he was afterwards pardoned, on condition (as I have heard) that he surrendered his commission and exequatur. \* \* \*<sup>24</sup>

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In re BAIZ.

(Supreme Court of the United States, 1890. 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222.)

The case, as stated by the court, was as follows:

On the 29th day of June, 1889, an action was commenced by one John Henry Hollander in the District Court of the United States for the Southern District of New York against Jacob Baiz, to recover damages for the publication of an alleged libel upon the plaintiff, and a summons was served upon him on the 2d day of July of that year.

The defendant pleaded to the jurisdiction of the court, stating that since July 1887 he had been consul general of Guatemala at the city of New York; that from January 16, 1889, until July 10, 1889, he was acting minister and sole representative of Guatemala in the United States, in the absence of its duly accredited envoy extraordinary and minister plenipotentiary to this country; that on June 9, 1889, during the period in which he acted as minister, he communicated to the Associated Press a decree of Guatemala of May 14, 1889, under instructions from Guatemala so to do, which communication constituted the libel in question, and that because of the defendant's position, as acting minister at the time of such communication, he was exempt from the jurisdiction of the court.

Mr. Chief Justice FULLER delivered the opinion of the court.<sup>25</sup> \* \* \*

Diplomatic duties are sometimes imposed upon consuls, but only in virtue of the right of a government to designate those who shall represent it in the conduct of international affairs (1 Calvo, *Droit Int.* 586, 2d Ed., Paris, 1870), and among the numerous authorities on international laws, cited and quoted from by petitioner's counsel, the attitude of consuls, on whom this function is occasionally conferred, is perhaps as well put by De Clercq and De Vallat as by any, as follows:

"There remains a last consideration to notice, that of a consul who is charged for the time being with the management of the affairs of

<sup>24</sup> Part of the report is omitted.

<sup>25</sup> A short statement of facts has been substituted for that of the report and only so much of the opinion is given as relates to the claim of diplomatic immunity.



the diplomatic post; he is accredited in this case in his diplomatic capacity, either by a letter of the minister of foreign affairs of France to the minister of foreign affairs of the country where he is about to reside, or by a letter of the diplomatic agent whose place he is about to fill, or finally by a personal presentation of this agent to the minister of foreign affairs of the country." *Guide Pratique des Consuls*, vol. I., p. 93.

That it may sometimes happen that consuls are so charged is recognized by section 1738 of the Revised Statutes (Comp. St. § 3196), which provides:

"No consular officer shall exercise diplomatic functions, or hold any diplomatic correspondence or relation on the part of the United States, in, with, or to the government, or country to which he is appointed, or any other country or government when there is in such country any officer of the United States authorized to perform diplomatic functions therein; nor in any case, unless expressly authorized by the President so to do."

But in such case their consular character is necessarily subordinated to their superior diplomatic character. "A consul," observed Mr. Justice Story, in *The Anne*, 3 Wheat. 435, 445, 4 L. Ed. 428, "though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt that his sovereign may specially intrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it."

When a consul is appointed *chargé d'affaires*, he has a double political capacity; but though invested with full diplomatic privileges, he becomes so invested as *chargé d'affaires* and not as consul, and though authorized as consul to communicate directly with the government in which he resides, he does not thereby obtain the diplomatic privileges of a minister. *Atty. Gen. Cushing*, 7 Op. Attys. Gen. 342, 345.

This is illustrated by the ruling of Mr. Secretary Blaine, April 12, 1881, that the Consul General of a foreign government was not to be regarded as entitled to the immunities accompanying the possession of diplomatic character, because he was also accredited as the "political agent" so-called of that government, since he was not recognized as performing any acts as such, which he was not equally competent to perform as Consul General. 1 Whart. Dig. Int. Law, 2d Ed., ch. 4, § 88, p. 624.

We are of opinion that Mr. Baiz was not, at the time of the commencement of the suit in question, *chargé d'affaires ad interim* of Guatemala, or invested with and exercising the principal diplomatic functions, or in any view a "diplomatic officer." He was not a public minister within the intent and meaning of § 687; and the District Court had jurisdiction. \* \* \*

Mr. Baiz was a citizen of the United States and a resident of the city of New York. In many countries it is a state maxim that one of its own subjects or citizens is not to be received as a foreign diplomatic agent, and a refusal to receive, based on that objection, is always regarded as reasonable. The expediency of avoiding a possible conflict between his privileges as such and his obligations as a subject or citizen, is considered reason enough in itself. Wheaton (8th Ed.) § 210; 2 Twiss, *Law of Nations*, 276, § 186; 2 Phill. *Int. Law*, 171. Even an appointment as consul of a native of the place where consular service is required, is, according to Phillimore, "perhaps, rightfully pronounced, by a considerable authority, to be objectionable in principle." Volume II, p. 291, citing De Martens & De Cussey, *Recueil des Traités Index Explicatif*, p. xxx, Tit. "Consuls."

"Other powers" says Calvo, vol. I., p. 559 (2d Ed.) "admit without difficulty their own citizens as representatives of foreign states, but imposing on them the obligation of amenability to the local laws as to their persons and property. These conditions, which, nevertheless, ought never to go so far as to modify or alter the representative character, ought always to be defined before or at the time of receiving the agent; for otherwise, the latter might find it impossible to claim the honors, rights and prerogatives attached to his employment." See also Heffter, 3d. Fr. Ed., 387.

In the United States, the rule is expressed by Mr. Secretary Evarts, under date of Sept. 19, 1879, thus: "This government objects to receiving a citizen of the United States as a diplomatic representative of a foreign power. Such citizens, however, are frequently recognized as consular officers of other nations, and this policy is not known to have hitherto occasioned any inconvenience." And again, April 20, 1880, while waiving the obstacle in the particular instance, he says: "The usage of diplomatic intercourse between nations is averse to the acceptance, in the representative capacity, of a person who, while native born in the country which sends him, has yet acquired lawful status as a citizen by naturalization of the country to which he is sent." 1 Wharton *Dig. Int. Law* (2d Ed.) § 88a, p. 628.

Of course the objection would not exist to the same extent in the case of designation for special purposes or temporarily, but it is one purely for the receiving government to insist upon or waive at its pleasure. The presumption, therefore, would ordinarily be against Mr. Baiz's contention, and, as matter of fact, we find that when, in 1886, he was appointed *chargé d'affaires* of the Republic of Honduras to the

government of the United States, Mr. Secretary Bayard declined receiving him as the diplomatic representative of the government of that country, because of his being a citizen of the United States, and advised him that: "It has long been the almost uniform practice of this Government to decline to recognize American citizens as the accredited diplomatic representatives of foreign powers. The statutory and jurisdictional immunities and the customary privileges of right attaching to the office of a foreign minister make it not only inconsistent, but at times even inconvenient, that a citizen of this country should enjoy so anomalous a position." And in a subsequent communication rendered necessary by a direct question of Mr. Baiz, the Secretary informs him "that it is not the purpose of the department to regard the substitutionary agency, which it cheerfully admits in your case, as conferring upon you personally any diplomatic status whatever." This correspondence disposes of the question before us. The objection which existed in 1886 to the reception of Mr. Baiz as *chargé d'affaires ad hoc* or *ad interim*, or according to him any diplomatic status whatever, whether temporary or otherwise, existed in 1889; and it is out of the question to assume that the State Department intended to concede the diplomatic status between January 16 and July 10, 1889, upon the request of Señor Lainfiesta that Consul General Baiz might be allowed to be a medium of communication during his absence, which it had refused to accord to the Republic of Honduras itself. It is evident that the statement of the Assistant Secretary, October 4, 1889, was quite correct, that "the business of the legation [of Guatemala] was conducted by Consul General Baiz, but without diplomatic character." \* \* \*

Regarding the matter in hand as, in its general nature, one of delicacy and importance, we have not thought it desirable to discuss the suggestions of counsel in relation to the remedy, but have preferred to examine into and pass upon the merits.

We ought to add that while we have not cared to dispose of this case upon the mere absence of technical evidence, we do not assume to sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister, and therefore have the right to accept the certificate of the State Department that a party is or is not a privileged person, and cannot properly be asked to proceed upon argumentative or collateral proof.

Our conclusion is, as already stated, that the District Court had jurisdiction, and we accordingly discharge the rule and

Deny the writs.

## UNITED STATES v. TRUMBULL, et al.

(District Court of the United States, Southern District of California, 1891.  
48 Fed. 94.)

At Law. Indictment of Ricardo Trumbull and G. A. Burt for violation of neutrality laws. On motion of Walter D. Catton to be discharged from process of subpoena. \* \* \*

Ross, J. It is greatly to be regretted that the important question now presented to the court must be disposed of in the haste of a *nisi prius* trial. The question arises in a case in which the government of the United States, by various counts in the indictment, charges, in effect, that on the 9th day of May, 1891, at a certain designated place within this judicial district, Ricardo Trumbull and G. A. Burt attempted to fit out and arm, fitted out and armed, caused to be fitted out and armed, and were knowingly concerned in fitting out and arming, a certain steamship called the "Itata," which was then and there in the possession and under the control of certain citizens of the republic of Chili, known as the "Congressional Party," and who were then and there, in said republic, organized and banded together in great numbers in armed rebellion and attempted revolution, and carrying on war against the republic of Chili and the government thereof, with which the United States then, and at the time of the finding of the indictment, were at peace, with intent that said ship should be employed in the service of the aforesaid Congressional party, to cruise or commit hostilities against the then established and recognized government of Chili, with which this government then was at peace; contrary to the provisions of section 5283 of the Revised Statutes of the United States (Comp. St. § 10175). A similar violation of sections 5285 and 5286 of the Revised Statutes (Comp. St. §§ 10176, 10177) is also alleged. Counsel for the United States having caused a subpoena to be served upon Mr. Walter D. Catton to appear as a witness in the case on the part of the prosecution, he has appeared in obedience to the subpoena, and presented to the court his *exequatur*, issued by President Cleveland on the 26th of January, 1888, by which he was recognized by the executive as the duly-appointed vice-consul of Chili at San Francisco, Cal., and declared "free to exercise and enjoy such functions, powers, and privileges as are allowed to the vice-consuls of the most favored nations in the United States." He also presents the consular instructions received from his own government, which, among other things, prohibit consuls, without authorization from the minister of foreign affairs or the respective legations, if there be such, from making public the correspondence which they may hold with the government, or from giving publicity to information or data which they may receive while exercising their charge; and by which they are required to demand the privileges and exemptions which may ap-

pertain to them by virtue of treaties or conventions entered into between Chili and the nations where they may be stationed, and, in case there be no treaty, to demand the privileges and exemptions which are generally conceded in the country of their residence to consuls of other nations; and, as essential to the exercise of their office, they are required to demand inviolability of their archives and documents, and freedom in their acts performed in their capacity of consuls. For a violation of their instructions certain punishments are prescribed. Presenting the credentials and instructions mentioned, Mr. Catton asks to be relieved from further attendance upon the court as a witness. He bases the demand—First, upon the broad ground that his privileges as vice-consul exempt him from compulsory process to attend as a witness in any court of the United States; and, secondly, upon the ground that the circumstances of the present case are such as render it improper to require him to attend as a witness on the part of the prosecution.

The counsel for the United States deny that the privileges thus asserted by Mr. Catton exist; contending, in the first place, that he ceased to be vice-consul of Chili upon the overthrow of the government by which he was accredited. If the position of the counsel for the United States in this respect is correct, the question is of course ended, and Mr. Catton occupies the position of an ordinary witness subpoenaed in the cause. But, I am unable to take that view of the matter. The court cannot say that the person who holds the unrevoked *exequatur* issued by the president, by virtue of which he is in discharge of the duties of vice-consul of his country, is in fact not such officer. The recognition of representatives of foreign countries is a matter for the executive department of the government, whose action in the premises is accepted and followed by the judicial department. Whart. Int. Law Dig. p. 552.

But, accepting Mr. Catton as the duly authorized and acting vice-consul of the Chilean government, does his position as such, of itself, entitle him to exemption from compulsory process to attend as a witness in the courts of the United States? It is very clear that by the law of nations consuls and vice-consuls stand upon a very different footing from ambassadors and ministers. The latter are not amenable to either the civil or criminal jurisdiction of the country to which they are deputed; not so, however, the former. 1 Whart. Int. Law Dig. pp. 767, 775, 776; Wools. Int. Law, p. 162; 1 Kent, Comm. 45, 46. But it is contended that such immunity attached to the vice-consul of Chili by reason of the treaty concluded between the United States and that country on the 29th of April, 1832. The first subdivision of article 31 of that treaty provided that it should "remain in full force and virtue for the term of twelve years, to be reckoned from the day of exchange of the ratification; and, further, until the end of one year after either of the contracting parties shall have given notice to the

other of its intentions to terminate the same, each of contracting parties reserving to itself the right of giving such notice to the other at the end of said term of twelve years. And it is hereby agreed between them that, on the expiration of one year after such notice shall have been received by either from the other party, this treaty in all the parts relating to commerce and navigation shall altogether cease and determine, and in all those parts which relate to peace and friendship it shall be permanently and perpetually binding on both parties."

Pursuant to notice by the Chilian government under the foregoing article, the treaty, together with the explanatory convention which followed it in 1833, were terminated January 20, 1850. *Treat. & Conven.* p. 118. As will be observed, the portions of the treaty so terminated were those relating to commerce and navigation, leaving permanently and perpetually binding on both powers those parts relating to peace and friendship, embracing, as is contended, article 25 of the treaty, which is as follows:

"Both the contracting parties, being desirous of avoiding all inequality in relation to their public communications and official intercourse, have agreed, and do agree, to grant to their envoys, ministers, and other public agents the same favors, immunities, and exemptions which those of the most favored nations do or shall enjoy; it being understood that whatever favors, immunities, or privileges the United States of America or the republic of Chili may find it proper to give to the ministers and public agents of any other power shall, by the same act, be extended to those of each of the contracting parties."

It being stipulated by the convention between the United States and France, ratified April 1, 1853, that their consuls shall never be compelled to appear in court as witnesses, it is urged that the same privilege attaches to the consuls of Chili by virtue of article 25 of the treaty of 1832 above cited. In the case of *In re Dillon*, 7 Sawy. 561, Fed. Cas. No. 3,914, which arose in 1854, it was held by the court that, because of the stipulation in the treaty between the United States and France to the effect that their consuls shall never be compelled to appear in court as witnesses such consuls are not amenable to the compulsory process of the courts requiring their attendance, notwithstanding the provision of the constitution of the United States securing to the accused in criminal prosecutions the right to have compulsory process for obtaining witnesses in his favor. The subpoena served upon Mr. Dillon also required him to produce a certain document, said to be in his possession. Having failed to appear, an attachment was issued, and he was brought into court, from which, after a hearing of the matter, he was discharged. When the attachment was served, he hauled down his consular flag and the case was taken up by the French minister at Washington as involving a gross disrespect to France. A long and animated controversy between Mr. Marcy, then secretary of state, and the French government ensued. The fact that an attachment had

issued, under which Mr. Dillon was brought into court, was regarded by the French government as not merely a contravention of the treaty, but an offense by international law; and it was argued that the disrespect was not purged by the subsequent discharge of Mr. Dillon from arrest. It was urged, also, that the fact that the subpoena contained the clause *duces tecum* involved a violation of the consular archives. Mr. Marcy, in a letter of September 11, 1854, to Mr. Mason, then minister at Paris, discusses these questions at great length. He maintains that the provision in the federal constitution giving defendants opportunity to meet witnesses produced against them face to face overrides conflicting treaties, unless in cases where such treaties embody exceptions to this right recognized as such when the constitution was framed. One of these exceptions relates to the case of diplomatic representatives. "As the law of evidence stood when the constitution went into effect," says Mr. Marcy, "ambassadors and ministers could not be served with compulsory process to appear as witnesses, and the clause in the constitution referred to did not give the defendant the right in criminal prosecutions to compel their attendance in court." This privilege, however, Mr. Marcy maintained, did not extend to consuls; and consuls, therefore, could only procure the privilege when given to them by treaty, which, in criminal cases, was subject to the limitations of the constitution of the United States. Mr. Marcy, however, finding that the French government continued to regard the attachment with the subpoena *duces tecum* as an attack on its honor, offered, in a letter to Mr. Mason, dated January 18, 1855, to compromise the matter by a salute to the French flag upon a French man-of-war, stopping at San Francisco. Count de Santiges, the French minister at Washington, asked in addition, that when the consular flag at San Francisco was rehoisted it should receive a salute. This was declined by Mr. Marcy. In August, 1855, after a long and protracted controversy, the French government agreed to accept as a sufficient satisfaction an expression of regret by the government of the United States, coupled with the provision that "when a French national ship or squadron shall appear in the harbor of San Francisco the United States authorities there, military or naval, will salute the national flag borne by such ship or squadron with a national salute, at an hour to be specified and agreed on with the French naval commanding officer present, and the French ship or squadron whose flag is thus saluted will return the salute, gun for gun." Whart. Int. Dig. p. 666.

It will therefore be seen that while the court held, in *Dillon's Case*, that the provision of the constitution securing to the accused in criminal prosecutions the right to have compulsory process for obtaining witnesses in their favor does not authorize the issuing of such process to such consuls who, by express treaty, are not amenable to the process of the courts, the state department of the government contended

that that provision overrides conflicting treaties, not embodying exceptions to the right guaranteed, recognized as such when the constitution was framed, within which exceptions consuls did not come. In the present case, however, the provision of the constitution referred to in Dillon's Case is not involved; for Mr. Catton has not been subpoenaed as a witness for the defendants, but on behalf of the prosecution. And if he is entitled, as in effect it is declared he is, by article 25 of the convention of 1832, and by the exequatur issued to him by the president, to the same privileges and immunities as are granted to the consuls of France, it would seem to follow that he is exempt from compulsory process to attend the court as a witness.

But for another reason I do not think he should be compelled to attend as a witness in this cause. The offenses with which the defendants stand charged are violations of the neutrality laws of the United States, and consist in the giving of aid to those who now constitute the established and recognized government of Chili. Having succeeded and become recognized, the acts of that government from the commencement of its existence will be upheld as those of an independent nation. *Williams v. Bruffy*, 96 U. S. 176, 24 L. Ed. 716. To require the representative of that government to appear and give testimony against those alleged to have aided its establishment would not only be contrary to the principle upon which neutrality laws are based, but would strongly tend to give grave offense to the government now recognized by the United States, and with which this government, happily, is at peace.

The motion on behalf of the vice-consul is allowed.\*\*

\*\* A consul is a commercial, not a diplomatic agent, and has no claim under international law to immunity from the civil or criminal jurisdiction of the country in which he is stationed. *Barbuit's Case*, Cas. t. Talbot, 281 (1737); *Clarke v. Cretico*, 1 Taunt. 106 (1808); *Viveash v. Becker*, 3 M. & S. 284 (1814); *Com. v. Kosloff*, 5 Serg. & R. (Pa.) 545 (1816). "Consuls," said Mr. Justice Swayne, in *Coppell v. Hall*, 7 Wall. 542, 553, 19 L. Ed. 244 (1868), "are approved and admitted by the local sovereign. If guilty of illegal or improper conduct, the exequatur which has been given may be revoked and they may be punished, or sent out of the country, at the option of the offended government. In civil and criminal cases, they are subject to the local law in the same manner with other foreign residents owing a temporary allegiance to the state. *Dana's Wheaton*, § 249; 1 *Kent's Commentaries*, 53. A trading consul, in all that concerns his trade, is liable in the same way as a native merchant. 2 *Phillimore's International Law*, celi. The character of consul does not give any protection to that of merchant when they are united in the same person. *The Indian Chief*, 3 C. Rob. 27 (1800); *Arnold v. U. S. Ins. Co.*, 1 Johns. Cas. 363 (1800)."

See, also, opinion of C. Cushing, 8 Op. Attys. Gen. 169 (1856).

While consuls are and always have been liable to suit in the United States, they might only be sued in the federal courts (Act of 1789, Rev. St. § 711, cl. 8 [Comp. St. § 1233]); but this clause was repealed by Act Cong. Feb. 18, 1875, 18 St. L. p. 318, with the result that state and federal courts now exercise concurrent jurisdiction in suits against consuls and vice consuls, as appears from an excellent opinion of Mr. Justice Harrison in the recent case of *Wilcox v. Lucio*, 118 Cal. 639, 45 Pac. 676, 50 Pac. 758, 45 L. R. A. 579, 62 Am. St. Rep. 806 (1897).

SCOTT INT. LAW



## VI. RIGHT OF ASYLUM

*(A) In Embassy or Legation*

## UNITED STATES v. JEFFERS.

(United States Circuit Court for District of Columbia, 1836. 4 Cranch, C. C. 704, Fed. Cas. No. 15,471.)

Francis S. Key, Esq.,<sup>27</sup> attorney of the United States, for the District of Columbia, having laid before the court a letter to him from the Secretary of State, in these words: "F. S. Key, Esq., United States Attorney for the District of Columbia. Department of State, Washington, May 27, 1836. Sir: I transmit a copy of a communication from his Britannic Majesty's envoy extraordinary and minister plenipotentiary, Mr. Fox, dated yesterday, complaining of the conduct of a constable named Jeffers, at the house of one of the members of his majesty's mission. You are requested to inquire immediately into the case and to ascertain and report to the department, under what authority the constable acted; with what process he was charged; by whom the process was issued, and on whose application; and generally what proceedings have taken place in the matter. You will also be pleased to inform me, to whom the constable is amenable, and in what manner he is removable for misconduct. I am, sir, your ob't servant, John Forsyth." And a copy of the communication from his Britannic Majesty's envoy extraordinary, therein referred to, in these words: "The undersigned, his Britannic Majesty's envoy extraordinary and minister plenipotentiary, feels it his duty to bring the following case, involving a breach of the privilege of the diplomatic body, under the immediate consideration of Mr. Forsyth, Secretary of State of the United States. A colored lad, serving for hire in the family of Mr. Bankhead, his Britannic Majesty's secretary of legation, was this morning taken away from the house of that gentleman by a constable of the name of [Madison] Jeffers, belonging to the capitol ward of this city, upon the plea of conveying him to his master, Mr. King, from Alabama. No previous intimation of a wish to remove the lad from Mr. Bankhead's service had been given to him either by Mr. King or by any one else. Mr. Bankhead, in order to avoid any disturbance, allowed the servant to be removed, but formally protested against the proceeding; and the undersigned now submits the case to the consideration of Mr. Forsyth, in the confident expectation that immediate redress will be granted by the government of the United States for this act of authority exercised by a constable of the District, in the house of

<sup>27</sup> Better known as the author of "The Star-Spangled Banner," 1814.

one of the members of his Britannic Majesty's mission, in violation of the privileges of the diplomatic body. The undersigned has the honor to renew to Mr. Forsyth the assurances of his distinguished consideration. H. S. Fox. Washington, May 26th, 1836. The Honorable John Forsyth, &c., &c., &c." It is, on the motion of the said attorney of the United States, ordered, that the said Madison Jeffers, in the said communication mentioned, be removed from the office of constable of the county of Washington, unless he show cause to the contrary on the thirty-first day of May instant, provided a copy of this order shall have been served upon him this day. By order of the court, May 30th, 1836. Test: William Brent, Clerk.

The rule having been duly served, the said Madison Jeffers appeared on the 31st of May and, by way of showing cause, filed his affidavit admitting the facts, but alleging his ignorance of the diplomatic privileges, and his belief that he was executing his duty lawfully in arresting a fugitive slave, and disclaiming all intentional disrespect to Mr. Bankhead.

His counsel, Mr. W. L. Brent, contended that Jeffers, as the agent of the owner of the slave, had a right to take him anywhere; and also that, as a constable, he had a right to take up a runaway. That the diplomatic privilege extends only to foreign ministers, and upon certain terms; and not to servants of a secretary of legation. That the servant had not been registered according to the Act of Congress of 30th of April, 1790, § 26 (1 Stat. 112 [Comp. St. § 7612]), and therefore Jeffers had a right to arrest him; because the act of Congress for punishing the violation of privilege does not extend to those who may arrest a servant not registered. By not registering his servant the minister has waived his privilege. *Seacomb v. Bowlney*, 1 Wils. 20.

The court stopped Mr. Key in reply.

THURSTON, Circuit Judge, said he wished no further time or argument. He was of opinion that Jeffers should be dismissed from office.

MORSELL, Circuit Judge, concurred.

CRANCH, Chief Judge, would have taken time to consider; but said that his present opinion coincided with that of the court.

Whereupon, the court passed the following order: "Madison Jeffers, upon whom a rule was laid on the 30th of May last, to show cause why he should not be removed from the office of constable for the county of Washington, upon the grounds therein stated, appeared and filed his affidavit, and the same was read and heard, and he was further heard by his counsel. Whereupon it is considered by the court, that the said Madison Jeffers was guilty of a violation of the privileges of his Britannic Majesty's envoy extraordinary and minister plenipotentiary, as stated in his letter to the secretary of state, referred to in the said rule; and the said Madison Jeffers, having shown no sufficient cause to the contrary, it is thereupon considered by the court,

this 7th day of June, 1836, that the said Madison Jeffers be, and he is hereby, removed from his said office of constable for the county aforesaid." <sup>28</sup>

<sup>28</sup> The French Court of Cassation has quashed the appeal of Nitchencoff, the Russian sentenced to imprisonment for life for a murderous attack upon M. de Balsh, in the house of the Russian Ambassador in Paris. It will be remembered that this case gave rise to a diplomatic correspondence, the Russian government having disputed the right of the French courts to try the murderer, and claimed a right to have him given up for trial in Russia. The court laid down the law that "the fiction of the law of nations, according to which the house of an ambassador is reputed to be a continuation of the territory of his sovereign, only protects diplomatic agents and their servants, and does not exclude the jurisdiction of French courts in case of a crime committed in such a locality by a person not belonging to the embassy, even although he is a subject of the nation from which the ambassador is accredited." 10 *The Solicitors' Journal and Reporter*, part 1, p. 56.

In South America it was, if it is not still, a general practice to claim and exercise the right and privilege as stated in above note, but the practice is bad, unreasonable, and so obviously a violation of local sovereignty that it cannot claim recognition as a principle of international law. It is tolerated, rather than justified, by the exceptional circumstances in Central and South American republics.

"In the United States," Mr. John Bassett Moore says, "where the supremacy of the local law is rigorously maintained, diplomatic asylum has never existed. With this exception, it is believed that examples may be found in every independent American state. In the countries that were formerly Spanish colonies, the practice may be said to have been inherited; and in some of them it has been so far extended as to include persons resting under civil and commercial responsibilities. The principal excuse for its continuance has been found in the constantly recurring tumults which fill so many pages in the history of American republics, and which, by reason of their partisan complexion, Mr. Seward once described as representing 'a chronic revolutionary condition.'"

The vexed question of asylums in legations and consulates and in vessels has been treated historically and logically in three articles by Mr. Moore, published in *Political Science Quarterly* for 1892.

See, also, the more recent article by Mr. Barry Gilbert on *The Practice of Asylum in Legations and Consulates of the United States*, 8 *American Journal of International Law*, 562-595 (1909).

*(B) On Public Vessel*

## FORBES v. COCHRANE et al.

(Court of King's Bench, 1824. 2 Barn. &amp; Cr. 448.)

The declaration stated that the plaintiff was lawfully possessed of a certain cotton plantation, situate in parts beyond the seas, to wit, in East Florida, of large value, and on which plantation he employed divers persons, his slaves or servants. The first count charged the defendants with enticing the slaves away. The second count stated that the slaves or servants having wrongfully and against the plaintiff's will quitted and left the plantation and the plaintiff's service, and gone into the power, care, and keeping of the defendants; they, knowing them to be the slaves or servants of the plaintiff, wrongfully received the slaves into their custody, and harbored, detained, and kept them from the plaintiff's service. The last count was for wrongfully harboring, detaining, and keeping the slaves or servants of the plaintiff after notice given to the defendants that the slaves were the plaintiff's property, and request made to the defendants by the plaintiff to deliver them up to him: plea, not guilty. At the trial before Abbott, C. J., at the London sittings after Trinity term, 1822, a verdict was found for the plaintiff, damages £3,800, subject to the opinion of the court on the following case.

The plaintiff was a British merchant in the Spanish provinces of East and West Florida, where he had carried on trade for a great many years, and was principally resident at Pensacola in West Florida. East and West Florida were part of the dominions of the king of Spain, and Spain was in amity with Great Britain. The plaintiff, before and at the time of the alleged grievances, was the proprietor and in the possession of a cotton plantation, called San Pablo, lying contiguous to the river St. John's, in the province of East Florida, and of about one hundred negro slaves whom he had purchased, and who were employed by him upon his plantation. The river St. John's is about thirty or forty miles from the confines of Georgia, one of the United States of America, which is separated from East Florida by the river St. Mary, and Cumberland Island is at the mouth of the river St. Mary on the side next Georgia, and forms part of that State. During the late war between Great Britain and America, in the month of February, 1815, the defendant, Vice-Admiral Sir Alexander Inglis Cochrane, was commander-in-chief of His Majesty's ships and vessels on the North American station. The other defendant, Rear-Admiral Sir George Cockburn, was the second in command upon the said station, and his flag-ship was the Albion. The British forces had taken possession of Cumberland Island, and at that time occupied and garrisoned the same. The Albion, Terror Bomb, and others of

His Majesty's ships of war, formed a squadron under Sir George Cockburn's immediate command off that island, where the headquarters of the expedition were. \* \* \*

In the night of the 23d February, 1815, a number of the plaintiff's slaves deserted from his said plantation, and on the following day thirty-eight of them were found on board the *Terror Bomb*, part of the squadron at Cumberland Island, and entered on her muster-books as refugees from St. John's. \* \* \* On the 26th of the same month of February, Sir George Cockburn received from the plaintiff a memorial. \* \* \* The plaintiff prayed "that the defendant, Sir G. Cockburn, would order the said thirty-eight slaves to be forthwith delivered to him, their lawful proprietor." \* \* \* Sir G. Cockburn told him he might see his slaves, and use any arguments and persuasions he chose to induce them to return. The plaintiff accordingly endeavored to persuade them to go back to his plantation, and no restraint was put upon them, but they refused to go. The plaintiff then urged his claim very strongly to Sir G. Cockburn, and said he must get redress if he did not succeed in prevailing upon Sir G. Cockburn to order them back again, which Sir G. Cockburn said he could not do, because they were free agents and might do as they pleased, and that he could not force them back.<sup>20</sup>

BAYLEY, J. It is a matter of great satisfaction to me that this case, which is one of considerable importance, and of some novelty, may, at the option of either party, be turned into a special verdict. At present the impression upon my mind is, that the action is not maintainable. The cases decided in the Admiralty Courts are not applicable to the present. There certain persons had taken upon themselves to be active, and to seize ships having slaves on board, on the ground that they had a right so to do, either by the law of nations or the law of this country. The Court of Admiralty refused to assist the captors in condemning that property, to which the claimants, by the law of the particular country to which they belonged, had a right. In such cases the Court of Admiralty is called upon to act between the two countries upon a common principle applicable to both. That court, therefore, cannot lend its assistance in the condemnation of a vessel, on the ground that it is engaged in a traffic which, according to the municipal laws of the country to which the claimant belongs is no wrong. The captain of the *Fortuna* had done no act that subjected him to condemnation by the laws of his own country, and this country had no right to say that he had been doing wrong, or that his property was subject to condemnation. In substance, therefore, the decision of that Court operates only in the nature of an *amoveas manus* and no more. In *Madrazzo v. Willes*, the defendant had taken upon himself to be active, and to seize the ship and slaves, and the court held that

<sup>20</sup> A shortened statement of facts has been substituted for that of the original report and parts of the opinions of Bayley and Best, JJ., are omitted.

he had no right to make the seizure. Having thus disposed of the authorities referred to in argument, I now come to consider the question for our decision. My opinion in this case does not at all proceed upon the ground that slavery is not to be tolerated in the place where these slaves came on board; nor that an action, under circumstances, may not be maintained for enticing away or harbouring a slave; nor on the ground that the instant he leaves his master's plantation and gets upon other land, where slavery is not tolerated, that, *ex necessitate*, he becomes, to all intents and purposes, a free man. I give no opinion upon any one of these points; but I say that there is a great distinction between making the law of England active, and leaving the law of England passive. Here we are called upon to put that law into activity upon the ground that the defendants have done a wrong. \* \* \*

HOLROYD, J. I am also of opinion that the plaintiff is not entitled to maintain the present action. The declaration alleges that the plaintiff was the proprietor, and in the possession of a cotton plantation lying contiguous to the river St. John's, in East Florida, on which land he employed divers persons, his slaves or servants. The plaintiff therefore claims a general property in them as his slaves or servants, and he claims this property, as founded, not upon any municipal law of the country where he resides, but upon a general right. This action is therefore founded upon an injury done to that general right. Now it appears, from the facts of the case, that the plaintiff had no right in these persons, except in their character of slaves, for they were not serving him under any contract; and, according to the principles of the English law, such a right cannot be considered as warranted by the general law of nature. I do not mean to say that particular circumstances may not introduce a legal relation to that extent; but assuming that there may be such a relation, it can only have a local existence, where it is tolerated by the particular law of the place, to which law all persons there resident are bound to submit. Now if the plaintiff cannot maintain this action under the general law of nature, independently of any positive institution, then his right of action can be founded only upon some right which he has acquired by the law of the country where he is domiciled. If he, being a British subject, could show that the defendant, also a British subject, had entered the country where he, the plaintiff, was domiciled, and had done any act amounting to a violation of that right to the possession of slaves which was allowed by the laws of that country, I am by no means prepared to say that an action might not be maintained against him. The laws of England will protect the rights of British subjects, and give a remedy for a grievance committed by one British subject upon another, in whatever country that may be done. That, however, is a very different case from the present. Here, the plaintiff, a British subject, was resident in a Spanish colony, and perhaps it may be inferred, from what is stated in the special case, that, by the law of

that colony, slavery was tolerated. I am of opinion, that, according to the principles of the English law, the right to slaves, even in a country where such rights are recognized by law, must be considered as founded not upon the law of nature, but upon the particular law of that country. And, supposing that the law of England would give a remedy for the violation of such a right by one British subject to another (both being resident in and bound to obey the laws of that country) still the right to these slaves being founded upon the law of Spain, as applicable to the Floridas, must be co-extensive with the territories of that state.

I do not mean to say, that if the plaintiff having the right to possess these persons as his slaves there, had taken them into another place, where, by law, slavery also prevailed, his right would not have continued in such a place, the laws of both countries allowing a property in slaves. The law of slavery is, however, a law in invitum; and when a party gets out of the territory where it prevails, and out of the power of his master, and gets under the protection of another power, without any wrongful act done by the party giving that protection, the right of the master, which is founded on the municipal law of the particular place only, does not continue, and there is no right of action against a party who merely receives the slave in that country, without doing any wrongful act. This has been decided to be the law with respect to a person who has been a slave in any of our West India colonies and comes to this country. The moment he puts his foot on the shores of this country his slavery is at an end. Put the case of an uninhabited island discovered and colonized by the subjects of this country; the inhabitants would be protected and governed by the laws of this country. In the case of a conquered country, indeed, the old laws would prevail, until altered by the King in council; but in the case of the newly discovered country, freedom would be as much the inheritance of the inhabitants and their children as if they were treading on the soil of England. Now, suppose a person who had been a slave in one of our own West India settlements, escaped to such a country, he would thereby become as much a freeman as if he had come into England. He ceases to be a slave in England only because there is no law which sanctions his detention in slavery; for the same reason he would cease to be a slave the moment he landed in the supposed newly discovered island. In this case, indeed, the fugitives did not escape to any island belonging to England, but they went on board an English ship (which for this purpose may be considered a floating island), and in that ship they became subject to the English laws alone. They then stood in the same situation in this respect as if they had come to an island colonized by the English. It was not a wrongful act in the defendants to receive them, quite the contrary. The moment they got on board the English ship there was an end of any right which the plaintiff had by the Spanish laws acquired over them as slaves. They had got beyond the control of

their master, and beyond the territory where the law recognizing them as slaves prevailed. They were under the protection of another power. The defendants were not subject to the Spanish law, for they had never entered the Spanish territories, either as friends or enemies. The plaintiff was permitted to see the men, and to endeavor to persuade them to return; but in that he failed. He never applied to be permitted to use force; and it does not appear that he had the means of doing so. I think that Sir G. Cockburn was not bound to do more than he did; whether he was bound to do so much it is unnecessary for me to say. It was not a wrongful act in him, a British officer, to abstain from using force to compel the men to return to slavery. It does not appear that he prevented force being used. I do not say that he might not have refused, but in fact there was no refusal. I have given my opinion upon this question, supposing that there would be a right of action against these defendants, if a wrong had actually been done by them, but I am by no means clear that, even under such circumstances, any action would have been maintainable against them by reason of their particular situation as officers acting in discharge of a public duty, in a place *flagrante bello*. I doubt whether the application ought not to have been made in such a case to the governing powers of this country for redress. The cases from the admiralty courts are distinguishable from the present, upon the grounds already stated by my Brother Bayley. In *Madrado v. Willes*, 3 B. & Ald. 353, the plaintiff was a Spanish subject, and by the law of Spain slavery and the trade in slaves being tolerated, he had a right, by the laws of his own country, to exercise that trade. The taking away the slaves was an active wrong done in aggression upon rights given by the Spanish law. That is very different from requiring, as in this case, an act to be done against the slaves, who had voluntarily left their master. When they got out of the territory where they became slaves to the plaintiff and out of his power and control, they were, by the general law of nature, made free, unless they were slaves by the particular law of the place where the defendant received them. They were not slaves by the law which prevailed on board the British ship of war. I am, therefore, of opinion that the defendants are entitled to the judgment of the court.

BEST, J. \* \* \* The question is, were these persons slaves at the time when Sir G. Cockburn refused to do the act which he was desired to do? I am decidedly of opinion that they were then no longer slaves. The moment they put their feet on board of a British man-of-war, not lying within the waters of East Florida (where, undoubtedly, the laws of that country would prevail), those persons who before had been slaves were free. The defendants were not guilty of any act prejudicial to the rights which the plaintiff alleges to have been infringed. Those rights were at an end before the defendants were called upon to act. Slavery is a local law, and, therefore, if a man wishes to preserve his slaves, let him attach them to him by



affection, or make fast the bars of their prison, or rivet well their chains, for the instant they get beyond the limits where slavery is recognized by the local law, they have broken their chains, they have escaped from their prison, and are free. These men, when on board an English ship, had all the rights belonging to Englishmen, and were subject to all their liabilities. If they had committed any offence they must have been tried according to English laws. If any injury had been done to them they would have had a remedy by applying to the laws of this country for redress. I think that Sir G. Cockburn did all that he lawfully could do to assist the plaintiff; he permitted him to endeavor to persuade the slaves to return; but he refused to apply force. I think that he might have gone further, and have said that force should not be used by others; for if any force had been used by the master or any person in his assistance, can it be doubted that the slaves might have brought an action of trespass against the persons using that force? Nay, if the slave, acting upon his newly recovered right of freedom, had determined to vindicate that right, originally the gift of nature, and had resisted the force, and his death had ensued in the course of such resistance, can there be any doubt that every one who had contributed to that death would, according to our laws, be guilty of murder? That is substantially decided by *Sommersett's Case*, from which, it is clear, that such would have been the consequence had these slaves been in England; and so far as this question is concerned, there is no difference between an English ship and the soil of England; for are not those on board an English ship as much protected and governed by the English laws as if they stood upon English land? \* \* \*

There is no statute recognizing slavery which operates in the part of the British empire in which we are now called upon to administer justice. \* \* \*

The place where the transaction took place was, with respect to this question, the same as the soil of England. Had the defendants detained these men on board their ships near the coast of England, a writ of habeas corpus would have set them at liberty. \* \* \* For these reasons I am of opinion, that our judgment must be for the defendants.

Judgment for the defendants.<sup>10</sup>

<sup>10</sup> In the *Case of John Brown, 1820*, Sir William Scott (Lord Stowell) wrote an elaborate opinion for the British foreign office, in which he vigorously maintained that the right of asylum, as regards political refugees, does not properly belong to ships of war.

"Your Excellency will find it easy, from these papers, to give such an explanation of the circumstances which attended the liberation in England of this individual, as will be satisfactory to the Spanish minister. You will at the same time, on the part of your court, disavow Captain Falcon's conduct in rescuing Brown on board his ship within a Spanish port, and not delivering him up, upon the requisition of the local authorities. The officer no doubt, acted upon a good motive, but in assuming that the British flag could protect him against the legal process of the territorial jurisdiction within which the

(C) *On Merchant Vessel*

## UNITED STATES v. DIEKELMAN.

(Supreme Court of the United States, 1875. 92 U. S. 520, 23 L. Ed. 742.)

Mr. Chief Justice WAITE delivered the opinion of the court.

This suit was brought in the Court of Claims under the authority of a joint resolution of both houses of Congress, passed May 4, 1870, as follows:

"That the claim of E. Diekelman, a subject of the King of Prussia, for damages for an alleged detention of the ship *Essex* by the military

parties then were, was to maintain a principle which the British government desire distinctly to disclaim as not consistent with their uniform practice, or with the law of nations." Report of Royal Commission on Fugitive Slaves, p. lxxvii.

On the other hand, a directly opposite view was expressed by Lord Palmerston, in 1849. Mr. Addington, writing to the Secretary of the Admiralty, August 4th, said:

"Viscount Palmerston directs me to request that you will acquaint the Board of Admiralty that his Lordship is of opinion that it would not be right to receive and harbor on board a British ship of war any person flying from justice on a criminal charge, or who was escaping from the sentence of a court of law. But a British man-of-war has always and everywhere been considered a safe place of refuge for persons of whatever country or party who have sought shelter under the British flag from persecution on account of their political conduct or opinions; and this protection has been equally afforded, whether the refugee was escaping from the arbitrary acts of a monarchical government, or from the lawless violence of a revolutionary committee. \* \* \*

"Although the commander of such ship of war should not seek out or invite political refugees, yet he ought not to turn away nor to give up any who may reach his ship and ask admittance on board. Such officer must of course take care that such refugees shall not carry on from on board his ship any political correspondence with their partisans on shore, and he ought to avail himself of the earliest opportunity to send them to some place of safety elsewhere." Rep. of Royal Comm. on Fug. Slaves, p. 155.

For a full discussion of the question of the extraterritoriality of ships of war, see the separate reports of Lord Chief Justice Cockburn and Mr. Rothery in the Report of the Royal Commission on Fugitive Slaves, 1876. Mr. Rothery takes strong ground against the right of asylum on such ships.

Sir James Fitzjames Stephen, another member of the commission, takes similar ground. Stephen's History of the Criminal Law, II, 43-58.

As to American practice, Attorney General Bradford held, in 1794, that a "writ of habeas corpus may be awarded to bring up an American subject unlawfully detained on board a foreign ship of war, the commander being amenable to the usual jurisdiction of the state where he happens to be, and not entitled to claim the extraterritoriality which is annexed to a foreign minister and his domicile." Wharton's Digest, I, 138.

But in 1855 Attorney General Cushing—a high authority—held that a "prisoner of war on board a foreign ship of war, or of her prize, cannot be released by habeas corpus issuing from courts of the United States or of a particular state." And again, in 1856: "Ships of war enjoy the full rights of extraterritoriality in foreign ports and territorial waters." Wharton's Digest, I, 138. It would seem to follow, therefore, that right of asylum could be granted on American ships of war. In South American ports it has frequently been done. Freeman Snow's Cases on International Law (1893) 146, 147, note.

authorities of the United States at New Orleans, in the month of September, 1862, be and is hereby referred to the Court of Claims for its decision in accordance with law, and to award such damages as may be just in the premises, if he may be found to be entitled to any damages."

Before this resolution was passed, the matter of the claim had been the subject of diplomatic correspondence between the governments of the United States and Prussia.

The following article, originally adopted in the treaty of peace between the United States and Prussia, concluded July 11, 1799 (8 Stat. 168), and revived by the treaty concluded May 1, 1828 (8 Stat. 384), was in force when the acts complained of occurred, to wit:

"Art. XIII. And in the same case, if one of the contracting parties, being engaged in war with any other power, to prevent all the difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband so as to induce confiscation or condemnation, and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding; paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use in the service of the captors the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not, in that case, be carried into any port, nor further detained, but shall be allowed to proceed on her voyage."

When the *Essex* visited New Orleans, the United States were engaged in the War of the Rebellion. The port of that city was, at the very commencement of the war, placed under blockade, and closed against trade and commercial intercourse; but, on the 12th of May, 1862, the President, having become satisfied that the blockade might "be safely relaxed with advantage to the interests of commerce," issued his proclamation, to the effect that from and after June 1 "commercial intercourse, \* \* \* except as to persons, things, and information contraband of war," might "be carried on subject to the laws of the United States, and to the limitations, and in pursuance of the regulations \* \* \* prescribed by the Secretary of the Treasury," and appended to the proclamation. These regulations so far as they are applicable to the present case, are as follows:

"1. To vessels clearing from foreign ports and destined to \* \* \* New Orleans, \* \* \* licenses will be granted by consuls of the United States upon satisfactory evidence that the vessels so licensed will convey no persons, property, or information contraband of war either to or from the said ports; which licenses shall be exhibited to the collector of the port to which said vessels may be respectively bound, immediately on arrival, and, if required, to any officer in charge of the blockade; and on leaving either of said ports every vessel will be required to have a clearance from the collector of the customs according to law, showing no violation of the conditions of the license." 12 Stat. 1264.

The Essex sailed from Liverpool for New Orleans June 19, 1862, and arrived August 24. New Orleans was then in possession of the military forces of the United States, with General Butler in command. The city was practically in a state of siege by land, but open by sea, and was under martial law.

The commanding general was expressly enjoined by the government of the United States to take measures that no supplies went out of the port which could afford aid to the rebellion; and, pursuant to this injunction, he issued orders in respect to the exportation of money, goods, or property, on account of any person known to be friendly to the Confederacy, and directed the custom-house officers to inform him whenever an attempt was made to send anything out which might be the subject of investigation in that behalf.

In the early part of September, 1862, General Butler, being still in command, was informed that a large quantity of clothing had been bought in Belgium on account of the Confederate government, and was lying at Matamoras awaiting delivery, because that government had failed to get the means they expected from New Orleans to pay for it; and that another shipment, amounting to a half million more, was delayed in Belgium from coming forward because of the non-payment of the first shipment. He was also informed that it was expected the first payment would go forward through the agency of some foreign consuls; and this information afterwards proved to be correct.

He was also informed early in September by the custom-house officers that large quantities of silver-plate and bullion were being shipped on the Essex, then loading for a foreign port, by persons, one of whom had declared himself an enemy of the United States, and none of whom would enroll themselves as friends; and he thereupon gave directions that the specified articles should be detained, and their exportation not allowed until further orders.

On the 15th September, the loading of the vessel having been completed, the master applied to the collector of the port for his clearance, which was refused in consequence of the orders of General Butler, but without any reasons being assigned by the collector. The next day, he was informed, however, that his ship would not be

cleared unless certain specified articles which she had on board were taken out and landed. Much correspondence ensued between General Butler and the Prussian consul at New Orleans in reference to the clearance, in which it was distinctly stated by General Butler that the clearance would not be granted until the specified goods were landed, and that it would be granted as soon as this should be done. Almost daily interviews took place between the master of the vessel and the collector, in which the same statements were made by the collector. The master refused to land the cargo, except upon the return of his bills of lading. Some of these bills were returned, and the property surrendered to the shipper. In another case, the shipper gave an order upon the master for his goods, and they were taken away by force. At a very early stage in the proceeding, the master and the Prussian consul were informed that the objection to the shipment of the articles complained of was that they were contraband.

A part only of the goods having been taken out of the vessel, a clearance was granted her on the 6th of October, and she was permitted to leave the port and commence her voyage.

Upon this state of facts, the Court of Claims gave judgment for Diekelman, from which the United States took an appeal. \* \* \*

1. As to the general law of nations.

The merchant vessels of one country visiting the ports of another for the purposes of trade subject themselves to the laws which govern the port they visit, so long as they remain; and this as well in war as in peace, unless it is otherwise provided by treaty. *The Exchange v. McFaddon*, 7 Cranch, 116, 3 L. Ed. 287. When the *Essex* sailed from Liverpool, the United States were engaged in war. The proclamation under which she was permitted to visit New Orleans made it a condition of her entry that she should not take out goods contraband of war, and that she should not leave until cleared by the collector of customs according to law. Previous to June 1 she was excluded altogether from the port by the blockade. At that date the blockade was not removed, but relaxed only in the interests of commerce. The war still remained paramount, and commercial intercourse subordinate only. When the *Essex* availed herself of the proclamation and entered the port, she assented to the conditions imposed, and cannot complain if she was detained on account of the necessity of enforcing her obligations thus assumed. \* \* \*

We are clearly of the opinion that there is no liability to this plaintiff resting upon the United States under the general law of nations.

2. As to the treaty.

The vessel was in port when the detention occurred. She had not broken ground, and had not commenced her voyage. She came into the waters of the United States while an impending war was flagrant, under an agreement not to depart with contraband goods on board. The question is not whether she could have been stopped and detained

after her voyage had been actually commenced, without compensation for the loss, but whether she could be kept from entering upon the voyage and detained by the United States within their own waters, held by force against a powerful rebellion, until she had complied with regulations adopted as a means of safety, and to the enforcement of which she had assented, in order to get there. In our opinion, no provision of the treaties in force between the two governments interferes with the right of the United States, under the general law of nations, to withhold a custom-house clearance as a means of enforcing port regulations. \* \* \*

Art. XIII of the treaty of 1799, revived by that of 1828, evidently has reference to captures and detentions after a voyage has commenced, and not to detentions in port, to enforce port regulations. \* \* \*

As we view the case, the claimant is not "entitled to any damages" as against the United States, either under the treaty with Prussia or by the general law of nations.

The judgment of the Court of Claims is, therefore, reversed, and the cause remanded with directions to dismiss the petition.<sup>21</sup>

<sup>21</sup> In *Sotelo's Case*, 1 Calvo, 569 (1840), M. Sotelo, an ex-Spanish Minister of State, was taken off the French merchant vessel *L'Océan* on reaching Alicante, a Spanish port.

To the same effect was the opinion of Lord Aberdeen, as appears from the following:

"I am directed by Lord Aberdeen to acquaint you, for the information of the Lords Commissioners of the Admiralty, that there is no stipulation in the existing treaties between this country and Spain which can be deemed sufficient to debar the Spanish government from exercising the right which, in his lordship's opinion, appertains to that government of claiming its own subjects when they may be found in a Spanish port as passengers on board vessels hired to convey the mails between this country and the Peninsula." Viscount Canning to the Secretary of the Admiralty, March 20, 1844; Rep. of Royal Comm. on Fugitive Slaves, 154.

The better American precedents are in accord. In the *Case of Gomez* (United States Foreign Relations, 1885, 82), Secretary of State Bayard, on March 12, 1885, sent the following instructions to Minister Hall:

"It appears that Mr. Gomez, who is said to be a political fugitive from Nicaragua, voluntarily took passage at San José de Guatemala for Punta Arenas, Costa Rica, on board the Pacific Mail steamship Honduras with the knowledge that the vessel would enter en route the port of San Juan del Sur, Nicaragua.

"The government of Nicaragua upon learning of this fact ordered the commandant of the port of San Juan del Sur to arrest Gomez upon the arrival of the Honduras at that port.

"The minister for foreign affairs of Nicaragua informed Mr. Leavitt, United States consul at Managua, of the action of the government by a telegram, as follows:

"Government has ordered the commander of port San Juan del Sur to arrest José Dolores Gomez, a fugitive prisoner, who is on board of the steamer Honduras, now en route to that port. I suppose the captain will not interfere with the action of the commander, but to avoid whatever difficulties likely to arise I suggest you to send a telegraphic message to the captain of the Honduras, at San Juan del Sur, stating that the order has been issued by the government and recommending him to support the commander, as there

## SECTION 3.—EXTRATERRITORIAL JURISDICTION

## I. IN CASE OF PIRACY

## OPINION OF SIR LEOLINE JENKINS.

CHARGE TO THE JURY, 1668

(1 Life of Sir Leoline Jenkins, LXXXVI.)

There are some sorts of felonies and offences, which cannot be committed anywhere else but upon the sea, within the jurisdiction of the Admiralty. These I shall insist upon a little more particularly, and the chiefest in this kind is piracy.

You are therefore to inquire of all Pirates and sea-rovers; they are in the eye of the law hostes humani generis, enemies not of one nation or of one sort of people only, but of all mankind. They are outlawed, as I may say, by the laws of all nations, that is, out of

is no ground on the part of the captain to hinder the execution of the government order.'

"It appears that, before Mr. Leavitt had an opportunity to act upon this request, you telegraphed him as follows:

"Reported here arrest of a transit passenger bound to Panama on board steamer Honduras at San Juan del Sur. Say respectfully to Nicaraguan minister of foreign affairs that our Government never has consented and never will consent to the arrest and removal from an American vessel in a foreign port, of any passenger in transit, much less if offense is political."

"It appears that Mr. Leavitt declined to comply with the request of the minister of foreign affairs, and followed your instructions by submitting a copy in writing to the minister.

"From the brief outline given by the consul of the subsequent proceedings, it appears that the government authorities at San Juan del Sur, upon the arrival of the Honduras at that port, requested the captain to deliver up Mr. Gomez. This he declined to do and set sail without proper clearance papers.

"The consul reports that for these offenses the captain has been tried by the Nicaraguan government and found guilty, and although he has not been able to learn the nature of the sentence, he is convinced, from the present attitude of the government, that the sentence will be executed in case of the return of the captain or the vessel within the jurisdiction of the government of Nicaragua.

"As the nature and character of the proceedings against the captain of the Honduras are not known to this department, a full and detailed report should be made as early as practicable. It is clear that Mr. Gomez voluntarily entered the jurisdiction of a country whose laws he had violated. \* \* \*

"It may be safely affirmed that when a merchant vessel of one country visits the ports of another for the purposes of trade, it owes temporary allegiance and is amenable to the jurisdiction of that country, and is subject to the laws which govern the port it visits so long as it remains, unless it is otherwise provided by treaty.

"Any exemption or immunity from local jurisdiction must be derived from the consent of that country. No such exemption is made in the treaty of commerce and navigation concluded between this country and Nicaragua on the 21st day of June, 1837."

the protection of all princes and of all laws whatsoever. Everybody is commissioned, and is to be armed against them, as against rebels and traitors, to subdue and to root them out.

That which is called robbing upon the highway, the same being done upon the water is called piracy. Now robbery, as 'tis distinguished from thieving or larceny, implies not only the actual taking away of my goods, while I am, as we say, in peace, but also the putting me in fear, by taking them away by force and arms out of my hands, or in my sight and presence; when this is done upon the sea, without a lawful commission of war or reprisals, it is downright piracy.

And such was the generosity of our ancient English, such the abhorrence of our laws against pirates and sea-rovers, that if any of the King's subjects robbed or murdered a foreigner upon our seas or within our ports, though the foreigner happened to be of a nation in hostility against the King, yet if he had the King's passport, or the Lord Admiral's, the offender was punished, not as a felon only, but this crime was made high treason, in that great Prince Henry the Fifth's time; and not only himself, but all his accomplices were to suffer as traitors against the crown and dignity of the King."<sup>22</sup>

#### LE LOUIS.

(High Court of Admiralty, 1817. 2 Dodson, 210.)

This was the case of a French vessel which sailed from Martinique on the 30th of January, 1816, destined on a voyage to the coast of Africa and back, and was captured ten or twelve leagues to the southward of Cape Mesurada, by the Queen Charlotte cutter, on the 11th of March in the same year, and carried to Sierra Leone.

She was proceeded against in the Vice Admiralty Court of that colony, and the information pleaded—1st, that the seizors were duly and legally commissioned to make captures and seizures. 2d, That the seizure was within the jurisdiction of the court. 3d, That the vessel belonged to French subjects or others, and was fitted out, manned and navigated for the purpose of carrying on the African slave-trade, after that trade had been abolished by the internal laws of France, and by the treaty between Great Britain and France: 4th, That the vessel had bargained for twelve slaves at Mesurada, and was prevented by the capture alone from taking them on board. 5th, That the brig being engaged in the slave-trade, contrary to the laws of France, and the law of nations, was liable to condemnation, and could derive no

<sup>22</sup> See *U. S. v. Smith*, 5 Wheat. 153, 5 L. Ed. 57 (1820).

In speaking of this case Sir Robert Phillimore (1 Int. Law, 489, note d) says: "The note (a) to this page [5 Wheat. 163] contains a most learned and careful accumulation of all the authorities on the subject of Piracy." Lack of space unfortunately compels its omission.



protection from the French or any other flag. 6th, That the crew of the brig resisted the Queen Charlotte, and piratically killed eight of her crew, and wounded twelve others. 7th, That the vessel being engaged in this illegal traffic resisted the King's duly commissioned cruisers, and did not allow of search until overpowered by numbers. And 8th, That by reason of the circumstances stated, the vessel was out of the protection of any law, and liable to condemnation. The ship was condemned to his Majesty in the Vice-Admiralty Court at Sierra Leone, and from this decision an appeal was made to this court.

Sir W. Scott.<sup>22</sup> This ship was taken off Cape Mesurada, on the coast of Africa, on the 11th of March, 1816, by an English colonial armed vessel, after a severe engagement, which followed an attempt to escape. \* \* \*

The ship seized was, in appearance and in fact, a French ship, admitted both in the plea and in the argument to be so unquestionably, owned and navigated by Frenchmen, originally, indeed, built in America, and having been for a short time in British possession, which had ceased. She is immediately proceeded against in the Vice-Admiralty Court at Sierra Leone (whither she had been carried), as a French ship violating French law by the intention of purchasing slaves for the purpose of carrying them to her port in Martinique. \* \* \*

At Sierra Leone, proceedings were commenced, which led to the first condemnation of the ship and cargo. \* \* \* I will suppose the jurisdiction to be duly founded, as far as the matter of locality is concerned, and consider only whether the sentence can be sustained, giving the authority which pronounced it the benefit of a supposed indisputable jurisdiction.

At the outset of the proceedings, the seizer describes himself as commissioned to make captures and seizures. It certainly appeared to be a singular commission that authorized him to make captures in time of peace; and it was therefore not an unnatural curiosity on the part of the court to desire to see it. The commission, after repeated requisitions, has been at last brought in, at a time extremely inconvenient for the purpose of any careful examination by the court, if that were necessary. It may, however, be sufficient to state that this commission professes to be issued by the governor of Sierra Leone, on the 25th of January, 1816, to be founded on the Slave Trade Act, 51 Geo. III, and to authorize the commander to seize and detain (for I do not find that the word capture occurs) all ships and vessels offending against that act, or any other act abolishing the slave trade; and, after stating these facts, to observe, that neither this British act of parliament, nor any commission founded on it, can affect any right or interest of foreigners, unless they are founded upon principles, and impose regulations, that are consistent with the law of nations. That

<sup>22</sup> Parts of the opinion are omitted.

is the only law which Great Britain can apply to them; and the generality of any terms employed in an act of parliament must be narrowed in construction by a religious adherence thereto. \* \* \*

Assuming the fact, which is indistinctly proved, that there was a demand, and a resistance producing the deplorable results here described, I think that the natural order of things compels me to inquire first, whether the party who demanded had a right to search; for if not, then not only was the resistance to it lawful, but likewise the very fact on which the other ground of condemnation rests is totally removed. \* \* \* Supposing, however, that it should appear that he had a right to visit and search, and therefore to avail himself of all the information he so acquired, the question would then be, whether that information has established all the necessary facts? The first is, that this was a French ship intentionally employed in the slave trade, which, I have already intimated, appears to be sufficiently shown. The second is, that such a trading is a contravention of the French law; for it has been repeatedly admitted that the court, in order to support this sentence of condemnation, must have the foundation of the trade being prohibited by the law of the country to which the party belongs.

Upon the first question, whether the right of search exists in time of peace, I have to observe, that two principles of public law are generally recognized as fundamental. One is the perfect equality and entire independence of all distinct states. Relative magnitude creates no distinction of right; relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbor; and any advantage seized upon that ground is mere usurpation. This is the great foundation of public law, which it mainly concerns the peace of mankind, both in their politic and private capacities, to preserve inviolate. The second is, that all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any one of its subjects, has a right to assume or exercise authority over the subjects of another. I can find no authority that gives the right of interruption to the navigation of states in amity upon the high seas, excepting that which the rights of war give to both belligerents against neutrals. This right, incommodious as its exercise may occasionally be to those who are subjected to it, has been fully established in the legal practice of nations, having for its foundation the necessities of self-defense, in preventing the enemy from being supplied with the instruments of war, and from having his means of annoyance augmented by the advantages of maritime commerce. Against the property of his enemy each belligerent has the extreme rights of war. Against that of neutrals, the friends of both, each has the right of visitation and search, and of pursuing an inquiry whether they are employed in the service of his enemy,

the right being subject, in almost all cases of an inquiry wrongfully pursued, to a compensation in costs and damages. \* \* \*

If it be asked why the right of search does not exist in time of peace as well as in war, the answer is prompt; that it has not the same foundation on which alone it is tolerated in war,—the necessities of self-defence. They introduced it in war; and practice has established it. No such necessities have introduced it in time of peace, and no such practice has established it. It is true, that wild claims (alluded to in the argument) have been occasionally set up by nations, particularly those of Spain and Portugal, in the East and West Indian seas: but these are claims of a nature quite foreign to the present question, being claims not of a general right of visitation and search upon the high seas unappropriated, but extravagant claims to the appropriation of particular seas, founded upon some grants of a pretended authority, or upon some ancient exclusive usurpation. Upon a principle much more just in itself and more temperately applied, maritime states have claimed a right of visitation and inquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations has, for their common convenience, allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal or defensive regulations more immediately affecting their safety and welfare. Such are our hovering laws, which within certain limited distances more or less moderately assigned, subject foreign vessels to such examination. This has nothing in common with a right of visitation and search upon the unappropriated parts of the ocean. A recent Swedish claim of examination on the high seas, though confined to foreign ships bound to Swedish ports, and accompanied in a manner not very consistent or intelligible, with a disclaimer of all right of visitation, was resisted by our government as unlawful, and was finally withdrawn.

The right of visitation being in this present case exercised in time of peace, the question arises, how is it to be legalized? And looking to what I have described as the known existing law of nations evidenced by all authority and all practice, it must be upon the ground that the captured vessel is to be taken legally as a pirate, or else some new ground is to be assumed on which this right which has been distinctly admitted not to exist generally in time of peace can be supported. Wherever it has existed, it has existed upon the ground of repelling injury, and as a measure of self-defence. No practice that exists in the world carries it farther.

It is perfectly clear, that this vessel cannot be deemed a pirate from any want of a national character legally obtained. \* \* \* If, therefore, the character of a pirate can be impressed upon her, it must be only on the ground of her occupation as a slave trader; no other act of piracy being imputed. The question then comes to this:—Can the occupation of this French vessel be legally deemed a piracy, inferring, as it must do, if it be so, all the pains and penalties of piracy? \* \* \*

It has not been contended in argument, that the common case of dealing in slaves could be deemed a piracy in law. In all the fervor of opinion which the agitation of all questions relating to this practice has excited in the minds of many intelligent persons in this country, no attempt has ever been thought of, at least with any visible effect, to submit any such question to the judgment of the law by such a prosecution of any form instituted in any court: and no lawyer, I presume, could be found hardy enough to maintain, that an indictment for piracy could be supported by the mere evidence of a trading in slaves. Be the malignity of the practice what it may, it is not that of piracy, in legal consideration.

Piracy being excluded, the court has to look for some new and peculiar ground: but in the first place a new and very extensive ground is offered to it by the suggestion, which has been strongly pressed, that this trade, if not the crime of piracy, is nevertheless crime, and that every nation, and indeed every individual has not only a right, but a duty, to prevent in every place the commission of crime. It is a sphere of duty sufficiently large that is thus opened out to communities and to their members. But to establish the consequence required, it is first necessary to establish that the right to interpose by force to prevent the commission of crime, commences not upon the commencement of the overt act, nor upon the evident approach towards it, but on the bare surmise grounded on the mere possibility; for unless it goes that length it will not support the right of forcible inquiry and search. What are the proximate circumstances which confer on you the right of intruding yourself into a foreign ship, over which you have no authority whatever, or of demanding the submission of its crew to your inquiry, whether they mean to deal in the traffic of slaves, not in your country, but in one with which you have no connection? Where is the law that has defined those circumstances and created that right under their existence? Secondly, it must be shown that the act imputed to the parties is unquestionably and legally criminal by the universal law of nations; for the right of search claimed makes no distinctions, and in truth can make none; for till the ship is searched it cannot be known whether she is a slave trader or not, and whether she belongs to a nation which admits the act to be criminal, or to one which maintains it to be simply commercial,—and I say legally criminal, because neither this court nor any other can carry its private apprehensions, independent of law, into its public judgments on the quality of actions. It must conform to the judgment of the law upon that subject; and acting as a court in the administration of law, it cannot attribute criminality to an act where the law imputes none. It must look to the legal standard of morality; and upon a question of this nature, that standard must be found in the law of nations as fixed and evidenced by general and ancient and admitted practice, by treaties and by the

general tenor of the laws and ordinances, and the formal transactions of civilized states; and looking to those authorities, I find a difficulty in maintaining that the traffic is legally criminal. \* \* \*

What is the doctrine of our courts of the law of nations relatively to them? Why, that their practice is to be respected; that their slaves if taken are to be restored to them; and if not taken under innocent mistake, to be restored with costs and damages. All this surely, upon the ground that such conduct on the part of any state is no departure from the law of nations; because, if it were, no such respect could be allowed to it, upon an exemption of its own making; for no nation can privilege itself to commit a crime against the law of nations by a mere municipal regulation of its own. And if our understanding and administration of the law of nations be, that every nation, independently of treaties, retains a legal right to carry on this traffic, and that the trade carried on under that authority is to be respected by all tribunals, foreign as well as domestic, it is not easy to find any consistent grounds on which to maintain that the traffic, according to our views of that law, is criminal. \* \* \*

It is next said that every country has a right to enforce its own navigation laws; and so it certainly has, so far as it does not interfere with the rights of others. It has a right to see that its own vessels are duly navigated, but it has no right in consequence to visit and search all the apparent vessels of other countries on the high seas, in order to institute an inquiry whether they are not in truth British vessels violating British laws. No such right has ever been claimed, nor can it be exercised without the oppression of interrupting and harassing the real and lawful navigation of other countries; for the right of search when it exists at all, is universal, and will extend to vessels of all countries, whether they tolerate the slave trade or not; and whether the vessels are employed in slave trading or in any other traffic. It is no objection to say that British ships may thus by disguise elude the obligations of British law. The answer of the foreigner is ready, that you have no right to provide against that inconvenience by imposing a burden upon his navigation. If even the question were reduced to this, that either all British ships might fraudulently escape, or all foreign ships be injuriously harassed, Great Britain could not claim the option to embrace the latter branch of the alternative. When you complain that the regulation cannot be enforced without the exercise of such a right, the answer again is, that you ought not to make regulations which you cannot enforce without trespassing on the rights of others. If it were a matter by which your own safety was affected, the necessities of self-defence would fully justify; but in a matter in which your own safety is in no degree concerned, you have no right to prevent a suspected injustice towards another, by committing an actual injustice of your own.

The next argument is, that the legislature must have contemplated

the exercise of this right in time of peace; otherwise they have left the remedy incomplete, and peace in Europe will be war in Africa. The legislature must be understood to have contemplated all that was within its power, and no more. It provided for the existing occasion and left to future wisdom to provide for future times. Nothing can be more clear than that it was so understood by the British Government; for the project of the treaty proposed by Great Britain to France, in 1815, is, "that permission should be reciprocally given by each nation to search and bring in the ships of each other;" and when the permission of neutrals to have their ships searched is asked at the commencement of a war, it may then be time enough to admit that the right stands on exactly the same footing in time of war and in time of peace. The fact turned out to be, that such permission was actually refused by France, upon the express ground that she would not tolerate any maritime police to be exercised on her subjects, but by herself. Nor can it be matter of just surprise or resentment, that that people should be willing to retain, what every independent nation must be averse to part with, the exclusive right of executing their own laws.

It is pressed as a difficulty, what is to be done, if a French ship laden with slaves for a French port is brought in? I answer, without hesitation, restore the possession which has been unlawfully divested—rescind the illegal act done by your own subject; and leave the foreigner to the justice of his own country. \* \* \*

It is said, and with just concern, that if not permitted in time of peace it will be extremely difficult to suppress the traffic. It will be so, and no man can deny, that the suppression, however desirable, and however sought, is attended with enormous difficulties; difficulties which have baffled the most zealous endeavors of many years. To every man it must have been evident that without a general and sincere concurrence of all maritime states in the principle and in the proper modes of pursuing it, comparatively but little of positive good could be acquired; so far at least, as the interests of the victims of this commerce were concerned in it; and to every man who looks to the rival claims of these states, to their established habit of trades, to their real or pretended wants, to their different modes of thinking, and to their real mode of acting upon this particular subject, it must be equally evident that such a concurrence was matter of very difficult attainment. But the difficulty of the attainment will not legalize measures that are otherwise illegal. To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; to force the way to the liberation of Africa by trampling on the independence of other states in Europe; in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice. Obtain the concurrence of other nations, if you can, by application, by remonstrance,

by example, by every peaceable instrument which man can employ to attract the consent of man. But a nation is not justified in assuming rights that do not belong to her, merely because she means to apply them to a laudable purpose; nor in setting out upon a moral crusade of converting other nations by acts of unlawful force. Nor is it to be argued, that because other nations approve the ultimate purpose, they must therefore submit to every measure which any one state or its subjects may inconsiderately adopt for its attainment. In this very case nothing can be clearer than that the only French law produced is in direct contradiction to such a notion; because approving as it does (though to a very limited extent) the abolition, it nevertheless reserves to its own authorities the cognizance of each cause and the appropriation of the penalties.

If I felt it necessary to press the consideration further, it would be by stating the gigantic mischiefs which such a claim is likely to produce. It is no secret, particularly in this place, that the right of search in time of war, though unquestionable, is not submitted to without complaints loud and bitter, in spite of all the modifications that can be applied to it. If this right of war is imported into peace by convention, it will be for the prudence of states to regulate by that convention the exercise of the right with all the softenings of which it is capable. \* \* \*

Upon the matter of costs and damages that have been prayed, I must observe that it is the first case of the kind, and that the question itself is *primæ impressionis*, and that upon both grounds it is not the inclination of the court to inflict such a censure. If a second case should occur, it will require (in my judgment till corrected), and undoubtedly shall receive, a different consideration.<sup>24</sup>

### THE MAGELLAN PIRATES.

(High Court of Admiralty, 1853. 1 Spinks, 81.)

This was a cause arising under 13 & 14 Vict. c. 26, in pursuance of which the court was prayed to determine and pronounce that certain persons captured by Her Majesty's sloop *Virago*, in the Straits of Magellan, were pirates, and to adjudge the number of them, in order to the usual application being made for the bounty. \* \* \*

These cases have generally been decided in a summary manner on

<sup>24</sup> For other cases upon the subject of the slave trade, see *The Amélie*, 1 Act. 240 (1810), per Sir Wm. Grant; *The Fortuna*, 1 Dod. 81 (1811); *Madrazo v. Willes*, 8 B. & Ald. 353 (1820); *The Antelope*, 10 Wheat. 66, 6 L. Ed. 268 (1825).

Particular attention should be called to *The Marianna Flora*, 11 Wheat. 1, 6 L. Ed. 405 (1826), in which the Supreme Court of the United States, per Mr. Justice Story, held that the right to visit and search was essentially a belligerent right, to be exercised in time of war, and that it did not exist in time of peace, in the absence of special agreement to that effect.

See also *Dana's Wheaton*, notes 83 (198-195), 84 (196-200), 85 (201-203).

the hearing of the petition; but in the present case the petition was opposed by the Queen's proctor, the Admiralty proctor, and also a proctor for the owner of the *Eliza Cornish*, who asserted an interest, inasmuch as, if the men who seized the *Eliza Cornish* were not pirates, but only revolted subjects of the Chilian government, his party would then have a claim for damages against that government, which, if the men were pirates, could not, as he was advised, be supported.

Dr. LUSHINGTON.<sup>25</sup> \* \* \* I apprehend that, in the administration of our criminal law, generally speaking, all persons are held to be pirates who are found guilty of piratical acts; and piratical acts are robbery and murder upon the high seas. I do not believe that, even where human life was at stake, our courts of common law ever thought it necessary to extend their inquiries further, if it was clearly proved against the accused that they had committed robbery and murder upon the high seas. In that case they were adjudged to be pirates, and suffered accordingly. Whatever may have been the definition in some of the books, and I have been referred by Her Majesty's advocate to an American case (*United States v. Smith*, 5 Wheat. 153, 5 L. Ed. 57) where, I believe, all the authorities bearing on this subject are collected, it was never, so far as I am able to find, deemed necessary to inquire whether parties so convicted of these crimes had intended to rob on the high seas, or to murder on the high seas indiscriminately.

Though the municipal law of different countries may and does differ, in many respects, as to its definition of piracy, yet I apprehend that all nations agree in this: that acts, such as those which I have mentioned, when committed on the high seas, are piratical acts, and contrary to the law of nations.

It is true, that where the subjects of one country may rebel against the ruling power, and commit divers acts of violence with regard to that ruling power, that other nations may not think fit to consider them as acts of piracy. But, however this may be, I do not think it necessary to follow up that disquisition on the present occasion. I think it does not follow that, because persons who are rebels or insurgents may commit against the ruling power of their own country acts of violence, they may not be, as well as insurgents and rebels, pirates also; pirates for other acts committed towards other persons. It does not follow that rebels or insurgents may not commit piratical acts against the subjects of other states, especially if such acts were in no degree connected with the insurrection or rebellion.

Even an independent state may, in my opinion, be guilty of piratical acts. What were the Barbary pirates of olden times? What many of the African tribes at this moment? It is, I believe, notorious, that tribes now inhabiting the African coast of the Mediterranean will send

<sup>25</sup> The statement of facts is abridged and only so much of the opinion is given as relates to the question of piracy. That portion is omitted in which the learned judge found that the captors were entitled to the bounty provided by statute for the capture of pirates.



out their boats and capture any ships becalmed upon their coasts. Are they not pirates, because, perhaps, their whole livelihood may not depend on piratical acts? I am well aware that it has been said that a state cannot be piratical; but I am not disposed to assent to such dictum as a universal proposition. \* \* \*

Now, I refer to Russell on Crimes, where we find the result of many older authorities. He commences in these words: "The offence of piracy, at common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there" (Russell on Crimes, book ii. ch. 8, § 1); and in a subsequent part I find the following: "If a robbery be committed in creeks, harbors, ports, etc., in foreign countries, the Court of Admiralty indisputably has jurisdiction of it, and such offence is consequently piracy" (Id. § 2). There is a case also stated here which I think applies: "Where a prisoner was indicted for stealing three chests of tea out of the *Aurora*, of London, on the high seas, and it was proved that the larceny was committed while the vessel lay off Wampa, in the river, twenty or thirty miles from the sea, but there was no evidence as to the tide flowing or otherwise, at the place where the vessel lay; it was held, from the circumstance that the tea was stolen on board the vessel which had crossed the ocean, that there was sufficient evidence that the larceny was committed on the high seas." (Id.)

Again, it was decided in another case, that where A., standing on the shore of a harbour, fired a loaded musket at a revenue cutter which had struck upon a sand-bank in the sea, about 100 yards from the shore, by which firing a person was maliciously killed on board the vessel, it was piracy. (Id.)

It appears to me, therefore, that, from the quotations which I have just made, I derive two advantages; one, in being enabled with greater certainty to affix a true meaning to the statute itself; the other, a reference to what I must more particularly consider,—the place where the occurrence happened.

I will now advert to so much of the facts as will be sufficient to enable me to judge whether the present claim is well-founded.

It appears that, towards the latter end of 1851, there was an insurrection in some of the dominions belonging to the states of Chili. General Cruz was at the head of this insurrection, failed, and retired into the country. There was a Chilian convict settlement at a place called Punta Arenas; the garrison of which consisted of 160 soldiers, and 450 male convicts. An officer in that garrison raised an insurrection against the governor, murdered him, and, in conjunction with those who conspired with him, seized a British vessel, called the *Eliza Cornish*, and also an American vessel called the *Florida*. They murdered the master of the *Eliza Cornish*, and a Mr. Deane, a passenger and part owner, and they also murdered the owner of the *Florida*, who was

on board. These facts coming to the knowledge of Admiral Thoresby, the commander-in-chief of that station, he despatched the *Virago*, a British steamer, under the command of Captain Houston Stewart, to the Straits of Magellan. On the 28th January, 1852, a vessel, which proved to be the *Eliza Cornish* was descried working out of the Straits; chase was made; a shot fired across her bows brought her to; she was boarded and seized by orders of Captain Stewart.

At the time she was so seized she was in possession of a large number of persons who had raised the insurrection at Punta Arenas. There were found on board her 128 men, 24 women, and 18 children; the guns were loaded and the men were armed. These were under the command of a man named Bruno Brionis, who held a commission from Cambiaso, the leader of the insurrection, and the instigator of the murders and robberies then committed; and these men were afterwards delivered up to the Chilian authorities at Valparaiso. Captain Stewart proceeded in search of Cambiaso and the other insurgents, giving that name to those who had left Punta Arenas. He secured fifty-six at a place called Wood's Bay, and on the 15th February he discovered the *Florida* herself, in the possession of a large number of the same people. It was said that these insurgents had, whilst at sea, risen against Cambiaso and five others, and, with the aid of the American master and crew, brought the vessel to the port where Captain Stewart had found her.

On board the *Florida* was found treasure which has been plundered from the *Eliza Cornish*. All the persons on board the *Florida*, not American, were delivered up to the Chilian authorities.

As to the general character of these transactions, I really cannot bring myself to entertain a doubt. Even if I could be induced to adopt the distinction, that the acts in question were the acts of insurgents, I should still, even from that, adhere to the opinion that they were piratical acts; piratical acts, too, in my judgment, in no degree whatsoever connected with the insurrection or rebellion, or with the intention of these parties to go to any other part of the world. They were acts, in one sense, of wanton cruelty, in the murder of foreign subjects, and in the indiscriminate plunder of their property. I am of opinion that the persons who did these acts were guilty of piracy, and were to be deemed pirates, unless some of the other objections which have been urged ought to prevail.

It has been said that these acts were not committed on the high seas, and, therefore, the murder and robbery not properly or legally piratical. This objection well deserves consideration; for it is true that murder and robbery, done upon land, and not by persons notoriously pirates, would not be piracy. Here, as I understand the facts, the *Eliza Cornish* and the *Florida* were seized in port, and the murders committed in port or committed on land, on the persons taken out of the vessels. Had the vessels been recaptured whilst lying in port, there

might be raised an argument, though I do not say it would prevail, that these offences, legally speaking, would not be classed as acts of piracy. I say it might be so; though I am not disposed to hold that the doctrine that the port, forming a part of the dominions of the state to which it belongs, ought in all cases to divest robbery and murder done in such port of the character of piracy. I am much more strongly inclined to hold this from the facts quoted from Russell; and I am still more inclined to come to that conclusion for another reason, because the statute expressly contemplates acts done on shore; for these are the words: "Shall, after the said first day of June, attack or be engaged with any persons alleged to be pirates, afloat or ashore," manifestly intending to take cognizance of piratical offences, or offences of that class, when they were committed on shore. It would quite fail if it were not so; because we all know that pirates are not perpetually at sea, but under the necessity of going on shore at various places; and, of course, they must be followed and taken there, or not at all.

In this case, however, the ships were carried away and navigated by the very same persons who originally seized them. Now, I consider the possession at sea to have been a piratical possession; to have been a continuation of the murder and robbery; and the carrying away the ships on the high seas, to have been piratical acts, quite independently of the original seizure. \* \* \*

## II. MERCHANT VESSELS

### REGINA v. LESLEY.

(Court of Crown Cases Reserved, 1860. Bell's Crown Cases Reserved, 220.)

The following case was reserved by Watson, B.:

The prisoner was the master of the British ship *Louisa Braginton*, and the charge against him was for the false imprisonment of several Chilian subjects from Valparaiso to Liverpool.

These persons, having been ordered to be banished from Chili by the government of that country, were brought by force, guarded by soldiers of that state, on board the ship, whence the prisoner, under a contract (a copy accompanies this case) with the Chilian government, carried and conveyed these Chilian subjects to Liverpool.

The evidence, and an abstract of the indictment, accompanies this case. On this evidence I directed a verdict of guilty, reserving the question of law, whether or not the defendant was liable to an indictment in this country under the circumstances, for the opinion of this court.

W. H. Watson.<sup>26</sup>

\* \* \* \* \*

The judgment of the court was delivered, on the 28th January, 1860, by

<sup>26</sup> The abstract of indictment is omitted.

ERLE, C. J. In this case the question is, whether a conviction for false imprisonment can be sustained upon the following facts.

The prosecutor and others, being in Chili, and subjects of that state, were banished by the government from Chili to England.

The defendant, being master of an English merchant vessel lying in the territorial waters of Chili, near Valparaiso, contracted with that government to take the prosecutor and his companions from Valparaiso to Liverpool, and they were accordingly brought on board the defendant's vessel by the officers of the government, and carried to Liverpool by the defendant under his contract. Then, can the conviction be sustained for that which was done within the Chilian waters? We answer no.

We assume that in Chili the act of the government toward its subjects was lawful; and although an English ship in some respects carries with her the laws of her country in the territorial waters of a foreign state, yet in other respects she is subject to the laws of that state as to acts done to the subjects thereof.

We assume that the government could justify all that it did within its own territory, and we think it follows that the defendant can justify all that he did there as agent for the government and under its authority.

In *Dobree v. Napier*, 2 Bing. N. C. 781, the defendant, on behalf of the Queen of Portugal, seized the plaintiff's vessel for violating a blockade of a Portuguese port in time of war. The plaintiff brought trespass; and judgment was for the defendant, because the Queen of Portugal, in her own territory, had a right to seize the vessel and to employ whom she would to make the seizure; and therefore the defendant, though an Englishman seizing an English vessel, could justify the act under the employment of the Queen.

We think that the acts of the defendant in Chili become lawful on the same principle, and that there is therefore no ground for the conviction.

The further question remains, Can the conviction be sustained for that which was done out of the Chilian territory? and we think it can.

It is clear that an English ship on the high sea, out of any foreign territory, is subject to the laws of England; and persons, whether foreign or English, on board such ship, are as much amenable to English law as they would be on English soil.

In *Regina v. Sattler, Dears. & Bell's C. C. 525*, this principle was acted on, so as to make the prisoner, a foreigner, responsible for murder on board an English ship at sea. The same principle has been laid down by foreign writers on international law among which it is enough to cite Ortolan, "*Sur la Diplomatie de la Mer*," liv. 2, cap. 13. The Merchant Shipping Act, 17 & 18 Vict. c. 104, § 267, makes the master and seamen of a British ship responsible for all offences against property or person committed on the sea out of her Majesty's do-

minions as if they had been committed within the jurisdiction of the admiralty of England.

Such being the law, if the act of the defendant amounted to a false imprisonment, he was liable to be convicted. Now, as the contract of the defendant was to receive the prosecutor and the others as prisoners on board his ship and to take them, without their consent, over the sea to England, although he was justified in first receiving them in Chili, yet that justification ceased when he passed the line of Chilian jurisdiction and after that it was a wrong which was intentionally planned and executed in pursuance of the contract, amounting in law to a false imprisonment.

It may be that transportation to England is lawful by the law of Chili, and that a Chilian ship might so lawfully transport Chilian subjects; but for an English ship, the laws of Chili, out of the state, are powerless, and the lawfulness of the acts must be tried by English law.

For these reasons, to the extent above mentioned, the conviction is affirmed.

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#### REGINA v. ANDERSON.

(Court for Crown Cases Reserved, 1868. 11 Cox, C. C. 198.)

Case reserved by Byles, J., at the October Sessions of the Central Criminal Court, 1868, for the opinion of this court.

James Anderson, an American citizen, was indicted for murder on board a vessel, belonging to the port of Yarmouth in Nova Scotia. She was registered in London, and was sailing under the British flag.

At the time of the offence committed the vessel was in the river Garonne, within the boundaries of the French empire, on her way up to Bordeaux, which city is by the course of the river about ninety miles from the open sea. The vessel had proceeded about half-way up the river, and was at the time of the offence about three hundred yards from the nearest shore, the river at that place being about half a mile wide.

The tide flows up to the place and beyond it.

No evidence was given whether the place was or was not within the limits of the port of Bordeaux.

It was objected for the prisoner that the offence having been committed within the empire of France, the vessel being a colonial vessel, and the prisoner an American citizen, the court had no jurisdiction to try him.

I expressed an opinion unfavorable to the objection, but agreed to grant a case for the opinion of this court.

The prisoner was convicted of manslaughter.

J. Barnard Byles.

BOVILL, C. J.<sup>37</sup> There is no doubt that the place where the offence was committed was within the territory of France, and that the prisoner was therefore subject to the laws of France, which the local authorities of that realm might have enforced if so minded; but at the same time, in point of law, the offence was also committed within British territory, for the prisoner was a seaman on board a merchant vessel, which, as to her crew and master, must be taken to have been at the time under the protection of the British flag, and, therefore, also amenable to the provisions of the British law. It is true that the prisoner was an American citizen, but he had with his own consent embarked on board a British vessel as one of the crew. Although the prisoner was subject to the American jurisprudence as an American citizen, and to the law of France as having committed an offence within the territory of France, yet he must also be considered as subject to the jurisdiction of British law, which extends to the protection of British vessels, though in ports belonging to another country. From the passage in the treatise of Ortolan, already quoted, it appears that, with regard to offences committed on board of foreign vessels within the French territory, the French nation will not assert their police law unless invoked by the master of the vessel, or unless the offence leads to a disturbance of the peace of the port; and several instances where that course was adopted are mentioned. Among these are two cases where offences were committed on board American vessels—one at the port of Antwerp, and the other at Marseilles—and where, on the local authorities interfering, the American court claimed exclusive jurisdiction. As far as America herself is concerned, it is clear that she, by the statutes of the 23d of March, 1825 (4 Stat. 115), has made regulations for persons on board her vessels in foreign parts, and we have adopted the same course of legislation. Our vessels must be subject to the laws of the nation at any of whose ports they may be, and also to the laws of our country, to which they belong. As to our vessels when going to foreign parts we have the right, if we are not bound, to make regulations. America has set us a strong example that we have the right to do so. In the present case, if it were necessary to decide the question on the 17 & 18 Vict. c. 104, I should have no hesitation in saying that we now not only legislate for British subjects on board of British vessels, but also for all those who form the crews thereof, and that there is no difficulty in so construing the statute; but it is not necessary to decide that point now. Independently of that statute, the general law is sufficient to determine this case. Here the offence was committed on board a British vessel by one of the crew, and it makes no difference whether the vessel was within a foreign port or not. If the offence had been committed on the high seas it is clear that it would have been within the jurisdiction of the admiralty, and the Central Criminal Court has now the same extent of jurisdiction. Does

<sup>37</sup> The concurring opinions of Channell, B., and Lush, J., are omitted.

it make any difference because the vessel was in the river Garonne half-way between the sea and the head of the river? The place where the offence was committed was in a navigable part of the river below bridge, and where the tide ebbs and flows, and great ships do lie and hover. An offence committed at such a place, according to the authorities, is within the admiralty jurisdiction, and it is the same as if the offence had been committed on the high seas. On the whole I come to the conclusion that the prisoner was amenable to the British law, and that the conviction was right.

BYLES, J. I am of the same opinion. I adhere to the opinion that I expressed at the trial. A British ship is, for the purposes of this question, like a floating island; and, when a crime is committed on board a British ship, it is within the jurisdiction of the Admiralty Court, and therefore of the Central Criminal Court, and the offender is as amenable to British law as if he had stood on the Isle of Wight and committed the crime. Two English and two American cases decide that a crime committed on board a British vessel in a river like the one in question, where there is the flux and reflux of the tide, and wherein great ships do hover, is within the jurisdiction of the Admiralty Court; and that is also the opinion expressed in Kent's Commentaries. The only effect of the ship being within the ambit of French territory is that there might have been concurrent jurisdiction had the French claimed it. I give no opinion on the question whether the case comes within the enactment of the Merchant Shipping Act. *Reg. v. Lopez*, 7 Cox, C. C. 431; *Reg. v. Armstrong*, 13 Cox, C. C. 184.

BLACKBURN, J. I am of the same opinion. It is not necessary to decide whether the case comes within the Merchant Shipping Act. If the offence could have been properly tried in any English court, then the Central Criminal Court had jurisdiction to try it. It has been decided by a number of cases that a ship on the high seas, carrying a national flag, is part of the territory of that nation whose flag she carries; and all persons on board her are to be considered as subject to the jurisdiction of the laws of that nation, as much so as if they had been on land within that territory. From the earliest times it has been held that the maritime courts have jurisdiction over offences committed on the high seas where great ships go, which are, as it were, common ground to all nations, and that the jurisdiction extends over ships in rivers or places where great ships go as far as the tide extends. In this case the vessel was within French territory and subject to the local jurisdiction, if the French authorities had chosen to exercise it. Our decisions establish that the admiralty jurisdiction extends at common law over British ships on the high seas, or in waters where great ships go as far as the tide ebbs and flows. The cases *Rex v. Allen* and *Rex v. Jemot* are most closely in point, and establish that offences committed on board British ships in

places where great ships go are within the jurisdiction of the Court of Admiralty, and consequently of the Central Criminal Court. In America it appears, from the case of *United States v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37, that it was held that the United States had no jurisdiction in the case of the crime of manslaughter committed on board a United States vessel in the river Tigris in China; but as I understand the American cases of *Thomas v. Lane*, Fed. Cas. No. 13,902, and *United States v. Coombs*, 12 Pet. 72, 9 L. Ed. 1004, a rule more in conformity with the English decisions was laid down; and upon those authorities I take it that the American courts would agree with us. It is clear therefore, that a person on board a British ship is amenable to the British law just as much as a British person on board an American ship is subject to the American law. My view is, that when a person is on board a vessel sailing under the British flag, and commits a crime, that nation has a right to punish him for the crime committed by him; and clearly the same doctrine extends to those who are members of the crew of the vessel.

Conviction affirmed.<sup>22</sup>

<sup>22</sup> In *U. S. v. Bennett*, 3 Hughes, 466, Fed. Cas. No. 14,574 (1877), the crime was committed on the Garonne near the city of Bordeaux, and the decision was the same. See, also, *Reg. v. Lopez* and *Reg. v. Sattler*, D. & B. 525 (1858).

In 1856 a case arose in reference to seamen, supposed not to be citizens of the United States, who, having committed a mutiny at sea, on board of the American vessel *Atalanta*, were brought back in the vessel to Marseilles, where, on the application of the consul of the United States, they were received and imprisoned by the local authorities on shore.

Six of them were afterwards on his application taken from prison and placed on board the *Atalanta* for conveyance to the United States under charge of crime. Then, with notice to the consul, but in spite of his remonstrance, the local authorities went on board of the *Atalanta*, forcibly resumed possession of the prisoners, and replaced them in confinement on shore. Mr. Mason, in a note of the 27th of June, 1856, says:

"It is the first instance, in which a vessel wearing the flag of the United States, lying in a French port, or a French ship lying in a port of the United States, has, since the date of the treaty, been visited by police officers without the authority of the consul." MS. Department of State. The correspondence between the two governments having been submitted to the Attorney General of the United States, he concurred in opinion with the American Minister, "that the local authority of Marseilles exceeded its lawful power in substance, as well as in form, and that there could be no conflict on the part of France with other powers on account of the nationality of the prisoners, for they were always in the constructive, if not in the actual, custody of the United States." 8 Op. Attys. Gen. 73. Freeman Snow, *Cases and Opinions*, pp. 184, 185 (1893).

In the Case of *John Anderson*, 1879, Great Britain admitted the contention of the United States, that a crime committed upon an American merchant vessel while sailing on the high seas was properly triable in the United States, and the action of the Indian authorities in trying Anderson in Calcutta, in which port the vessel subsequently arrived, was disavowed by the British Government. 1 Wharton's Digest, 123-125.

SCOTT INT. LAW



## MARSHALL v. MURGATROYD.

(Queen's Bench, 1870. L. R. [1870-1871] 6 Q. B. 31.)

Case stated by Justices of the West Riding of Yorkshire under 20 & 21 Vict. c. 43.

An information was preferred by the respondent against the appellant for that she had, since the passing of 8 & 9 Vict. c. 101, and within twelve calendar months from the date of the application by the respondent, been delivered of a bastard child, of which she alleged the appellant to be the father. On the hearing the justices made an order for the maintenance of the child.

The facts proved before the justices were as follows:

The respondent was delivered of a bastard child on board the ship *Palmyra*, whilst sailing from New York to Liverpool; that ship belonged to the Cunard line of steamers. \* \* \* It was admitted by the appellant's attorney that the Cunard line was an English line of steamers. \* \* \*

BLACKBURN, J.<sup>39</sup> Our judgment must be for the respondent. It has been argued that the provisions of 7 & 8 Vict. c. 101, under which this order is made, extend only to England and Wales, that the child of which the respondent was delivered having been born on the high seas was born out of England, and that therefore the order is invalid. I think that the evidence set out in the case is sufficient to shew that the *Cunard* steamer is an English ship. It is part of the common law and of the law of nations, that a ship on the high seas is a part of the territory of that state to which she belongs; and therefore an English ship is deemed to be part of England. The child having been born on board an English ship, the statute applies. The justices were therefore right in making the order.

LUSH, J., concurred.<sup>40</sup>

<sup>39</sup> The statement of facts is abridged.

<sup>40</sup> In *Crapo v. Kelly*, 16 Wall. 610, 623, 21 L. Ed. 430 (1872), the court said: "The question then arises, while thus upon the high seas was she in law within the territory of Massachusetts. If she was, the insolvent title will prevail.

"It is not perceived that this vessel can be said to be upon United States territory, or within United States jurisdiction, or subject to the laws of the United States regulating the transfer of property, if such laws there may be. Except for the purposes and to the extent to which these attributes have been transferred to the United States, the state of Massachusetts possesses all the rights and powers of a sovereign State. By her own consent, as found in article 1 of the Constitution of the United States, she has abandoned her right to wage war, to coin money, to make treaties, and to do certain other acts therein mentioned. None of the subjects there mentioned affect the question before us. The third article of that instrument extends the judicial power of the United States 'to all cases of admiralty and maritime jurisdiction.' This gives the power to the courts of the United States to try those cases in which are involved questions arising out of maritime affairs, and of crimes committed on the high seas.\* To bring a transaction within that jurisdiction, it must be not simply a transaction which occurred at sea, as the

making of a contract, but one in which the question itself is of a maritime nature, or arises out of a maritime affair, or it must be a tort or crime committed on the high seas. Over such cases the United States courts have jurisdiction; that is, they are authorized to hear and determine them. No rule of property is thereby established. This remains as it would have been had no such authority been given to the United States court.

"To Congress is also given power 'to define and punish piracies and felonies committed on the high seas, and offences against the law of nations.' It will scarcely be claimed that the title to property could be affected by this provision. Nor does the circumstance that the Arctic sailed under the flag of the United States and was entitled to the protection of that government against insult or injury from the citizens or ships of other nations, touch the present point. None of these instances are like that of the passage of a bankrupt law by the United States, which acts directly upon the property of all the citizens of all the states, wherever it may be. Had the claim of either party to this vessel been based upon a proceeding under that statute, the title would have been complete, if the property had been within the territory or jurisdiction of any of the states of the Union.

"It is not perceived, therefore, that the relation of Massachusetts to the Union has any effect upon the title to this vessel. It stands as if that state were an independent sovereign state, unconnected with the other states of the Union. The question is the same as if this assignment had been made in London by a British insolvent court, adjudicating upon the affairs of a British subject.

"We are of the opinion, for the purpose we are considering, that the ship Arctic was a portion of the territory of Massachusetts, and the assignment by the insolvent court of that state passed the title to her, in the same manner and with the like effect as if she had been physically within the bounds of that state when the assignment was executed."

In *McDonald v. Mallory*, 77 N. Y. 546, 558, 556, 33 Am. Rep. 664 (1879) it is said: "In respect to crimes committed on the high seas, the power to provide for their punishment has been delegated to the Federal Government, and for that reason State laws cannot be applicable to them; but I cannot escape the conclusion that under the principle of the case of *Crapo v. Kelly* civil rights of action, for matters occurring at sea on board of a vessel belonging to one of the States of the Union must depend upon the laws of that State, unless they arise out of some matter over which jurisdiction has been vested in and exercised by the government of the United States, or over which the State has transferred its rights of sovereignty to the United States; and that to this extent the vessel must be regarded as part of the territory of the State, while in respect to her, relations with foreign governments, crimes committed on board of her, and all other matters over which jurisdiction is vested in the Federal Government, she must be regarded as part of the territory of the United States and subject to the laws thereof." \* \* \* "There is nothing in the nature of this action which renders it exclusively the subject of Federal cognizance. The jurisdiction of the States and of the United States in the matter of personal torts committed at sea, such as assaults by a master on his crew, injuries to passengers, and the like, are concurrent, though remedies by proceedings in rem can be administered only by the courts of admiralty of the United States. The field of legislation in respect to cases like the present one has not been occupied by the general government and is therefore open to the States. *Steamboat Co. v. Chase*, 16 Wall. 522, 530, 533 [21 L. Ed. 369 (1872)]. Indeed the United States Court of Admiralty would have no jurisdiction in such a case. *Steamboat Co. v. Chase*, 16 Wall. 522, 530, 533 [21 L. Ed. 369 (1872)]; *Sherlock v. Alling*, 93 U. S. 99 [23 L. Ed. 819 (1876)], and there is no greater objection to extending the operation of a statute of this description to a vessel at sea than there was to giving similar operation to a State insolvent law."

Dr. Wharton (*Commentaries on American Law*, 1884, § 308) says: "A ship at sea is, by the prevalent opinion, a part of the territory of the State whose flag she bears, and is consequently governed by the laws of such State. As between the several States in the American Union, a ship is governed by the law of the State in which she is registered. A ship in port, however, is gov-

## WILSON v. McNAMEE.

(Supreme Court of the United States, 1880. 102 U. S. 572, 26 L. Ed. 234.)

Error to the Court of Appeals of the State of New York.

McNamee tendered his services as a licensed Sandy Hook pilot to conduct the schooner *E. E. Racket* by way of Sandy Hook to the port of New York. He was the first that offered his services. The tender was made at sea, about fifty miles from that port. The vessel was from a foreign port, sailing under register, and drew nine feet of water. The master refused to accept the services, and came into port without a pilot. McNamee demanded the compensation allowed by the local state law, and, payment having been refused, brought this suit and recovered judgment in the District Court of the city of New York for the First Judicial Circuit against Wilson, the consignee of the schooner. The case was thereupon removed by appeal to the proper Court of Common Pleas, and subsequently to the Court of Appeals of the state. Those courts successively affirmed the judgment. Wilson sued out this writ.

The laws of New York on the subject of pilotage contain, among other provisions, the following:

"All masters of foreign vessels, and vessels from a foreign port, and all vessels sailing under register, bound to or from the port of

erned by port law, though this does not apply to foreign vessels of war." For ships of war, see *The Exchange v. McFaddon*, 7 Cranch, 116, 3 L. Ed. 287 (1812).

In *The Lamington* [D. C.] 87 Fed. 752 (1898), Thomas, J., said: "The first question is this: Did the accident occur on British territory? Every vessel outside the jurisdiction of a foreign power is a detached, floating portion of the territory of the country whose flag it flies, and under whose laws it is registered. *The Scotia*, 14 Wall. 170, 184 [20 L. Ed. 822 (1871)]; *Crapo v. Kelly*, 16 Wall. 610, 624 [21 L. Ed. 480 (1872)]; *Wilson v. McNamee*, 102 U. S. 572, 574 [26 L. Ed. 234 (1880)]; *In re Moncan* (C. C.) 14 Fed. 44 [1882]; *In re Ah Sing* [C. C.] 13 Fed. 286 (1882); *U. S. v. Bennett*, 3 Hughes, 466, Fed. Cas. No. 14,574 [1877]; *McDonald v. Mallory*, 77 N. Y. 546, 551, 553 [33 Am. Rep. 664 (1879)]; *Wheat. Int. Law* (Dana's ed.) § 106; 3 *Whart. Int. Law* Dig. 228; *Whart. Conf. Laws*, § 356; 1 *Kent, Comm.* 28; *Vatt. Law Nat.* bk. 1, ch. 19, § 216; 1 *Calvo*, 562; *Bluntschli*, § 317; 1 *Martens* (French Trans. of Leo), 496; *Seagrove v. Parks*, 1 Q. B. Div. 551 [1891]. The authorities noted so perfectly maintain the doctrine stated that quotation, amplification or illustration is unnecessary. The broad and fundamental principle is that the sovereignty of a nation extends to its private ships, and this dominion is never shared by a foreign power where the internal affairs of the vessel are alone involved, and where it is not within the territorial domain of such power. It results from the foregoing: (1) That tortious acts are governed by the law of the place where they are done. (2) That a foreign tribunal will never afford reparation for such acts, unless they are unjustified both by the law of the place where they occurred and by the law of the forum. (3) That a contract creating the relation of master and servant, made in a country for a service to be rendered in such country, imposes only such obligations, and confers only such rights, as the terms of the contract stipulate, and the laws of such country imply. (4) That the vessels of such country are, even upon the high seas, a detached, floating portion of its territory, and exclusively within the influence of its laws, so far as the internal economy of the vessel is concerned."

New York, by the way of Sandy Hook, shall take a licensed pilot; or, in case of refusal to take such pilot, shall himself, owners or consignees, pay the said pilotage, as if one had been employed; and such pilotage shall be paid to the pilot first speaking or offering his services as pilot to such vessel."

The fourth section of the act of Congress approved August 7, 1789 (1 Stat. 54 [Comp. St. § 7981]), declares that—

"All pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the states respectively wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress."

This enactment will also be found in section 4235 of the Revised Statutes.

The proviso to the second section of an Act of Congress of Feb. 25, 1867 (14 Stat. 412), is in these words:

"Nothing in this act contained, or in the act of which it is amendatory, shall be construed to annul or affect any regulations established by the existing laws of any state requiring vessels entering or leaving a port in such state to take a pilot duly authorized by the laws of such state, or of a state situate upon the waters of the same port."

Mr. James S. Stearns, for the plaintiff in error.

The court declined hearing counsel for the defendant in error.

Mr. Justice SWAYNE, after stating the case, delivered the opinion of the court.

The only point argued here was the validity of the pilot law of New York with reference to the Constitution of the United States.

At the close of the opening argument of the learned counsel for the plaintiff in error, we announced that the affirmative of the question thus presented was so well settled by the repeated adjudications of this court, that we had no desire to hear the counsel for the defendant in error upon the subject.

Thereafter, the counsel, who had been heard submitted a memorandum, in which he called our attention particularly "to the tenth point of the brief of the plaintiff in error, namely, that the tender took place outside of the jurisdiction of the state of New York." He added: "This question has never yet been passed upon by this court in either of the other pilot cases."

Our opinion will be confined to that subject.

There are several answers to the suggestion.

1. The objection does not appear to have been taken in the circuit court, and cannot, therefore, be considered here. *Edwards v. Elliott*, 21 Wall. 532, 22 L. Ed. 487.

2. A vessel at sea is considered as a part of the territory to which it belongs when at home. It carries with it the local legal rights and legal jurisdiction of such locality. All on board are endowed and sub-

ject accordingly. The pilot, upon his boat, had the same authority from the laws of New York to tender and demand employment, and the same legal consequences, under the circumstances, followed the refusal of the master as if both vessels had then been *infra fauces terræ*, where the municipal jurisdiction of the state was complete and exclusive. The jurisdiction of the local sovereign over a vessel, and over those belonging to her, in the home port and abroad on the sea, is, according to the law of nations, the same. Dana's *Wheaton*, p. 169, § 106; 1 Kent, *Com.* 27; Vattel, bk. 1, c. 19, § 216; 2 Rutherford's *Inst.* bk. 2, c. 9, §§ 8, 19.

The principle here recognized is, of course, subject to the paramount authority of the Constitution and laws of the United States over the foreign and interstate commerce of the country, and the commercial marine of the country engaged in such commerce, and subject also to the like power of Congress "to define and punish piracies and felonies committed on the high seas and offences against the law of nations." See *Ex parte McNiel*, 13 Wall. 236, 20 L. Ed. 624.

Speaking of the universal law of reason, justice, and conscience, of which the law of nations is necessarily a part, Cicero said: "Nor is it one thing at Rome and another at Athens, one now and another in future, but among all nations it is, and in all time will be, eternally and immutably the same." Lactantius, *Inst. Div.* bk. 7, c. 8.

3. Conceding that the pilot laws of the several states are regulations of commerce, Mr. Justice Story said: "They have been adopted by Congress, and without question are controllable by it." 2 Story, *Const.* § 1071.

Mr. Chief Justice Marshall, in *Gibbons v. Ogden*, said: "When the government of the Union was brought into existence, it found a system for the regulation of pilots in force in every state. The act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by Congress." 9 Wheat. 1, 207, 6 L. Ed. 23. The long-continued silence of Congress, with its plenary power, in the presence of such legislation by the states concerned, is itself an implied ratification and adoption, and is equivalent in its consequences to an express declaration to that effect. *Atkins v. Fiber Disintegrating Co.*, 18 Wall. 272, 21 L. Ed. 841.

The several acts of Congress bearing on the subject are fully referred to in *Ex parte McNiel*, *supra*. In that, and in the earlier and more elaborate case of *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 299, 13 L. Ed. 996, this subject, in all its aspects, was so fully considered that further remarks on the present occasion are deemed unnecessary.

Judgment affirmed.<sup>41</sup>

<sup>41</sup> In *One Hundred and Ninety-Four Shawls*, 1 Abb. Adm. 317, Fed. Cas. No. 10,521 (1848), it was held, according to the headnote, that:

"It rests in the discretion of a court of admiralty, whose aid is invoked to

## UNITED STATES v. RODGERS.

(Supreme Court of the United States, 1893. 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071.)

See ante, p. 222, for a report of the case.

the settlement of a controversy between foreigners, to hear and determine it, or to remit the parties to their home forum.

"There is no authority of weight which imposes on the courts of our own country the necessity of determining controversies between foreigners resident abroad, either in common-law proceedings, transitory in their nature, or in maritime suits prosecuted in rem.

"As a general rule, where the only question in a salvage suit is as to the rate of reward, and the salvaged property is within the jurisdiction of the court, a court of admiralty, in this country, will entertain the suit, notwithstanding that all the parties are foreigners.

"It seems that when, in a salvage suit between foreigners, the answer charges the libellant with wanton misconduct in obtaining possession of the property, and prays the privilege to contest the claim of the libellant before the courts of their common country, the case should be dismissed to the home forum. \* \* \*

In *The Belgenland*, 114 U. S. 855, 5 Sup. Ct. 860, 29 L. Ed. 152 (1885), it was held, according to the headnote, that:

"A collision on the high seas between vessels of different nationalities is prima facie a proper subject of inquiry in any court of admiralty which first obtains jurisdiction.

"The courts of the United States in admiralty may, in their discretion, take jurisdiction over a collision on the high seas between two foreign vessels. \* \* \*

"When a controversy in admiralty between foreign vessels in the courts of the United States arises under the common law of nations, the court below should take jurisdiction, unless special grounds are shown why it should not do so. \* \* \*

"In a proceeding in admiralty against one foreign vessel for collision with another foreign vessel on the high seas, the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted, is the law governing the case; except (1) that persons on either ship will not be open to blame for following the sailing regulations and rules of navigation prescribed by their own government for their direction on the high seas; and (2) that if the maritime law, as administered by both nations to which the respective ships belong, be the same in both, in respect to any matter of liability or obligation, such law, if shown to the court, should be followed, although different from the maritime law of the country of the forum."

See, also, *The Svea and the Seine*, Reichsgericht, 74 Decisions of the Reichsgericht in Civil Cases, 46 (1910).

III. MUNICIPAL SEIZURE BEYOND THE THREE-MILE LIMIT <sup>42</sup>

## CHURCH v. HUBBART.

(Supreme Court of the United States, 1804. 2 Cranch, 187, 2 L. Ed. 249.)

Error from the Circuit Court for the District of Massachusetts, in an action on the case, upon two policies of insurance, whereby John Barker Church, Jr., caused to be insured \$20,000 upon the cargo of the brigantine Aurora, Nathaniel Shaler, master, at and from New York to one or two Portuguese ports on the coast of Brazil, and at and from thence back to New York.

At the foot of one of the policies was the following clause: "The insurers are not liable for seizure by the Portuguese for illicit trade;" and in the body of the other was inserted the following: "N. B.—The insurers do not take the risk of illicit trade with the Portuguese." \* \* \*

MARSHALL, C. J., delivered the opinion of the court.<sup>43</sup> If, in this case, the court had been of opinion, that the circuit court had erred in its construction of the policies, which constitute the ground of action; that is, if we had conceived, that the defence set up would have been insufficient, admitting it to have been clearly made out in point of fact, we should have deemed it right to have declared that opinion, although the case might have gone off on other points; because it is desirable to terminate every cause, upon its real merits, if those merits are fairly before the court, and to put an end to litigation, where it is in the power of the court to do so. But no error is perceived in the opinion given on the construction of the policies. If the proof is sufficient to show that the loss of the vessel and cargo, was occasioned by attempting an illicit trade with the Portuguese; that an offence was actually committed against the laws of that nation, and that they were condemned by the government on that account, the case comes fairly within the exception of the policies, and the risk was one not intended to be insured against.

The words of the exception in the first policy are, "the insurers are not liable for seizure by the Portuguese for illicit trade." In the second policy the words are, "the insurers do not take the risk of illicit trade with the Portuguese." The counsel on both sides insist that these words ought to receive the same construction, and that each exception is substantially the same. The court is of the same opinion. The words themselves are not essentially variant from each other, and no reason is perceived, for supposing any intention, in the contracting parties to vary the risk.

<sup>42</sup> On this section, see an elaborate and carefully prepared memorandum by Lester H. Woolsey, Esq., then of the Solicitor's Office, and later Solicitor for the Department of State, in *Foreign Relations of the United States*, 1280-1297 (1912).

<sup>43</sup> The statement of facts is abridged and part of the opinion is omitted.

For the plaintiff, it is contended, that the terms used require an actual traffic between the vessel and inhabitants, and a seizure in consequence of that traffic, or at least, that the vessel should have been brought into port, in order to constitute a case which comes within the exception of the policy. But such does not seem to be the necessary import of the words. The more enlarged and liberal construction given to them by the defendants, is certainly warranted by common usage; and wherever words admit of a more extensive or more restricted signification, they must be taken in that sense which is required by the subject-matter, and which will best effectuate what it is reasonable to suppose was the real intention of the parties.

In this case, the unlawfulness of the voyage was perfectly understood by both parties. That the crown of Portugal excluded, with the most jealous watchfulness, the commercial intercourse of foreigners with their colonies, was, probably, a fact of as much notoriety as that foreigners had devised means to elude this watchfulness, and to carry on a gainful but very hazardous trade with those colonies. If the attempt should succeed, it would be very profitable, but the risk attending it was necessarily great. It was this risk which the underwriters, on a fair construction of their words, did not mean to take upon themselves. "They are not liable," they say, "for seizure by the Portuguese for illicit trade." "They do not take the risk of illicit trade with the Portuguese;" now, this illicit trade was the sole and avowed object of the voyage, and the vessel was engaged in it, from the time of her leaving the port of New York. The risk of this illicit trade is separated from the various other perils to which vessels are exposed at sea, and excluded from the policy. Whenever the risk commences, the exception commences also, for it is apparent that the underwriters meant to take upon themselves no portion of that hazard which was occasioned by the unlawfulness of the voyage.

If it could have been presumed by the parties to this contract, that the laws of Portugal, prohibiting commercial intercourse between their colonies and foreign merchants, permitted vessels to enter their ports, or to hover off their coasts for the purposes of trade, with impunity, and only subjected them to seizure and condemnation after the very act had been committed, or if such are really their laws, then, indeed, the exception might reasonably be supposed to have been intended to be as limited in its construction, as is contended for by the plaintiff. If the danger did not commence, until the vessel was in port, or until the act of bargain and sale, without a permit from the governor, had been committed, then it would be reasonable to consider the exception as only contemplating that event. But this presumption is too extravagant to have been made. If, indeed, the fact itself should be so, then there is an end of presumption, and the contract will be expounded by the law, but as a general principle, the nation which prohibits commercial intercourse with its colonies, must be supposed to adopt measures to make that prohibition effectual. They must,



therefore, be supposed to seize vessels coming into their harbors, or hovering on their coasts, in a condition to trade, and to be afterwards governed in their proceedings with respect to those vessels, by the circumstances which shall appear in evidence. That the officers of that nation are induced occasionally to dispense with their laws, does not alter them, or legalize the trade they prohibit. As they may be executed, at the will of the governor, there is always danger that they will be executed, and that danger the insurers have not chosen to take upon themselves.

That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the *Aurora*, and that this seizure is, on that account, a mere marine trespass, not within the exception, cannot be admitted. To reason from the extent of protection a nation will afford to foreigners, to the extent of the means it may use for its own security, does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged. The authority of a nation, within its own territory, is absolute and exclusive. The seizure of a vessel, within the range of its cannon, by a foreign force, is an invasion of that territory, and is a hostile act which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory. Upon this principle, the right of a belligerent to search a neutral vessel on the high seas, for contraband of war, is universally admitted, because the belligerent has a right to prevent the injury done to himself, by the assistance intended for his enemy: so too, a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right, is an injury to itself, which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same, at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.

In different seas, and on different coasts, a wider or more contracted range, in which to exercise the vigilance of the government, will be assented to. Thus, in the channel, where a very great part of the commerce to and from all the north of Europe, passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade, must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels, but for the purpose of illicit trade, the vigilance of the government may be extended somewhat farther; and foreign nations submit to such regulations as are reasonable in themselves, and are really necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions.

If this right be extended too far, the exercise of it will be resisted.

It has occasioned long and frequent contests, which have sometimes ended in open war. The English, it will be well recollected, complained of the right claimed by Spain to search their vessels on the high seas, which was carried so far, that the guarda costas of that nation seized vessels not in the neighborhood of their coasts. This practice was the subject of long and fruitless negotiations, and at length, of open war. The right of the Spaniards was supposed to be exercised unreasonably and vexatiously, but it never was contended, that it could only be exercised within the range of the cannon from their batteries. Indeed, the right given to our own revenue cutters, to visit vessels four leagues from our coast, is a declaration that, in the opinion of the American government, no such principle as that contended for has a real existence. Nothing, then, is to be drawn from the laws or usages of nations, which gives to this part of the contract before the court, the very limited construction which the plaintiff insists on, or which proves that the seizure of the *Aurora*, by the Portuguese governor, was an act of lawless violence.

The argument that such act would be within the policy, and not within the exception, is admitted to be well founded. That the exclusion from the insurance of "the risk of illicit trade with the Portuguese," is an exclusion only of that risk, to which such trade is by law exposed, will be readily conceded. It is unquestionably limited and restrained by the terms "illicit trade." No seizure, not justifiable under the laws and regulations established by the crown of Portugal, for the restriction of foreign commerce with its dependencies, can come within this part of the contract, and every seizure which is justifiable by those laws and regulations, must be deemed within it.

To prove that the *Aurora*, and her cargo, was sequestered at Para, in conformity with the laws of Portugal, two edicts and the judgment of sequestration have been produced by the defendants in the circuit court. These documents were objected to, on the principle, that they were not properly authenticated, but the objection was overruled, and the judges permitted them to go to the jury. \* \* \*

The judgment must be reversed with costs, and the cause remanded, to be again tried in the circuit court, with instructions not to permit the copies of the edicts of Portugal and the sentence in the proceedings mentioned to go to the jury, unless they be authenticated according to law.<sup>44</sup>

<sup>44</sup> Mr. Dana, in speaking of this decision (Dana's *Wheaton*, p. 259, note), says, as to the assertion that the seizure of a vessel four leagues from the coast does not render the seizure invalid: "This remark must now be treated as an unwarranted admission. \* \* \* It may be said that the principle is settled, that municipal seizures cannot be made, for any purpose, beyond territorial waters. It is also settled, that the limit of these waters is, in the absence of treaty, the marine league or the cannon-shot. It cannot now be successfully maintained, either that municipal visits and search may be made beyond the territorial waters for special purposes, or that there are different bounds of that territory for different objects. \* \* \* In the earlier cases, the courts were not strict as to standards of distance, where no foreign

## HUDSON and SMITH v. GUESTIER.

(Supreme Court of the United States, 1810. 6 Cranch, 281, 3 L. Ed. 224.)

Error to the Circuit Court for the District of Maryland, in an action of trover, for coffee and logwood, the cargo of the brig *Sea Flower*, which had been captured by the French, for trading to the revolted ports of the island of Hispaniola, contrary to the ordinances of France, and carried into the Spanish port of Baracoa, but condemned by a French tribunal, at Guadaloupe, sold for the benefit of the captors, and purchased by the defendant Guestier. \* \* \*

The plaintiffs took a bill of exceptions to the opinion of the court, who directed the jury "that if they find from the evidence produced, that the brig *Sea Flower* had traded with the insurgents at Port au Prince, in the island of St. Domingo, and had there purchased a cargo of coffee and logwood, and having cleared at the said port, and coming from the same, was captured by a French privateer, duly commissioned as such, within six leagues of the island of St. Heneague, a dependency of St. Domingo, for a breach of said municipal regulations, that in such case, the capture of the *Sea Flower* was legal, although such capture was made at the distance of six leagues from the said island of St. Domingo, or St. Heneague, its dependency, and beyond the territorial limits or jurisdiction of said island, and that the said capture, possession, subsequent condemnation and sale of the said *Sea Flower*, with her cargo, divested the said cargo out of the plaintiffs, and the property therein became vested in the purchaser."

Harper, for the plaintiffs in error. The main question in this case is, whether the French tribunal at Guadaloupe had jurisdiction of a seizure, under the municipal laws of St. Domingo, of a vessel seized more than two leagues distant from the coast. \* \* \*

P. B. Key and Martin, contra. A nation has a right to use all the

powers intervened in the causes. In later times, it is safe to infer that judicial as well as political tribunals will insist on a line of marine territorial jurisdiction for the exercise of force on foreign vessels in time of peace for all purposes alike."

There still stands upon the statute book of the United States a law passed in 1799 (Comp. St. § 5510) authorizing their revenue officers to stop and visit foreign vessels four leagues from the coast. The British "Hovering Act," passed in 1734, and which doubtless suggested the American act, contained a similar provision. But this, says Mr. Boyd (*Boyd's Wheaton*, p. 241), has long since been repealed. "The present customs legislation makes a distinction as regards the extent of jurisdiction claimed for revenue purposes, between ships belonging to British subjects and ships belonging to foreigners." There is no longer any authority under English laws to visit a foreign vessel beyond the three-mile limit. See *Customs Consolidations Act*, 1876, § 134.

See further, on this subject, the case of *Rose v. Himply*, 4 Cranch, 241, 2 L. Ed. 608 (1808), in which the Supreme Court of the United States held that a seizure, under customs' regulations, of a foreign vessel beyond the territorial waters of a state, was not valid. See, also, the case of *Hudson v. Guestier*, 6 Cranch, 281, 3 L. Ed. 224 (1810); *Freeman Snow's Cases and Opinions on International Law*, 194-195, note (1893).

means necessary to enforce obedience to its municipal regulations and laws. It has a right to enforce its municipal laws of trade, beyond its territorial jurisdiction. This right is exercised both by Great Britain and America, to enforce their respective revenue laws. The only limit to this right is the principle that you do not thereby invade the exclusive rights of other nations. \* \* \*

LIVINGSTON, J.<sup>45</sup> In this case, when here before, I dissented from the opinion of the court, because I did not think that the condemnation of a French court, at Guadaloupe, of a vessel and cargo lying in the port of another nation, had changed the property; but this ground, which was the only one taken by two of the judges in this case, and by three, in that of *Rose v. Himely*, 4 Cranch, 241, 2 L. Ed. 608, and was principally and almost solely relied on at bar, was overruled by a majority of the court, as will appear by examining those two cases, which were decided the same day. I am not, therefore, in determining this cause, as it now comes up, at liberty to proceed upon it; and such must have been the opinion of Judge Chase, on the trial of it, who was one of the court who had proceeded on that principle.

Considering it, then, as settled, that the French tribunal had jurisdiction of property seized under a municipal regulation, within the territorial jurisdiction of the government of St. Domingo, it only remains for me to say, whether it will make any difference if, as now appears to have been the case, the vessel were taken on the high seas, or more than two leagues from the coast. If the res can be proceeded against, when not in the possession or under the control of the court, I am not able to perceive, how it can be material, whether the capture were made within or beyond the jurisdictional limits of France; or in the exercise of a belligerent or municipal right. By a seizure on the high seas, she interfered with the jurisdiction of no other nation, the authority of each being there concurrent. It would seem also, that if jurisdiction be at all permitted, where the thing is elsewhere, the court exercising it must necessarily decide, and that ultimately, or subject only to the review of a superior tribunal of its own state, whether, in the particular case, she had jurisdiction, if any objection be made to it. And although it be now stated, as a reason why we should examine whether a jurisdiction was rightfully exercised over the *Sea Flower*, that she was captured more than two leagues at sea, who can say, that this very allegation, if it had been essential, may not have been urged before the French court, and the fact decided in the negative? And if so, why should not its decision be as conclusive on this as on any other point? The judge must have had a right to dispose of every question which was made on behalf of the owner of the property, whether it related to his own jurisdiction, or arose out of the law of nations, or out of the French decrees, or in any other way: and even if the reasons of his judgment should not appear satisfactory, it would be no reason for a foreign court

<sup>45</sup> The statement of facts is abridged and part of the opinion is omitted.

to review his proceedings, or not to consider his sentence as conclusive on the property.

Believing, therefore, that this property was changed by its condemnation at Guadaloupe, the original owner can have no right to pursue it in the hands of any vendee under that sentence, and the judgment below must, therefore, be affirmed.

The other Judges (except the CHIEF JUSTICE) concurred. \* \* \*

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### THE ITATA.

#### SOUTH AMERICAN STEAMSHIP CO. v. UNITED STATES.

(United States and Chilean Claims Commission under Convention of August 7, 1892. 3 Moore's International Arbitrations, 3067.)

The questions raised by the demurrer in this case are very important, and have been argued with unusual zeal and ability by the learned counsel on both sides. At present we deem it only necessary to decide whether the steamship Itata was the property of the claimant at the time the acts complained of were committed, and whether her alleged seizure by the Government of the United States was illegal. As to the question of ownership, there is a distinct allegation in the memorial that the vessel belonged to the memorialist. That allegation is admitted by the demurrer to be true in so far as it is not contradicted or controlled by the accompanying documents. After a careful examination of those documents, we find nothing inconsistent with the allegation of the memorialist as to ownership; on the contrary, we think they fully sustain its claim. They show that at the time of its seizure the steamship Itata was in the temporary possession of the provisional government of Chile. It is immaterial to inquire whether that possession was acquired under a charter party or by virtue of the authority given by the laws of Chile enacted on the 29th of December, 1883, and the 1st of February, 1888. If the possession was only temporary and the general ownership of the vessel remained in the company, it has, beyond all question, we think, the right to maintain an action for any damage done to the vessel itself. It appears that when the libel or information against the Itata was filed in the district court of the United States for the southern district of California the captain, in the navy of the Republic of Chile, who commanded her at the time of the seizure, made the following claim: "That he is the commander and in possession of the steamship Itata, her tackle, apparel, and furniture, for the Government and Republic of Chile, as charterer thereof under the laws of said republic from the South American Steamship Company, owner of said steamship. Wherefore this claimant prays that this honorable court will be pleased to decree a restitution of the same to him as such commander in possession, and otherwise right and justice to administer in the premises."

But it also appears that Charles R. Flint, intervening as agent for the interest of the South American Steamship Company in the said steamship *Itata*, appeared before the court and made claim to the said steamship and averred: "That said company was the owner of the said steamship at the time of the attachment thereof, and that the said company is the true and bona fide owner of the said steamship, and that no other person is the owner thereof."

The record of the suit also shows that there was no contest made by the counsel representing the steamship company and the provisional government of Chile as to the ownership of the said vessel. It seems they were in perfect accord on that subject, and that by an agreement entered into between them and announced in open court the vessel was delivered to the representatives of the provisional government of Chile. Under these circumstances we are unable to assent to the proposition that the South American Steamship Company has forfeited its right to appear before this commission and assert its claim. It may or may not be true that the said company has a valid claim against Chile, and that Chile has a valid claim against the United States, growing out of the seizure of the *Itata*. We do not feel called upon to express any opinion upon that subject. We only decide at present that the memorialist, as the owner of the steamship *Itata*, is entitled to maintain its claim for any damage done to the vessel itself, if such damage has been occasioned by any unjustifiable action of the United States.

Did the government of the United States, by the seizure of the *Itata* for an alleged infraction of its neutrality laws, incur any legal liability? The record of the suit referred to shows that the district court of the United States for the southern district of California, after full consideration of all the evidence, documentary and oral, ordered and decreed that the United States should recover nothing by reason of the libel against the steamship *Itata*, and that said libel should be dismissed.<sup>46</sup> The United States took appeal from this decree, and it was affirmed by the circuit court of appeals, the three judges of that court being unanimously of the opinion that the evidence adduced was not sufficient to justify a decree of forfeiture.<sup>47</sup> It is true they pronounced the seizure to have been justifiable under the circumstances, but as the question of probable cause was not involved in the determination of the question before the court, we do not feel bound by the dictum of the judges on that subject. In view of the occurrences that took place after the original seizure of the *Itata*, we do not deem it necessary at this time to decide whether there was probable cause for the seizure or not.

After stating that on or about the 6th of May, 1891, while lying in the harbor of San Diego, the said steamship was boarded by a person who alleged himself to be one Spaulding, an officer of the United

<sup>46</sup> U. S. v. Trumbull, 48 Fed. 99 (1891).

<sup>47</sup> The *Itata*, 56 Fed. 505, 5 C. C. A. 608 (1893).

States, and in such pretended capacity assumed to take possession of said vessel; that the said Spaulding was unable to exhibit any authority as an officer of the United States, and the officers of the said Itata, believing him to be falsely impersonating an officer of the United States, set him on shore, and said Itata put to sea, the memorialist proceeds as follows:

"Meanwhile the government of the United States, or the duly authorized and responsible officers thereof, had taken cognizance of the presence of the said Itata within the jurisdiction of the United States and the fact of her departure therefrom, and for reasons unknown to your memorialist directed certain of its naval officers to proceed with vessels of war in pursuit of the said Itata; to intercept her by force if found on the high seas, and to cause her to return to San Diego.

"It became known to the provisional government of Chile, or its duly authorized and empowered representatives, through the medium of the public press, that the steamship Itata was charged by the government of the United States, or by certain of its officers, with an infraction of the neutrality laws of the said United States, that a portion of the United States naval forces were then en route to the port of Iquique for the purpose of securing the said Itata, and said reports were confirmed by a note to Mr. Isidoro Errazuriz, minister of foreign relations from Admiral W. P. McCann, in which the latter, in his official capacity as commander in chief of the United States naval forces on that station and as the representative of his government, solemnly asserted and declared without qualification that, in his opinion, the said Itata, in procuring her cargo within the waters of the United States, was guilty of a violation of said neutrality laws. Upon these representations of Admiral McCann, made in the manner aforesaid, and because of the demands of the Government of the United States, accompanied as they were by the presence of a large naval force, the said Itata, with her cargo, was surrendered under duress to the representatives of the United States.

"The said Itata was accordingly taken possession of by said Admiral McCann on the 4th day of June, 1891, and departed from Iquique on the 13th day of June, 1891, under convoy of the U. S. S. Charleston, Captain George C. Remey commanding, by whom she was placed in the custody of the United States marshal at San Diego on or about the 6th day of July, 1891."

We find nothing at variance with these statements in the documents accompanying the memorial or in any public document to which we may properly make reference. Assuming it to be true that after the departure of the Itata from the port of San Diego she was pursued by the naval authorities of the United States upon the high seas into Chilean waters, induced to surrender by a display of superior force, and brought back under duress, the question arises whether or not

such action on the part of the United States was allowed by the laws of nations. After an examination of many authorities on international law and numerous decisions of courts, we are of opinion that the United States committed an act for which they are liable in damages and for which they should be held to answer. Mr. David Dudley Field, in his *International Code*, § 626, says:

"An inmate of a foreign ship who commits an infraction of the criminal law of a nation within its territory can not be pursued beyond its territory into any part of the high seas."

In the case of *The Apollon*, reported in 9 Wheat. p. 361 [6 L. Ed. 111], it was decided—

"That the municipal laws of one nation do not extend in their operation beyond its own territory except as regards its own citizens, and that a seizure for a breach of municipal laws of one nation can not be made within the territory of another."

Mr. Justice Story, in delivering the opinion of the court, says:

"It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations."

In the case of *Rose v. Himely*, reported in 4 Cranch, 239 [2 L. Ed. 608], Chief Justice Marshall, speaking for a majority of the court says:

"It is conceded that the legislation of every country is territorial; that beyond its own territory it can only affect its own subjects or citizens. It is not easy to conceive a power to execute a municipal law or to enforce obedience to that law without the circle in which that law operates. A power to seize for the infraction of a law is derived from the sovereign and must be exercised, it would seem, within those limits which circumscribe the sovereign power. The rights of war may be exercised on the high seas, because war is carried on upon the high seas; but the specific rights of sovereignty must be exercised within the territory of the sovereign. If these propositions be true, the seizure of a person not a subject, or of a vessel not belonging to a subject, made on the high seas for the breach of a municipal regulation, is an act which the sovereign cannot authorize. The person who makes this seizure, then makes it on a pretext which, if true, will not justify the act, and is a marine trespasser."

In view of these authorities and others that might be cited, we are of the opinion that the South American Steamship Company has a claim for extraordinary repairs of machinery and boilers made necessary by the long voyages to and from San Diego. We do not deem it necessary at this time to examine the other items of the damages



claimed. If any single item in the list constitutes a valid claim for damages, the demurrer can not be sustained.

We therefore decide that it should be overruled and the respondent required to answer.<sup>48</sup>

#### IV. JURISDICTION OF OFFENSES COMMITTED ABROAD

##### The TRIAL OF EARL RUSSELL.

(Before the King in Parliament, 1901. L. R. 1901, App. Cas. 446.)

Earl Russell was married to Mabel Edith Scott on February 6, 1890, in England. On April 14, 1900, he obtained a divorce from his wife in Nevada, and on the day thereafter, married one Mollie Cook, otherwise known as Mrs. Somerville.

In June, 1890, Lady Russell presented a petition against Earl Russell for divorce on the ground of bigamous adultery, and on March 24, 1901, a decree nisi was pronounced, the suit being undefended.

On June 17, 1901, Earl Russell was arrested and charged with bigamy. Subsequently, the Grand Jury found a true bill, but as Lord Russell was a Peer of the Realm, his case was transferred to the House of Lords, of which he was a member, and was tried, in accordance with precedent, before the Lord High Steward (Halsbury, L. C.). \* \* \*

July 18. The Earl of Halsbury L. C., presided as Lord High Steward. There were also present about 160 Peers, including all the Law Lords who generally hear appeals, and the following judges: Sir Francis Jeune, and Mathew, Wills, Wright, Lawrance, Kennedy, Darling, Bigham, Cozens-Hardy, Farwell, and Buckley, JJ.

The King's Commission, the writ of certiorari, the return thereof,

<sup>48</sup> See *The King v. The Ship North*, 11 British Columbia Reports, 473 (1906), in which the High Court of Admiralty of British Columbia held that a pursuit begun within the jurisdiction of that province for violation of municipal law might be continued upon the high seas, and "the schooner North, her boats, tackle, rigging, apparel, furniture, stores, and cargo, \* \* \* condemned and declared forfeited to His Majesty." This judgment was affirmed on appeal by the Supreme Court of Canada in *The Ship North v. The King*, 37 Canada Supreme Court Reports, 885 (1906). This, it will be observed, is the decision of a municipal court of justice.

In *The C. H. White*, the contrary was held by Asser, Arbitrator, in arbitration between the United States and Russia, under agreement of August 26/September 8, 1900. (*Foreign Relations of the U. S.*, 1902, Appendix I, 459). It is to be observed that the decision of the arbitrator was under international, not municipal, law.

"Thus it would seem," as Mr. Lester H. Woolsey states in the memorandum referred to, ante, p. 361, "that the question whether municipal seizures beyond the three-mile limit are legal has been decided affirmatively by the municipal courts, bound by municipal law, and negatively by international tribunals governed by international law." *Foreign Relations of the United States*, 1912, 1289-1297.

<sup>49</sup> A shortened statement has been substituted for that of the original report.

and the indictment having been read, Earl Russell was called upon to plead guilty or not guilty. \* \* \*

Robson, K. C., for Earl Russell:

Before the defendant pleads to this indictment it is submitted that the indictment ought to be quashed, inasmuch as it discloses no offence according to the true construction of the fifty-seventh section of the Offences against the Person Act, 1861. The section defining the offence does not in express terms apply to any offence committed beyond the King's dominions. According to the well-known rule of construction in every Act passed by our Parliament, words, however wide, with reference to area must have read along with them a reference to the King's dominions, unless very express words are added in the Act shewing that it was the intention of the Legislature to make justiciable offences committed outside the King's dominions. The word "elsewhere" must be read with a limitation—that is, it means "elsewhere" within the King's dominions. This is shewn by sections 9 and 4 of this very Act, where the framers of the statute did not consider the preliminary words "where any murder, &c., shall be committed on land out of the United Kingdom" sufficiently wide to cover offences committed outside His Majesty's dominions, and added the express words which are absent from section 57, "whether within the Queen's dominions, or without." Therefore, if the words "or elsewhere" had been intended to apply to places beyond the King's dominions, words would have been added to that effect.

[The LORD HIGH STEWARD referred to the proviso in section 57. Has not the Imperial Legislature a right to legislate with respect to His Majesty's subjects all over the world wherever they are?]

Undoubtedly. But if section 57 had been intended to apply to countries abroad, words would have been inserted for that purpose. The reasons given for the decision in *Macleod v. Attorney General for New South Wales* (1) apply here. \* \* \*

The LORD HIGH STEWARD. My Lords, we have the advantage of having His Majesty's judges here. I have been myself of opinion for some time that the matter which has been discussed at such inordinate length was really too plain for argument. The statute is plain in its ordinary signification, and the only ground upon which the learned counsel can suggest that we should not give it its ordinary signification is apparently because of the use of certain words in other statutes enacted under other circumstances in relation to other crimes. My Lords, I thought it right to ask His Majesty's judges whether there is anything in the argument suggested which should call for the Attorney General to reply; and they are unanimously of opinion that there is not, and that it is not necessary to hear the Attorney General.

Thereupon, Earl Russell having under the advice of his counsel pleaded guilty,

Robson, K. C., addressed their Lordships on the mitigation of punishment; and Earl Russell was also allowed to make a speech.

Sentence—Three calendar months' imprisonment in His Majesty's prison at Holloway as an offender of the First Division.<sup>50</sup>

### STATE v. KNIGHT.

(Superior Court of North Carolina, 1799. 1 N. C. 143.)

The defendant was indicted under the fourth section of the act of 1784, c. 25, the words of which are: "And whereas there is reason to apprehend that wicked and ill-disposed persons, resident in the neighbouring states, make a practice of counterfeiting the current bills of credit of this state; and by themselves, or emissaries, utter or vend the same with an intention to defraud the citizens of this state; Be it enacted, &c. that all such persons shall be subject to the same mode of trial, and on conviction, liable to the same pains and penalties, as if the offence had been committed within the limits of this state, and be prosecuted in the Superior Court of any district of the state." Being found guilty by the jury, he was now brought up to receive judgment.

TAYLOR, J. As the prisoner was unassisted with counsel at his trial, we have felt it to be our duty to examine whether this indictment and conviction be warranted by a just application of the principles of criminal justice and of general jurisprudence; and an inquiry having produced great doubts as to the validity of this section of the act, independent of the indefinite terms in which it is expressed, we have thought it right that this judgment should be arrested. The states are to be considered,

<sup>50</sup> The question discussed and decided in the principal case has recently arisen in another of the British dominions. The facts involved and the decision of the court are thus stated by Arthur Berridale Keith, in his *War Government of the British Dominions*, 262 (1921):

"In 1919 the question was brought to a direct issue on the trial of a New Zealand soldier (*R. v. Lander*, [1919] N. Z. L. R. 305), who being already married, went through a form of marriage with a girl in England, where he was stationed while on war service. The New Zealand Crimes Act, 1908, following the provisions of the British law of bigamy, enacted penalties for any British subject who entered into a second marriage, during the subsistence of his first marriage, wherever the second marriage might take place, but it was contended for the defence that, while the Imperial legislature had power to pass such an enactment, no such authority was vested in the Dominion Parliament, whose legislative sphere was restricted to New Zealand. This contention was repelled by the Chief Justice, who held that power to punish a New Zealander for such an offence followed as a natural consequence from the right to make laws for the peace, order, and good government of the Dominion, but the other judges of the Court of Appeal agreed that the New Zealand Act was invalid in so far as it purported to penalize actions taking place beyond New Zealand limits."

In *Macleod v. Atty. Gen.* [1891] A. C. 455, Halsbury L. C., laid down as English law that "all crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever."

with respect to each other, as independent sovereignties, possessing powers completely adequate to their own government, in the exercise of which they are limited only by the nature and objects of government, by their respective constitutions, and by that of the United States. Crimes and misdemeanors committed within the limits of each, are punishable only by the jurisdiction of that state where they arise; for the right of punishing, being founded upon the consent of the citizens, express or implied, cannot be directed against those who never were citizens, and who likewise committed the offence beyond the territorial limits of the state claiming jurisdiction. Our legislature may define and punish crimes committed within the state, whether by citizens or strangers; because the former are supposed to have consented to all laws made by the legislature, and the latter, whether their residence be temporary or permanent, do impliedly agree to yield obedience to all such laws, as long as they remain in the state: but they cannot define and punish crimes committed in another state, the citizens of which, while they remain there, are bound to regulate their civil conduct only according to their own laws. If our legislature does not rightfully possess such a power, its assumption and exercise should be carefully avoided, lest our own citizens should be harassed under the operation of similar laws enacted in other states; whereby acts, against which the policy of this state did not require that any punishment should be denounced, may be punished in other states with exemplary severity. This may happen in relation to those acts which are not criminal in the state where committed; but the consequences will be far more serious, if the acts are originally criminal; for then a conviction and punishment in a state having no right to entertain jurisdiction of the offence, and consequently to inflict the punishment, will be disregarded in the courts of that state, where the offence arose. The crime described in this section of the act is no doubt punishable in Virginia as a common law misdemeanor, and although the punishment may be less severe than that prescribed by our act of assembly, yet it is better to yield up the offender to the laws of his own state, than, by inflicting a punishment under the exercise of a doubtful jurisdiction, furnish a precedent for a sister state to legislate against acts committed by our own citizens, and within the limits of our own territory.

I am authorized by Judge HAYWOOD, to declare his concurrence in the opinion, that the prisoner be discharged.<sup>51</sup>

<sup>51</sup> In *United States v. Arjona*, 120 U. S. 479, 487, 7 Sup. Ct. 628, 30 L. Ed. 728 (1887), the Supreme Court held that the right to coin money was an essential of sovereignty; that the United States could prevent the counterfeiting of foreign money within its territory, and should punish the offense when committed.

In the course of the opinion, Mr. Chief Justice Waite, speaking for the court, said:

"But if the United States can require this of another, that other may require it of them, because international obligations are of necessity reciprocal in their nature. The right, if it exists at all, is given by the law of nations,

## COMMONWEALTH v. BLANDING.

(Supreme Judicial Court of Massachusetts, 1825. 3 Pick. 304, 15 Am. Dec. 214.)

This was an indictment charging the defendant with making, framing and causing to be published in a newspaper called the Providence Gazette at Rehoboth, in the county of Bristol, on the 20th of February, 1822 a false, scandalous and libellous paragraph concerning one Enoch Fowler, he then being an innholder in that county, and a good and peaceable citizen, etc.

On the trial, before Wilde, J., it was proved that the defendant delivered the writing set forth in the indictment to the printer of the Providence Gazette, at Providence, in the state of Rhode Island, and that it was published in that paper at the request of the defendant who acknowledged that he was the author of it; and it was proved that that paper circulates in Rehoboth, and had so circulated previously to such publication; and that the number containing this writing was received and circulated in that town.

The defendant offered to give in evidence a coroner's inquest alluded to in the libel, to prove that the allegations contained therein were true; and he also offered to prove the truth of all the allegations in the writing. But this evidence was not admitted.

The defendant contended that there was no evidence that the writing was composed or published in the county of Bristol; but the jury were instructed, that the causing of it to be published in the Providence Gazette, the defendant knowing that that newspaper was taken and circulated in Rehoboth, was a sufficient publication within the county.

The jury were also instructed, that the malicious intent charged in the indictment was an inference of law, it not being competent for the defendant to prove the truth of the facts alleged, and there being no such proof in the case; and that although the jury were, with the advice of the court, the judges of the law and the fact, yet they were bound to decide according to the law as actually established, whatever might be their opinion of its policy; and that unless they knew the law to be otherwise, they ought to receive it from the judge, whose instructions, if incorrect, would be subject to revision and correction by the whole court.

A verdict was returned against the defendant; but if these instructions were wrong, or if the evidence offered by the defendant should have been admitted, the verdict was to be set aside and a new trial granted, or the defendant was to be discharged, according as the whole Court might direct.

and what is law for one is, under the same circumstances, law for the other. A right secured by the law of nations to a nation, or its people, is one the United States as the representatives of this nation are bound to protect."

PARKER, C. J.,<sup>52</sup> delivered the opinion of the court.

As to the first question, which relates to the publication of the supposed libel, we think the admitted facts, that it was at the request of the defendant inserted in a public newspaper printed in Providence, which, though in another state, borders on the county of Bristol, and that that paper usually circulates in the town of Rehoboth in that county, and that the number containing the libel was actually received and did circulate in that town, were competent and conclusive evidence of a publication in the county of Bristol. In this respect the case is like that of *Rex v. Burdett*, 4 Barn. & Ald. 95.<sup>53</sup>

As to that part of the instructions of the judge, which states that the malicious intent charged in the indictment (there being no evidence admitted to prove the truth of the facts alleged) was an inference of law,—this is certainly the common law doctrine, and it never has been repealed by any statute of this commonwealth, nor overruled by any decision of this court; and if the doctrine be true, that the gist or essence of the offence of libel is, that it tends to provoke a breach of the peace, and this certainly is maintained in all the books, then it must follow, that when the publication complained of is of a libellous nature, it must be taken to be of a malicious character, unless the defendant shall within some of the known provisions of law be admitted to prove, and shall in fact prove, that the allegations made are true, and that he had some warrantable purpose, inconsistent with a malicious intent, in causing the publication. \* \* \*

Having thus attempted to vindicate the law of libel, as established in this commonwealth, from the aspersions which are frequently cast upon it, we will consider its application to the case before us, in order to determine whether, upon either of the grounds assumed, a new trial ought to be granted.

The first ground, to wit, the want of legal proof that the libel was published, as alleged, within the county of Bristol, has been considered and overruled; as has also the objection to the charge to the jury.

The other objection, which opens the general question, is that the judge refused to admit in evidence the inquisition which is alluded to in the publication, and with a view to prove the truth of the facts therein stated. \* \* \*

Motion for new trial overruled.

<sup>52</sup> Part of the opinion is omitted.

<sup>53</sup> See 1 Russell on Crimes, 240; Roscoe's Dig. Crim. Ev. 587; 2 Stark. Ev. (5th Am. Ed.) 455, 456; 3 Chitty on Crim. Law (3d Am. Ed.) 872.

<sup>54</sup> See *Root v. King*, 7 Cow. (N. Y.) 613 (1827); *Dexter v. Spear*, 4 Mason, 115, Fed. Cas. No. 3,887 (1825); 3 Chitty on Crim. Law (3d Am. Ed.) 887, 888, 875; 2 Stark. Ev. (5th Am. Ed.) 461; Roscoe's Dig. Crim. Ev. 586; 1 Russell on Crimes, 242, 243; *Erwin v. Sumrow*, 8 N. C. 472 (1821).

## UNITED STATES v. SMILEY et al.

(Circuit Court of the United States, Northern District of California, 1864. 6 Savy. 640, Fed. Cas. No. 16,317.)

The steamer *Golden Gate* left San Francisco for Panama on July 21, 1862, and had on board "treasure" amounting to \$1,450,000. On July 27, when three miles and a half from the Mexican shore, fire broke out, the steamer headed for the shore and went to pieces about two hundred and fifty feet from the shore, at a point fifteen miles north of Manzanillo, in Mexico. Of the money on board \$1,200,000 were ultimately recovered in port by Smiley and his associates. The shippers and Smiley disagreeing about his share of the recovered treasure, he was indicted in March, 1864, in United States Circuit Court for plundering and stealing the treasure from the *Golden Gate*, under the ninth section of act of Congress of March 3, 1825 (4 St. L. 116 [Comp. St. § 10470]) which provides "that if any person \* \* \* shall plunder, steal or destroy any money, goods, merchandise or other effects from or belonging to any ship or vessel or boat or raft, which shall be in distress, or which shall be wrecked, lost, stranded, or cast away upon the sea, or upon any reef, shore, bank, or rocks of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States," he "shall be deemed guilty of a felony," etc.<sup>55</sup>

Mr. Justice FIELD. \* \* \*

The criminal jurisdiction of the government of the United States—that is, its jurisdiction to try parties for offences committed against its laws—may in some instances extend to its citizens everywhere. Thus, it may punish for violation of treaty stipulations by its citizens abroad, for offences committed in foreign countries where, by treaty, jurisdiction is conceded for that purpose, as in some cases in China and in the Barbary States; it may provide for offences committed on deserted islands, and on an uninhabited coast, by the officers and seamen of vessels sailing under its flag. It may also punish derelictions of duty by its ministers, consuls, and other representatives abroad. But in all such cases it will be found that the law of Congress indicates clearly the extraterritorial character of the act at which punishment is aimed. Except in cases like these, the criminal jurisdiction of the United States is necessarily limited to their own territory, actual or constructive. Their actual territory is coextensive with their possessions, including a marine league from their shores into the sea.

This limitation of a marine league was adopted because it was formerly supposed that a cannon-shot would only reach to that extent. It is essential that the absolute domain of a country should extend into the sea so far as necessary for the protection of its inhabitants against injury from combating belligerents while the country itself is neutral.

<sup>55</sup> This statement is substituted for that of the report.

Since the great improvement of modern times in ordnance, the distance of a marine league, which is a little short of three English miles, may, perhaps, have to be extended so as to equal the reach of the projecting power of modern artillery. The constructive territory of the United States embraces vessels sailing under their flag; wherever they go they carry the laws of their country, and for a violation of them their officers and men may be subjected to punishment. But when a vessel is destroyed and goes to the bottom, the jurisdiction of the country over it necessarily ends, as much so as it would over an island which should sink into the sea.

In this case it appears that the Golden Gate was broken up; not a vestige of the vessel remained. Whatever was afterwards done with reference to property once on board of her, which had disappeared under the sea, was done out of the jurisdiction of the United States as completely as though the steamer had never existed.

We are of opinion, therefore, that the Circuit Court has no jurisdiction to try the offence charged, even if, under the facts admitted by the parties, any offense was committed. According to the stipulation, judgment sustaining the demurrer will be, therefore, entered and the defendants discharged.<sup>55</sup>

<sup>55</sup> "In England and America, the jurisdiction is generally assumed over its citizens in respect to all civil acts, transactions, rights, or duties done or arising abroad. This is true, even though the act be a tort, and though it amount to a breach of the peace. Thus a British subject is liable to a civil action in England for an assault and battery committed by him, say in Italy. The same would be true in the United States. But by a very ancient principle of the English common law, adopted in this country, all crimes are strictly local, and the offenders are justiciable only in the countries where the criminal act is done." Pomeroy's *Int. Law*, 205.

It is, however, true that in a few instances English and American courts take jurisdiction of crimes committed by their respective subjects and citizens beyond their territorial limits other than on the high seas, but they do not, as is commonly the case on the Continent, try foreigners for offences against their municipal laws.

"It is, however, a decided and settled principle in the English and American law, that the penal laws of a country do not reach in their disabilities or penal effects, beyond the jurisdiction where they are established. *Folliott v. Ogden*, 1 H. Black. 123, 135 [1789]; *Lord Ellenborough*, *Wolff v. Oxholm*, 6 M. & S. 99 [1817]; *Commonwealth of Massachusetts v. Green*, 17 Mass. 514, 539-543 [1822]; *Scoville v. Canfield*, 14 Johns. 338, 440-[7 Am. Dec. 487 (1817)]." 1 Kent, *Com.* 38, note b.

See also, *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 289-291, 8 Sup. Ct. 1370, 32 L. Ed. 239 (1887), and *Hall, Int. Law*, 218-222.



## In re ROSS.

(United States Supreme Court, 1890. 140 U. S. 453, 11 Sup. Ct. 897, 85 L. Ed. 581.)

One John M. Ross served in 1880 as seaman on board the American ship *Bullion*, in the waters of Japan. While the vessel lay at anchor in the harbor of Yokohama, he assaulted Robert Kelley, second mate of the *Bullion*, with a knife, inflicting in his neck a mortal wound of which he died in a few minutes, on the deck of the ship. Ross was at once arrested by direction of the master of the vessel, placed in irons, taken ashore, and confined in jail at Yokohama. The master filed a complaint with the American Consul General of Yokohama, charging Ross with murder, and he was tried and convicted thereof in the American Consular Court of Japan. His sentence was commuted by the President of the United States to life imprisonment in the Penitentiary at Albany. In 1890 he applied to the United States Circuit Court for the Northern District of New York for a writ of habeas corpus for his discharge, which was duly issued. On hearing, the court denied the motion of the prisoner for his discharge and remanded him to the penitentiary. From that order, an appeal was taken to the Supreme Court.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court.<sup>57</sup>

The Circuit Court did not refuse to discharge the petitioner upon any independent conclusion as to the validity of the legislation of Congress establishing the consular tribunal in Japan, and the trial of Americans for offences committed within the territory of that country, without the indictment of a grand jury, and without a trial by a petit jury, but placed its decision upon the long and uniform acquiescence by the executive, administrative, and legislative departments of the government in the validity of the legislation. Nor did the Circuit Court consider whether the status of the petitioner as a citizen of the United States, or as an American within the meaning of the treaty with Japan, could be questioned, while he was a seaman of an American ship, under the protection of the American flag, but simply stated the view taken on that subject by the minister to Japan, the State Department, and the President. \* \* \*

The Circuit Court might have found an additional ground for not calling in question the legislation of Congress, in the uniform practice of civilized governments for centuries to provide consular tribunals in other than Christian countries, or to invest their consuls with judicial authority, which is the same thing, for the trial of their own subjects or citizens for offences committed in those countries, as well as for the settlement of civil disputes between them; and in the uni-

<sup>57</sup> The statement of facts has been shortened and part of the opinion is omitted.

form recognition, down to the time of the formation of our government, of the fact that the establishment of such tribunals was among the most important subjects for treaty stipulations. This recognition of their importance has continued ever since, though the powers of those tribunals are now more carefully defined than formerly. *Dainese v. Hale*, 91 U. S. 13, 23 L. Ed. 190. \* \* \*

We do not understand that any question is made by counsel as to its power in this respect. His objection is to the legislation by which such treaties are carried out, contending that, so far as crimes of a felonious character are concerned, the same protection and guarantee against an undue accusation or an unfair trial, secured by the Constitution to citizens of the United States at home, should be enjoyed by them abroad. In none of the laws which have been passed by Congress to give effect to treaties of the kind has there been any attempt to require indictment by a grand jury before one can be called upon to answer for a public offence of that grade committed in those countries, or to secure a jury on the trial of the offence. Yet the laws on that subject have been passed without objection to their constitutionality. Indeed, objection on that ground was never raised in any quarter, so far as we are informed, until a recent period.

It is now, however, earnestly pressed by counsel for the petitioner, but we do not think it tenable. By the Constitution a government is ordained and established "for the United States of America," and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad. *Cook v. United States*, 138 U. S. 157, 181, 11 Sup. Ct. 268, 34 L. Ed. 906. The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. \* \* \*

We turn now to the treaties between Japan and the United States.

The treaty of June 17, 1857, executed by the consul general of the United States and the governors of Simoda, is the one which first conceded to the American consul in Japan authority to try Americans committing offences in that country. Article IV of that treaty is as follows:

"Art. IV. Americans committing offences in Japan shall be tried by the American consul general or consul, and shall be punished according to American laws. Japanese committing offences against Americans shall be tried by the Japanese authorities and punished according to Japanese laws." 11 Stat. 723. \* \* \*

Our government has always treated Article IV of the treaty of 1857

as continuing in force, and it is published as such in the United States Consular Regulations, issued in 1888. Appendix No. 1, p. 313. \* \* \*

The legislation of Congress to carry into effect the treaty with Japan is found in the Revised Statutes, in sections most of which apply equally to treaties with China, Siam, Egypt, and Madagascar (sections 4083-4091 [Comp. St. §§ 7633-7641]). Confining ourselves to the treaty with Japan only, we find that the legislation secures a regular and fair trial to Americans committing offences within that empire.

It enacts that the minister and consuls of the United States, appointed to reside there, shall, in addition to other powers and duties imposed upon them respectively, be invested with the judicial authority therein described, which shall appertain to their respective offices and be a part of the duties belonging thereto, so far as the same is allowed by treaty; and empowers them to arraign and try, in the manner therein provided, all citizens of the United States charged with offences against law committed in that country, and to sentence such offenders as therein provided, and to issue all suitable and necessary process to carry their authority into execution. It declares that their jurisdiction in both criminal and civil matters shall in all cases be exercised and enforced in conformity with the laws of the United States, which, so far as necessary to execute the treaty and suitable to carry it into effect, are extended over all citizens of the United States in Japan, and over all others there to the extent that the terms of the treaty justify or require. It also provides that where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others; and that if neither the common law, nor the law of equity, or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the minister shall, by decrees and regulations, which shall have the force of law, supply such defects and deficiencies. Each of the consuls is authorized, upon facts within his own knowledge, or which he has good reason to believe true, or upon complaint made or information filed in writing and authenticated in such way as shall be prescribed by the minister, to issue his warrant for the arrest of any citizen of the United States charged with committing in the country an offence against law; and to arraign and try any such offender; and to sentence him to punishment in the manner therein prescribed.

The legislation also declares that insurrection or rebellion against the government, with intent to subvert the same, and murder, shall be punishable with death, but that no person shall be convicted thereof unless the consul and his associates in the trial all concur in the opinion, and the minister approves of the conviction. It also provides that whenever in any case the consul is of opinion that, by reason of the legal questions which may arise therein, assistance will

be useful to him, or that a severer punishment than previously specified in certain cases will be required, he shall summon to sit with him on the trial one or more citizens of the United States, not exceeding four, and in capital cases not less than four, who shall be taken by lot from a list which has been previously submitted to and approved by the minister, and shall be persons of good repute and competent for the duty.

The jurisdiction of the consular tribunal, as is thus seen, is to be exercised and enforced in accordance with the laws of the United States; and of course in pursuance of them the accused will have an opportunity of examining the complaint against him, or will be presented with a copy stating the offence he has committed, will be entitled to be confronted with the witnesses against him and to cross-examine them, and to have the benefit of counsel; and, indeed, will have the benefit of all the provisions necessary to secure a fair trial before the consul and his associates. The only complaint of this legislation made by counsel is that, in directing the trial to be had before the consul and associates summoned to sit with him, it does not require a previous presentment or indictment by a grand jury, and does not give to the accused a petit jury. The want of such clauses, as affecting the validity of the legislation, we have already considered. It is not pretended that the prisoner did not have, in other respects, a fair trial in the Consular Court.

It is further objected to the proceedings in the Consular Court that the offence with which the petitioner was charged, having been committed on board of a vessel of the United States in Japanese waters, was not triable before the Consular Court; and that the petitioner, being a subject of Great Britain, was not within the jurisdiction of that court. These objections we will now proceed to consider.

The argument presented in support of the first of these positions is briefly this. Congress has provided for the punishment of murder committed upon the high seas, or any arm or bay of the sea within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State; and has provided that the trial of all offences committed upon the high seas, out of the jurisdiction of any particular State, shall be in the district where the offender is found or into which he is first brought. The term "high seas" includes waters on the sea coast without the boundaries of low-water mark; and the waters of the port of Yokohama constitute, within the meaning of the statute, high seas. Therefore it is contended that, although the ship *Bullion* was at the time lying in those waters, the offence for which the appellant was tried and convicted was committed on the high seas and within the jurisdiction of the domestic tribunals of the United States, and is not punishable elsewhere. In support of this position it is assumed that the jurisdiction of the Consular Court is limited to offences committed on land,

within the territory of Japan, to the exclusion of offences committed on waters within that territory.

There is, as it seems to us, an obvious answer to this argument. The jurisdiction to try offences committed on the high seas in the district where the offender may be found, or into which he may be first brought, is not exclusive of the jurisdiction of the consular tribunal to try a similar offence when committed in a port of a foreign country in which that tribunal is established, and the offender is not taken to the United States. There is no law of Congress compelling the master of a vessel to carry or transport him to any home port when he can be turned over to a Consular Court having jurisdiction of similar offences committed in the foreign country. 7 Op. Attys. Gen. 722. The provisions conferring jurisdiction in capital cases upon the consuls in Japan, when the offence is committed in that country, are embodied in the Revised Statutes, with the provisions as to the jurisdiction of domestic tribunals over such offences committed on the high seas; and those statutes were re-enacted together, and, as re-enacted, went into operation at the same time. To both effect must be given in proper cases, where they are applicable. We do not adopt the limitation stated by counsel to the jurisdiction of the consular tribunal, that it extends only to offences committed on land. Neither the treaty nor the Revised Statutes to carry them into effect contain any such limitation. The latter speak of offences committed in the country of Japan—meaning within the territorial jurisdiction of that country—which includes its ports and navigable waters as well as its lands.

The position that the petitioner, being a subject of Great Britain, was not within the jurisdiction of the Consular Court, is more plausible, but admits, we think, of a sufficient answer. The national character of the petitioner, for all the purposes of the consular jurisdiction, was determinable by his enlistment as one of the crew of the American ship *Bullion*. By such enlistment he becomes an American seaman—one of an American crew on board of an American vessel—and as such entitled to the protection and benefits of all the laws passed by Congress on behalf of American seamen, and subject to all their obligations and liabilities. Although his relations to the British Government are not so changed that, after the expiration of his enlistment on board of the American ship, that government may not enforce his obligation of allegiance, and he on the other hand may not be entitled to invoke its protection as a British subject, that relation was changed during his service of seaman on board of the American ship under his enlistment. He could then insist upon treatment as an American seaman, and invoke for his protection all the power of the United States which could be called into exercise for the protection of seamen who were native born. He owes for that time to the country to which the ship on which he is serving belongs, a temporary allegiance, and must be held to all its responsibilities. The

question has been treated more as a political one for diplomatic adjustment than as a legal one to be determined by the judicial tribunals, and has been the subject of correspondence between our government and that of Great Britain. \* \* \*

The views expressed by the Department of State, quoted above, are in harmony with the doctrine uniformly asserted by our government against the claim by England of a right to take its countrymen from the deck of an American merchant vessel and press them into its naval service. It is a part of our history that the assertion of this claim, and its enforcement in many instances, caused a degree of irritation among our people which no conduct of any other country has ever produced. Its enforcement was deemed a great indignity upon this country and a violation of our right of sovereignty, our vessels being considered as parts of our territory. It led to the war of 1812, and although that war closed without obtaining a relinquishment of the claim, its further assertion was not attempted. At last, in a communication by Mr. Webster, then Secretary of State, to Lord Ashburton, the special British minister to this country, on the 8th of August, 1842, the claim was repudiated, and the announcement made that it would no longer be allowed by our government and must be abandoned. The conclusion of Mr. Webster's communication bears upon the question before us. After referring to the claim of Great Britain, and demonstrating the injustice of the position and its violation of national rights, he said: "In the early disputes between the two governments, on this so long-contested topic, the distinguished person to whose hands were first intrusted the seals of this department declared, that 'the simplest rule will be, that the vessel being American shall be evidence that the seamen on board are such.' Fifty years' experience, the utter failure of many negotiations, and a careful reconsideration now had of the whole subject at a moment when the passions are laid, and no present interest or emergency exists to bias the judgment, have convinced this government that this is not only the simplest and best, but the only rule which can be adopted and observed consistently with the rights and honor of the United States, and the security of their citizens. That rule announces, therefore, what will hereafter be the principle maintained by their government. In every regularly documented American merchant vessel, the crew who navigate it will find their protection in the flag which is over them." Webster's Works, Vol. VI, p. 325.

This rule, that the vessel being American is evidence that the seamen on board are such, is now an established doctrine of this country; and in support of it there is with the American people no diversity of opinion and can be no division of action.

We are satisfied that the true rule of construction in the present case was adopted by the Department of State in the correspondence with the English Government, and that the action of the consular tribunal in

taking jurisdiction of the prisoner Ross, though an English subject, for the offence committed, was authorized. While he was an enlisted seaman on the American vessel, which floated the American flag, he was, within the meaning of the statute and the treaty, an American, under the protection and subject to the laws of the United States equally with the seaman who was native born. As an American seaman he could have demanded a trial before the Consular Court as a matter of right, and must therefore be held subject to it as a matter of obligation.

We have not overlooked the objection repeatedly made and earnestly pressed by counsel, that the consular tribunal is a court of limited jurisdiction. It is undoubtedly a court of that character, limited by the treaty and the statutes passed to carry it into effect, and its jurisdiction cannot be extended beyond their legitimate meaning. But their construction is not, therefore, to be so restricted as to practically defeat the purposes to be accomplished by the treaty, but rather so as to give it full operation, in order that it may not be a vain and nugatory act.

It is true that the occasion for consular tribunals in Japan may hereafter be less than at present, as every year that country progresses in civilization and in the assimilation of its system of judicial procedure to that of Christian countries, as well as in the improvement of its penal statutes; but the system of consular tribunals which have a general similarity in their main provisions, is of the highest importance, and their establishment in other than Christian countries, where our people may desire to go in pursuit of commerce, will often be essential for the protection of their persons and property.

We have not considered the objection to the discharge of the prisoner on the ground that he accepted the conditional pardon of the President. If his conviction and sentence were void for want of jurisdiction in the consular tribunal, it may be doubtful whether he was estopped, by his acceptance of the pardon, from assailing their validity; but into that inquiry we need not go, for the Consular Court having had jurisdiction to try and sentence him, there can be no question as to the binding force of the acceptance.

Order affirmed.<sup>55</sup>

<sup>55</sup> See the *Wildenhus Case*, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. Ed. 565 (1887), which examines the question of jurisdiction of consuls within countries where extraterritoriality in its technical sense does not exist.

Mr. Chief Justice Waite discussed, in the course of his opinion, the cases of *The Newton* and *The Sally*, decided by the Council of State of France, 6 Sirey, pt. 2, 501 (1806); *The Jally* (commonly called *The Tempest*), Court of Cassation of France, Sirey, 184 (1859). Both of these cases are more easily found in Ortolan, *Diplomatie de la Mer*, I, 450.

See, also, the case of *The Anémone*, Supreme Court of Justice of Mexico, 3 Clunet, *Journal du Droit International Privé et de la Jurisprudence Comparée*, 413 (1876), holding that a murder of a French citizen by a Frenchman, upon a French merchant vessel at anchor in a Mexican port, does not

necessarily disturb the peace of that port, and that the Mexican courts will not, in such a case, assume jurisdiction.

By Treaty of November 22, 1894, arts. 17, 19, the United States consented to the abrogation of consular jurisdiction in Japan, and on July 17, 1899, its Consular Courts ceased to exist.

"As a matter of law, foreign consuls have no jurisdiction within the territory of the United States, except by force of treaty stipulations. See *Wheat. Int. Law*, 217. The judicial power of a consul depends upon the treaties between the nations concerned and the laws of the nation the consul represents. *Dainese v. Hale*, 91 U. S. 13 [23 L. Ed. 190 (1875)]. See *The Elwine Kreplin*, 9 Blatchf. 438 [Fed. Cas. No. 4,426 (1872)]. Consular jurisdiction depends on the general law of nations, subsisting treaties between the two governments affected by it, and upon the obligatory force and activity of the rule of reciprocity. 2 Op. Atty. Gen. 378.

"We conclude, therefore, that neither under international law, nor under the statute law of the United States, has a consular officer of a foreign government a right to sit as judge or arbitrator within our territory, and render decrees or orders affecting personal liberty, which orders or decrees the courts of the United States are authorized or required to enforce, unless the consent of the United States to such jurisdiction has been given either by express statute or treaty stipulation."

*Pardee, J., in Re Aubrey (C. C.)* 26 Fed. 848, 851 (1885).

For the question of consular jurisdiction in Japan, in so far as Great Britain was concerned, see *Imperial Japanese Government v. Peninsular & Oriental Steam Navigating Co., L. R.* [1895] App. Cas. 644.

Consular jurisdiction in Japan has been renounced by Great Britain and by all of the other powers in whose favor it had existed. The Island Empire of Japan is, therefore, in law the equal of all other nations, and in fact it is one of the Great Powers.

In China, Consular jurisdiction still exists. It is exercised by the United States Court for China created by Act of Congress of June 30, 1906, c. 3934, 34 Stat. pt. 1, p. 814 (U. S. Comp. St. § 7687 et seq.)

By section 1 of this act (Comp. St. § 7687) the court was given "exclusive jurisdiction in all cases and judicial proceedings whereof jurisdiction may now be exercised by United States consuls and ministers by law and by virtue of treaties between the United States and China, except in so far as the said jurisdiction is qualified by section two of this act."

Section 4 of the same act (Comp. St. § 7690) provides: "The jurisdiction of said United States Court, both original and on appeal, in civil and criminal matters, and also the jurisdiction of the Consular Courts in China, shall in all cases be exercised in conformity with said treaties and the laws of the United States now in force in reference to the American Consular Courts in China, and all judgments and decisions of said Consular Courts, and all decisions, judgments, and decrees of said United States Court, shall be enforced in accordance with said treaties and laws. But in all such cases when such laws are deficient in the provisions necessary to give jurisdiction or to furnish suitable remedies, the common law and the law as established by the decisions of the courts of the United States shall be applied by said court in its decisions and shall govern the same subject to the terms of any treaties between the United States and China."

On the jurisdiction and procedure of this court, see *Biddle v. United States*, 156 Fed. 759, 84 C. C. A. 415 (1907).

On the question of extraterritorial jurisdiction in general, and particularly as it affects the United States, see *Frank E. Hinckley, American Consular Jurisdiction in the Orient* (1906).

This admirable volume, not only gives the history, but states the procedure, and it contains, in an appendix, the relevant provisions of treaties and statutes of the United States.



## THE CUTTING CASE.

(Bravos District Court, Chihuahua, Mexico, 1886. John Bassett Moore's Report on Extraterritorial Crime and The Cutting Case, 9.)

In view of the present suit instituted against A. K. Cutting, who declares himself to be unmarried, 40 years of age, a native of the state of New York, a resident of this town, and editor of the newspaper *El Centinela*, for the offense of defamation:

In view of the preliminary statement of the accused, the petition of the district attorney, the statement made by the complainant, Emigdio Medina (the civil party to the suit), the defense of the prisoner's attorney, Jesus E. Islas, and all else which appears from the proceedings and was proper to be seen:

It appears, 1. That in No. 14 of the newspaper called *El Centinela*, published in this place, under date of the 6th of June last, there appeared a local item in English, in which there was criticised as fraudulent a prospectus published in El Paso, Texas, announcing the appearance of a newspaper called *Revista Internacional*.

It appears, 2. That Emigdio Medina, considering himself alluded to and aggrieved by that paragraph, appeared before the second alcalde, acting in turn as criminal judge in this town, and asked for a judgment of conciliation against A. K. Cutting, as responsible editor of *El Centinela*.

It appears, 3. That the parties being present before the mediating judge, agreed on the publication in the same newspaper, *El Centinela*, of a retraction which was written by Medina and corrected by Cutting, the publication to be made four times in English, and, if Mr. A. N. Daguerre, an associate editor of the paper, would allow it, also in Spanish.

It appears, 4. That Cutting, instead of complying with the agreement as stipulated in the conciliation, published on the 20th of the same month of June a retraction only in English in *El Centinela*, in small type and with material errors that rendered it almost unintelligible, and published on the same day a notice or communication in the *El Paso Sunday Herald*, in which he ratified and enlarged the defamatory statements which were published against Medina, and denounced as contemptible the agreement of conciliation which had taken place before the second alcalde of this town.

It appears, 5. That the plaintiff then appeared and in due form accused Cutting of the penal offense of defamation, in conformity with articles 643 and 646,<sup>55</sup> section 2 of the Penal Code, for which cause the corresponding order of arrest was issued.

<sup>55</sup> Article 646 provides that "defamation" shall be "punished with a penalty of from six months' detention to two years' imprisonment and a fine of from \$300 to \$2,000, when there is imputed a crime, act, or vice, which may occasion to the offended party dishonor or serious prejudice."

It appears, 6. That on the 22d of the same month the plaintiff enlarged the accusation, stating that although the newspaper, the El Paso Sunday Herald, is published in Texas, Cutting had had circulated a great number in this town and in the interior of the Republic, it having been read by more than three persons, for which reason an order had been issued to seize the copies that were still in the office of the said Cutting.

It appears, 7. That according to law the preliminary statement of the accused was taken, in which he denied the jurisdiction of the court, on the ground that the act had been committed in Texas, placing himself under the protection of the consul of the United States, and the warrant for his arrest in due form was ordered to be issued and communicated to the proper parties.

It appears, 8. That, having followed the examination through all its details, the accused insisted on his former answer, and when notified to appoint a person to defend him, as the citizen licentiate,<sup>60</sup> José Maria Barajos, had declined to serve, he refused to do so, whereupon the citizen, A. N. Daguerre, a partner of the said Cutting in the editing of El Centinela, was officially appointed; but, as he also resigned, the appointment fell upon the citizen, Jesus E. Islas, who conducted the case up to the presentation of his brief of defense.

It appears, 9. That, in virtue of the opinion of the district attorney that the charge was well founded, the suit was duly advertised in the office of the clerk of the court for the term provided in article 409,<sup>61</sup> as amended, of the Code of Criminal Procedure, and that time having elapsed without any exception being filed, the parties to the controversy were summoned for the discussion which took place on the 5th instant in the form and terms prescribed by the same code, the proceedings closing with the summons for sentence.

Considering, therefore, 1. That, in conformity with article 121 of the Code of Criminal Procedure, the foundation of the criminal proceeding is the proof of the act which the law accounts a penal offense, and that in the present case the existence of this fact is fully proved, as it consists of the publication appearing in El Centinela on the 6th of June last, characterizing as fraudulent the prospectus which was issued to announce the publication of the Revista Internacional.

Considering, 2. That although it is true that there was in regard to this matter an act of conciliation, which would have satisfied the plaintiff if it had been carried out, it is also true that the terms of this act were not complied with, and that, for this reason, the responsibility of the penal offense remains the same.

Considering, 3. That the proof of the lack of fulfillment of the

<sup>60</sup> May here be translated as attorney at law.

<sup>61</sup> Article 409 (amended) provides that, after the preliminary examination and the formulation of the charge by the district attorney, the proceedings shall be placed in the office of the clerk of the court for three days, in order that exceptions may be taken by the defense.

compromise entered into in the judgment of conciliation is actually in the communication published by Cutting in the El Paso Sunday Herald, in which he ratified the original assertion that Emigdio Medina was a fraud and a swindler, and at the same time in the article published in El Centinela of the same date, leaving out all the capital letters and putting the name of Medina in microscopic type in order to make the reading of it difficult.

Considering, 4. That ratification, according to the dictionary of Escriche, is the confirmation and sanction of what has been said or done, it is retroactive and by consequence does not constitute an act different from that to which it refers: "*Ratihabitio retrahitur ad initium*," nor does new responsibility, distinct from that which originally existed, arise therefrom.

Considering, 5. That this being so, the criminal responsibility of Cutting arose from the article published in El Centinela, issued in this town, which article was ratified in the Texas newspaper, which ratification, however, did not constitute a new penal offense to be punished with a different penalty from that which was applicable to the first publication.

Considering, 6. That even on the supposition, not admitted, that the defamation arose from the communication published on the 20th of June in the El Paso Sunday Herald, article 186 of the Mexican Penal Code provides that—

"Penal offenses committed in a foreign country by a Mexican against Mexicans or foreigners, or by a foreigner against Mexicans," may be punished in the Republic and according to its laws, subject to the following conditions:

1. That the accused be in the Republic, whether he came voluntarily or has been brought by extradition proceedings;
2. That if the offended party be a foreigner, he shall have made proper legal complaint;
3. That the accused shall not have been definitively tried in the country where the offense was committed, or, if tried, that he shall not have been acquitted, included in an amnesty, or pardoned;
4. That the breach of law of which he is accused shall have the character of a penal offense both in the country in which it was committed and in the Republic;
5. That by the laws of the Republic the offense shall be subject to a severer penalty than that of "*arresto mayor*"—requisites which have been fully met in the present case: for Cutting was arrested in the territory of the Republic; there is complaint from a proper legal source—that of Medina, who presented his complaint in the form prescribed by law; the accused has not been definitively tried, nor acquitted, nor included in an amnesty, nor pardoned in the country in which he committed the offense; the penal offense of which Cutting is accused has that character in the country in which it was committed and in the Republic, as can be seen in the penal code in force in the State of Texas, articles 616, 617, 618, and 619, and in the Penal Code

of the State of Chihuahua, articles 642 and 646; and according to this latter article, section 2, the breach of law in question is subject to a heavier penalty than that of "arresto mayor."

Considering, 7. That according to the rule of law, "*Judex nom de legibus, sed secundum leges debet judicare*," it does not belong to the judge who decides to examine the principle laid down in said article 186, but to apply it fully, it being the law in force in the State.

Considering, 8. That this general rule has no other limitation than that expressed in article 126 of the General Constitution, which says: "This Constitution, the laws of the Congress of the Union passed in pursuance thereof, and all the treaties made or to be made by the President of the Republic with the approval of the Congress, shall be the supreme law of the whole Union. The judges of each State shall act according to said Constitution, laws, and treaties, notwithstanding the existence of contrary provisions in the constitution or laws of the States."

Considering, 9. That the said article 186 of the Penal Code, far from being contrary to the supreme law or to the treaties made by the President of the Republic, has for its object, as is seen in the expository part of the same code, page 38, "the free operation of the principle on which the right to punish is founded, to wit, justice united to utility."

Considering, 10. That even supposing, without conceding it, that the penal offense of defamation was committed in the territory of Texas, the circumstance that the newspaper, *El Paso Sunday Herald*, was circulated in this town, of which circumstance Medina complained, and which was the ground of ordering the seizure of the copies which might be found in the office of Cutting, in this same town, properly constituted the consummation of the crime, conformably to article 644 of the Penal Code.<sup>62</sup>

Considering, 11. That, according to the amended article 7 of the General Constitution, penal offenses committed by means of printing are to be tried by the competent Federal or State courts, in conformity with their penal laws.

Considering, 12. That the publication by Cutting in *El Centinela*, ratified subsequently in the *El Paso Sunday Herald* and in the *Evening Tribune*, on file in the case attacks the private life of Emigdio Medina by attributing to him the penal offense of fraud and of swindling, and is therefore comprised in the restriction placed on the liberty of the press by the said article of the constitution.

Considering, 13. That as acts consummated in the territory of the Canton of Bravos, State of Chihuahua, are in question, it is incumbent on the judge, whose name is hereto subscribed, to pass upon them conformably to the laws in force in the said State, especially in view of the

<sup>62</sup> This article provides that defamation is punishable when committed by writing, printing, etc.

fact that the accused resides in this town, where he has had his domicile for more than two years, as appears from the declarations made on folios 20, 21, and 22 of this case, a statement not contradicted by Cutting, who on folio 19 declares that he resides on both sides, that is, in Paso del Norte, Mexico, and in El Paso, Texas, without a fixed residence on either of the two sides.

Considering, 14. That to show this more fully, Cutting expressly recognized the jurisdiction of the authorities of this town by appearing before the second alcalde, acting in turn as criminal judge, and answering the demand for conciliation, which was made against him by Medina for defamation.

Considering, 15. That the responsibility of Cutting is fully proved, since it appears in credible documents which have in no wise been contradicted by their author; and, if any doubt should exist respecting the malicious intent with which the first publication was made, it would disappear in view of the subsequent ratifications made in the El Paso Sunday Herald and in the Evening Tribune, in which Cutting expressly says that Epigdio Medina is a fraud, swindler, coward and thief; <sup>63</sup> the requisites specified in article 391 of the Code of Criminal Proceedings being thus fully met.<sup>64</sup>

Considering, 16. That in order to fix the penalty which ought to be enforced, it must be borne in mind that, although the charge imputed to the offended party causes him dishonor and serious prejudice, and there are no extenuating circumstances, the crime under consideration is of a private character between two editors, in which the only aggravating circumstances that exist are those referred to in the seventh <sup>65</sup> and eleventh <sup>66</sup> sections of article 44 and articles 656 <sup>67</sup> and 657 <sup>68</sup> section 4 of the Penal Code, it does not appear that the other aggravating circumstances mentioned by the district attorney are fully proved; for, although it is true that the present case has caused great alarm in the community, this is not attributable to the penal offense imputed to Cutting, but to the inadequate means which have been taken for his defense; this being exactly the case provided for in the final part of article 66 of the said code; <sup>69</sup> and

Considering, finally, 17. That the person responsible for a penal offense is also responsible for its consequences, being likewise bound

<sup>63</sup> The epithets applied by Cutting to Medina in the card published in Texas, as appears from a copy of the card now before the writer, were "fraud" and "dead beat."

<sup>64</sup> Article 391 relates to proof of malicious intent.

<sup>65</sup> Circumstances: That the delinquent is an educated person.

<sup>66</sup> That he has violated more than one provision of the Penal Code.

<sup>67</sup> That publicity is an aggravation in defamation.

<sup>68</sup> That defamation is public when printed, etc., and distributed or exposed to the public, or shown to six or more persons.

<sup>69</sup> Giving certain discretion to the judge as to severity of penalty.

to make civil indemnity in the terms provided in article 326<sup>70</sup> and 327<sup>71</sup> of the Penal Code.

#### The Sentence.

In view of the foregoing article 646, section 2, and articles 661,<sup>72</sup> 119<sup>73</sup> and 218,<sup>74</sup> of the said code, it is ordered and adjudged as follows:

First. For the penal offense of defamation committed against the person of Emigdio Medina, A. K. Cutting is sentenced to serve a year at hard labor and pay a fine of \$600, or, in default thereof, endure additional imprisonment of a hundred days.

Second. He is also sentenced to pay the civil indemnity, to be fixed according to the provisions of article 313<sup>75</sup> of the Penal Code.

Third. Let the defendant be admonished not to repeat the offense for which he is sentenced, and advised of the penalties to be incurred in that event.

Fourth. This sentence shall be published in the manner specified in article 661 of the said code.

Fifth. The case shall be sent to the supreme court of justice, for the purposes to which the final part of the petition of the district attorney refers, relative to the intervention of the American consul in this suit.

Sixth. Let the interested parties be notified, and the prisoner be advised of the length of time he has to appeal from this sentence.

Lic. Miguel Zubia, judge of the Bravos District, has so decreed definitively, in the presence of witnesses.

MIGUEL ZUBIA.

Witnesses: L. Flores and S. Vargas.<sup>76</sup>

<sup>70</sup> The defendant is bound to make civil indemnity, if his act caused damage.

<sup>71</sup> And for this indemnity he shall be held liable, whether criminally absolved or not.

<sup>72</sup> Requiring publication of sentence, at defendant's cost.

<sup>73</sup> As to penalty of additional imprisonment, in default of payment of the fine imposed.

<sup>74</sup> Defendant must be admonished not to repeat the offense, and informed of the penalty imposed for such repetition.

<sup>75</sup> By agreement between the parties.

<sup>76</sup> After the decision in the lower court, Medina withdrew his complaint—probably at the request of the government, in order to prevent foreign complications.

The Supreme Court of Chihuahua held that the withdrawal was a bar to further proceedings, while maintaining the rightfulness of the original action.

For the text of the decision of the Supreme Court of Chihuahua, delivered on August 21, 1898, see John Bassett Moore's Report, 15, 18.

For the facts and a discussion of the law applicable to the Cutting Case, see the exhaustive report prepared by John Bassett Moore, then Third Assistant Secretary of State, for Thomas F. Bayard, then Secretary of State of the United States. See, also, John Bassett Moore, 2 Digest of International Law, pp. 228-269 (1906).

Upon Cutting's Case, Freeman Snow felt himself justified in saying, in his Cases and Opinions on International Law, 174, 175, note (1893):

"The position of the government of the United States in the Cutting Case, that the Mexican law giving to its courts the jurisdiction of extraterritorial

offenses, is contrary to custom and international law, and that the principles involved in it are practically obsolete in practice, would seem not to be borne out by facts. Aside from the question whether the common-law doctrine of territorial jurisdiction is the more expedient practical rule, it may at least be said that it is by no means so universally prevalent as to warrant the assertion that it has become a rule of international law. Not only are there many codes which go quite as far in the direction of extraterritorial jurisdiction as that of Mexico, but there is probably not a state which adheres strictly to the territorial theory. In the first place, practically, all states punish their own citizens for offenses of one kind or another committed in foreign countries. Even England punishes not only for treasonable acts, but also for bigamy, murder, and manslaughter committed abroad by her subjects. The laws of the United States, too, provide for the punishment of certain offenses committed abroad by their citizens. Rev. St. § 5335 (Comp. St. § 10169). And see Acts of Aug. 18, 1856, and Feb. 25, 1863.

"Secondly, In regard to foreigners, there is a large number of codes which take jurisdiction of offenses against the state committed by them in foreign states; and a lesser number which go further, and extend their jurisdiction to offenses against individuals. Of this number, are Austria, Hungary, Italy, Norway, Sweden, Russia, Greece, and Brazil as well as Mexico.

"Again there are many cases in the state courts of the United States, where acts, done by persons without the state but which take effect within the state, are held to be done by persons constructively within the state, and jurisdiction is assumed. Thus, if a man in one state fires a gun over the boundary line and kills a man in another state, he is triable in the latter state. *United States v. Davis*, 2 Sumn. 482, Fed. Cas. No. 14,982 (1837); *State v. Wyckoff*, 81 N. J. Law, 68 (1884); *Com. v. Macloon*, 101 Mass. 1, 100 Am. Dec. 89 (1869). So, the author of a libel, uttered by him in one country, and published by others in another country, is triable in the latter country. *Com. v. Blanding*, 3 Pick. (Mass.) 304, 15 Am. Dec. 214 (1825).

"The Cutting Case is similar to that of *Com. v. Blanding*, being a libel uttered in Texas, but being circulated and having its effect in Mexico; is the offense different in principle from that of wounding a man in one state by firing across the boundary from another state?

"Among jurists there is a wide difference of opinion in regard to the merits of the two systems—the 'territorial' and the 'personal' theories of jurisdiction. T. E. Holland, *Jurisprudence* (2d Ed.) p. 318; F. Wharton, *Philosophy of Criminal Law*, p. 309 et seq.; L. Bar, *Private International Law*, Translation by G. R. Gillespie, p. 620 et seq.; Wharton's *Conflict of Laws*, § 1810; 'Case of A. K. Cutting, by the Minister of Foreign Relations of the Republic of Mexico,' 1888."

Pitt Cobbett appends the following comment to the summary of the Cutting Case contained in his *Cases and Opinions on International Law*, part I, "Peace," 221, 222, note: (1909):

"Some states claim to apply their criminal law and to exercise a criminal jurisdiction in the case of offences committed outside their territorial limits not only by subjects, but also by foreigners. The present case serves to illustrate at once the nature of, and the risks incident to, such a practice. The position taken up by the United States was that the claim put forward by Mexico to take cognisance of an offence committed in the United States by a United States citizen, even though it affected a Mexican citizen, and even though the alleged offender might subsequently be apprehended in Mexico, was bad in principle as involving a violation of the right of every State to exercise exclusive sovereignty and jurisdiction as to all persons and things within its own territory; that it was not warranted by the accepted custom of nations; and, finally, that it was in the highest degree inconvenient and dangerous. These contentions appear to be in substance correct. Such a claim goes beyond that exceptional jurisdiction which is frequently claimed and exercised by states over their own subjects, for the reason that the latter jurisdiction is only exercisable when the citizen or subject has returned to his native land and to his natural allegiance, and when, consequently, no other state has any right or interest, in protecting him against his personal law. Even in such a case, however, if the person proceeded against were domiciled in some other state, the claim to exercise jurisdiction over him might conceivably be impugned, unless the offence charged was

## V. ACTS OF STATE

## BURON v. DENMAN.

(Court of Exchequer, 1848. 2 Exch. 167.)

The defendant, a naval commander, stationed on the coast of Africa, with instructions to suppress the slave trade, was requested by the Governor of Sierra Leone to obtain the liberation of two British subjects detained as slaves at the Gallinas by the son of the king of that country, and in effecting that object to use force, if necessary. He accordingly proceeded to the Gallinas with an armed force, and having landed at Dombocorro, took military possession of a barracoen belonging to the plaintiff, who was a Spaniard, carrying on the slave trade at the Gallinas. He then communicated with the king of the country, and the two British subjects having been released, the defendant concluded a treaty for the abolition of the slave trade in that country. In execution of this treaty, the defendant fired the barracoens of the plaintiff, and carried away his slaves to Sierra Leone, where they were liberated. Some of the plaintiff's goods, used in the slave traffic, were claimed by the king as forfeited, and delivered up to him; other goods were destroyed. These proceedings having been communicated to the Lords of the Admiralty, and the Secretaries of State for the foreign and colonial departments, they respectively, by letter, adopted and ratified the act of the defendant.<sup>77</sup>

PARKE, B. (in summing up). With respect to the issue, whether the plaintiff was possessed of these slaves, your verdict must be for the plaintiff. The law on the subject of slaves has been settled by the case of *Le Louis*, 2 Dod. 210, which has been referred to. That case was decided, in the year 1817, by Sir William Scott, who went fully into the question of the legality of the slave trade, and laid down certain positions, which have since been acquiesced in, both in this country and abroad. Those positions are, first, that dealers in slaves are not pirates by the law of nations, and can only be made so by and according to the terms of a treaty with the country to which they belong prohibiting the slave trade; secondly, that trading in slaves is not a crime by the law of nations; thirdly, that the right of stopping and searching ships in time of peace is not a right which can belong to any nation except by contract with the nation to which such ships belong; and, fourthly, that if there be a law in a particular country prohibiting the slave trade, it is not open to every one to punish the offender against that law, but proceedings must be taken in the tribunals of his own country. Those propositions being clear, a question arises, wheth-

one affecting his allegiance to his native country, or unless the seat of the offence was really local."

<sup>77</sup> The headnote of the case is substituted for the elaborate statement of the original report.



er the plaintiff can maintain this action for taking away his slaves. It is not necessary to decide whether, if he had been simply in the actual possession of slaves, using them as slaves, he could have recovered against any person who took them away: on that point it is not necessary to give an opinion, because, according to the evidence on both sides, he was living at Gallinas, where it was lawful to possess slaves. It is contended that, by the law of Spain, the plaintiff cannot possess a property in slaves for the purpose of exporting them, as slaves, to the West Indies. However, there is no evidence of such law, and we are all, therefore, of opinion that the second and fourteenth issues, both as to the slaves and the goods, must be found for the plaintiff.

The principal question is, whether the conduct of the defendant, in carrying away the slaves, and committing the other alleged trespasses, can be justified as an act of state done by authority of the Crown. It is not contended that there was any previous authority. If the defendant had merely instructions according to the terms of the treaty set out in the act of Parliament, those instructions would only have extended to the stopping of ships on the high seas, within the limits agreed to by the treaty with the Spanish crown. Therefore the justification of the defendant depends upon the subsequent ratification of his acts. A well-known maxim of the law between private individuals is, "*Omnis rati habitio retrotrahitur et mandato æquiparatur.*" If, for instance, a bailiff distrains goods, he may justify the act either by a previous or subsequent authority from the landlord; for, if an act be done by a person as agent, it is in general immaterial whether the authority be given prior or subsequent to the act. If the bailiff so authorized be a trespasser, the person whose goods are seized has his remedy against the principal. Therefore, generally speaking, between subject and subject, a subsequent ratification of an act done as agent is equal to a prior authority. That, however, is not universally true. In the case of a tenant from year to year, who has, by law, a right to a half-year's notice to quit, if such notice be given by an agent, without the authority of the landlord, the tenant is not bound by it. Such being the law between private individuals, the question is whether the act of the sovereign, ratifying the act of one of his officers, can be distinguished.

On that subject I have conferred with my learned brethren, and they are decidedly of opinion that the ratification of the Crown, communicated as it has been in the present case, is equivalent to a prior command. I do not say that I dissent; but I express my concurrence in their opinion with some doubt, because on reflection there appears to me a considerable distinction between the present case and the ordinary case of ratification by subsequent authority between private individuals. If an individual ratifies an act done on his behalf, the nature of the act remains unchanged, it is still a mere trespass, and the party injured has

his option to sue either; if the Crown ratifies an act, the character of the act becomes altered, for the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the Crown only (such as it is), and actually exempts from all liability the person who commits the trespass. Whether the remedy against the Crown is to be pursued by petition of right, or whether the injury is an act of state without remedy, except by appeal to the justice of the state which inflicts it, or by application of the individual suffering to the government of his country, to insist upon compensation from the government of this—in either view, the wrong is no longer actionable. I do not feel so strong upon the point as to say that I dissent from the opinion of my learned Brethren; therefore, you have to take it as the direction of the court, that if the Crown, with knowledge of what has been done, ratified the defendant's act by the Secretaries of State or the Lords of the Admiralty, this action cannot be maintained. In the documents which have been read there is ample evidence of ratification, for the Secretary of State for Foreign Affairs, the Lords of the Admiralty, and the Secretary of State for the Colonial Department, on receiving the report of the Governor of Sierra Leone, and the account of the transactions given by the defendant himself, expressed their approbation of what he had done. The acts, indeed, have never been published, and that is one of the circumstances which created a doubt in my mind. But, although the ratification was not known before this action was commenced, that fact makes no difference in the opinion of the court. A previous command would be unknown, if given verbally; and a subsequent ratification, though unknown, will have the same effect.

It is argued, on the part of the plaintiff, that the Crown can only speak by an authentic instrument under the Great Seal, and that, therefore, the ratification ought to have been under the Great Seal. We are clearly of opinion, that as the original act would have been an act of the Crown, if communicated by a written or parol direction from the Board of Admiralty, so this ratification, communicated in the way it has been, is equally good. I should observe that the court are of opinion that it is not necessary for the defendant to prove the pleas which expressly state the authority of the Crown; for if this act, by adoption, becomes the act of the Crown, the seizure of the slaves and goods by the defendant is a seizure by the Crown, and an act of state for which the defendant is irresponsible, and, therefore, entitled to a verdict on the plea of "Not guilty."

The jury found that the Crown had ratified the act of the defendant, with full knowledge of what he had done, whereupon a verdict was taken for him on the fourth, ninth, and sixteenth pleas. A verdict was found for the plaintiff on the pleas of not possessed of the slaves and

goods; and the plea of "Not guilty" was entered, by consent, for the plaintiffs.

F. Robinson tendered a bill of exceptions to the above ruling; but the plaintiff afterwards obtained an order to discontinue, certain terms of settlement of this and other similar actions having been agreed to.<sup>78</sup>

<sup>78</sup> For an earlier case, holding ratification equivalent to command, see *The Rolla*, 6 C. Rob. 365, decided by Sir William Scott in 1807.

"The leading case on this subject is *Buron v. Denman*. \* \* \* This principle has been asserted and acted upon in many later cases. One of the most pointed is *The Secretary of State for India v. Kamachee Baye Sahiba* [13 Moore, P. O. C. 22 (1859)]. In this case the Rajah of Tanjore, having died without issue male, the East India Company seized the Rajah on the ground that the dignity was extinct for want of a male heir, and that the property lapsed to the British Government. The judicial committee of the Privy Council held, on a full examination of the facts, that the property claimed by the Rajah's widow had been seized by the British Government, acting as a sovereign power, through its delegate, the East India Company, and that the act so done, with its consequences, was an act of state over which the Supreme Court of Madras had no jurisdiction. \* \* \* Even if a wrong had been done, it is a wrong for which no municipal court can afford a remedy.' In order to avoid misconception it is necessary to observe that the doctrine as to acts of state can apply only to acts which affect foreigners, and which are done by the orders or with the ratification of the sovereign. As between the sovereign and his subjects there can be no such thing as an act of state. Courts of law are established for the express purpose of limiting public authority in its conduct towards individuals. If one British subject puts another to death or destroys his property by the express command of the King, that command is no protection to the person who executes it unless it is in itself lawful, and it is the duty of the proper courts of justice to determine whether it is lawful or not. On this ground the courts were prepared to examine into the legality of the acts done under Governor Eyre's authority in the suppression of the insurrection in Jamaica. The acts affected British subjects only. But as between British subjects and foreigners, the orders of the Crown justify what they command so far as British courts of justice are concerned. In regard to civil rights, this, as I have shown, has been established by express and solemn decisions; and it is impossible to suppose that a man should be criminal when he is not even a wrongdoer." Sir James F. Stephen's *History of Criminal Law*, Vol. II., pp. 64, 65 (1883).

See, also, Sir Frederick Pollock's *Law of Torts* (10th Ed. 1916) pp. 117-122.

A. V. Dicey, *Law of the Constitution* (8th Ed.) p. 302, note 3 (1915), says: "*Buron v. Denman*, 2 Ex. 167 (1848), is sometimes cited as showing that obedience to the orders of the Crown is a legal justification to an officer for committing a breach of law, but the decision in that case does not, in any way, support the doctrine erroneously grounded upon it. What the judgment in *Buron v. Denman* shows is that an act done by an English military or naval officer in a foreign country to a foreigner, in discharge of orders received from the Crown, may be an act of war, but does not constitute any breach of law for which an action can be brought against the officer in an English Court. Compare *Feather v. The Queen*, 6 B. & S. 257, 295 (1865), per Curiam."

See, further, *Dobree v. Napier*, 2 Bingham's New Cases, 781 (1836), in which the command of the Queen of Portugal was held sufficient justification for seizure of plaintiff's vessel by a British officer serving temporarily in the Portuguese Navy; *Underhill v. Hernandez*, 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456 (1907), in which the same doctrine was applied. McLeod's Case, famous in the annals of diplomacy, is the best known American case on this subject.

## JOHNSTONE v. PEDLAR.

(House of Lords, L. R. [1921] 2 App. Cas. 262.)

See post, p. 482, for a report of the case.

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## Claim of McLEOD.

(Anglo-American Claims Commission, 1853. Report of Decisions, 314.)

Alexander McLeod, a British subject resident in Canada, was arrested in Lewistown, in the state of New York, in November, 1840, on a charge of being concerned in the seizure and destruction of the steamer Caroline, attended with loss of life, in the state of New York, on the 29th of December, 1837.

During the pendency of the prosecution, Great Britain notified the government of the United States that the seizure of the Caroline was made under the authority of Great Britain, and claimed the discharge of McLeod on that ground.

He was not discharged, but was tried and acquitted, and now brings his claim before this commission for damages and expenses arising from his detention and trial.

The facts in the case are more fully set forth in the opinion of the commissioner, together with the correspondence on this subject between the two governments relating to the settlement of the same, so far as it has a bearing on the jurisdiction of the commissioners over the claim.

The case was fully argued. On behalf of the claimant, McLeod appeared per se, and by Hannen, agent and counsel for Great Britain. Thomas, agent and counsel for the United States.

HORNBY, Commissioner of Great Britain. Considered the adjustment made between the two governments as a settlement merely of the international points of controversy arising in the case, and that any private claims of damage on the part of McLeod remained an open question among outstanding claims existing at the date of the convention.

He was of opinion that McLeod was entitled to immediate release on the assumption by the British government of his acts, and the communication of proper notice of this fact to the American authorities. It then became a national controversy and ought not to have been further prosecuted against an individual.

He held further, that the detention was longer than was necessary in any event, and was rendered unduly severe on account of public excitement, which it was the duty of the government to have repressed, and that from this cause the claimant was exposed to hardship and much expense, for which he was justly entitled to compensation. \* \* \*

Two questions arise in the case:

I. Whether the settlement made by the governments precludes our jurisdiction over the claim now presented.

II. Whether, independently of such exception, the facts show a ground of claim against the United States.

The convention provides that we are to pass upon the unsettled claims of citizens or subjects of either government against the other, and we are to pass "only on such claims as shall be presented by the governments," and are to be confined "to such evidence and information as shall be furnished by or on their behalf." No claims can be sustained before us except those which the governments can rightly prefer for our consideration. With matters settled and adjusted between them, we have nothing to do.

A settlement by the governments of the ground of international controversy between them, *ipso facto* settles any claims of individuals arising under such controversies against the government of the other country, unless they are specially excepted; as each government by so doing assumes, as principal, the adjustment of the claims of its own citizens, and becomes, itself, solely responsible for them.

The controversies to which I have referred consisted of two grounds of complaint: the delay in the liberation of McLeod, on the one hand; and the violation of the American rights of territory in the seizure of the *Caroline*, on the other. These questions passed under the full consideration and revision of the two governments, in 1842, represented by Lord Ashburton, ambassador extraordinary and minister plenipotentiary, on the part of Great Britain, and Mr. Webster, then Secretary of State, on the part of the United States.

The result of their conference I regard as a full and final settlement of these matters in controversy. In the closing letter of Lord Ashburton on this subject, he says: "After looking through the voluminous correspondence concerning these transactions" (that is, the difficulty with McLeod,) "I am bound to admit there appears no indisposition with any of the authorities of the federal government, under its several administrations, to do justice in this respect in as far as their means and powers would allow."

He makes no complaint of want of diligence or promptness on the part of the United States government, but says: "Owing to a conflict of laws, difficulties have intervened, much to the regret of the American authorities, in giving practical effect to the principles avowed by them; and for these difficulties some remedy has been by all desired." He then says: "I trust you will excuse my addressing to you the inquiry, whether the government of the United States is now in a condition to secure, in effect and in practice, the principle, which has never been denied in argument, that individuals, acting under legitimate authority, are not personally responsible for executing the orders of their government? That the power, when it exists, will be used on every fit occasion, I am well assured."

Lord Ashburton thus rested his claim, and in the same letter and spirit tendered an apology for the violation of the United States' right of territory in the seizure of the *Caroline*, "which transactions," he says, "are connected with each other."

His Lordship then does not wait for the reply of Mr. Webster as to the adoption of a provision for more prompt means of redress, in cases like McLeod's, but, reposing confidence in advance in the proper action of the American government, closes his letter by saying, in reference to both these subjects of controversy: "I trust, sir, I may now be permitted to hope that all feelings of resentment and ill will resulting from these truly unfortunate events may be buried in oblivion and that they may be succeeded by those of harmony and friendship, which it is certainly the interest, and I also believe the inclination of all to promote."

Mr. Webster, in his reply to the subjects of this letter, adverting to the matter of McLeod, stated the reasons why delay had occurred in his case, and that "in regular constitutional governments persons arrested on charges of high crimes can only be discharged by some judicial proceeding. It is so in England. It is so in the colonies and provinces of England." He further says: "It was a subject of regret that McLeod's release had been so long deferred;" and, in answer to the question proposed to him by Lord Ashburton, stated: "It was for the Congress of the United States, whose attention has been called to the subject, to say what further provision ought to be made to expedite proceedings in such cases, and that the government of the United States holds itself not only fully disposed, but fully competent, to carry into practice every principle which it avows or acknowledges, and to fulfill every duty and obligation which it owes to foreign governments, their citizens or subjects."

During the same month, on the 29th of August, 1842, Congress passed a law by which immediate transfer of jurisdiction might be made to the courts of the United States of all cases where any persons, citizens, or subjects of a foreign state, and domiciled therein, should be held in custody on account of any act done under the commission, order, or sanction of any foreign state or sovereignty.

The delay, therefore, attendant on the previous means of removal of such cases to the jurisdiction of the United States courts for their decision, which was the only ground of complaint, was thus provided against, and every suggestion which had been made on the subject was thus fully met and answered.

In reference to the other grounds of complaint—the violation of the rights of territory of the United States in the seizure of the *Caroline*—Mr. Webster, in reply to the declarations of Lord Ashburton, thus disposes of the matter in the same letter: "Seeing, he says, that the transaction is not recent; seeing that your lordship, in the name of your government, solemnly declares that no slight or disrespect was in-

tended to the sovereign authority of the United States; seeing it is acknowledged that, whether justifiable or not, there was yet a violation of the territory of the United States, and that you are instructed to say that your government considers that as a most serious occurrence; seeing, finally, that it is now admitted that an explanation and apology for this violation was due at the time, the President is content to receive these acknowledgments and assurances in the conciliatory spirit which marks your lordship's letter, and will make this subject, as a complaint of violation of territory, the topic of no further discussion between the two governments."

These subjects of difficulty and controversy between the two countries were thus fully and finally adjusted, so that the able and patriotic statesmen by whom this settlement was effected trusted, in the words of Lord Ashburton, "that these truly unfortunate events might thenceforth be buried in oblivion."

The question then arises, what was the effect of this settlement on the private claims of any citizen of either country against the other? It is quite clear that this settlement was not made, leaving the private wrongs of the owners of the *Caroline* to be pressed against the British government for adjustment by an American agent; nor were the claims of McLeod to indemnity for injuries he may have received for supposed participation in these transactions to be set up through an agent of the British government against the United States.

Such a construction of the adjustment made between Mr. Webster and Lord Ashburton would be a violation of the whole tenor of the correspondence between the two governments; and of the international ground on which they both concurred in placing the collisions between the two countries. In my view the entire controversy, with all its incidents, was then ended; and if the citizens of either government had grievances to complain of, they could have redress only on their own governments, who had acted as their principals, and taken the responsibility of making the whole matter an international affair, and had adjusted it on this basis. \* \* \*

BATES, Umpire. The commissioners under the convention having been unable to agree upon the decision to be given with reference to the claim of Alexander McLeod, of Upper Canada, against the government of the United States, I have carefully examined and considered the papers and evidence produced on the hearing of the said claim.

This case arose out of the burning and destruction of the American steamboat *Caroline*, at Schlosser, in the state of New York, on the Niagara river, by an armed force from Canada, in the year 1837, for which the British government appears to have delayed formally answering the claims of the United States, until 1840, when the claimant was arrested by the authorities of the state of New York on a charge of murder and arson, as having been one of the party which destroyed the "*Caroline*." The British government then assumed the

responsibility of the act, as done by order of the government authorities in Canada, and pleaded justification on the ground of urgent necessity.

From this time the case of the claimant became a political question between the two governments, and the United States used every means in their power to insure the safety of the claimant, and to procure his discharge, which was effected after considerable delay.

It appears by the diplomatic correspondence that the affair of the "Caroline," the death of Durfee, who was killed in the affray, and the arrest of the claimant, were all amicably and finally settled by the diplomatic agents of the two governments in 1841 and 1842.

The question, in my judgment, having been so settled, ought not now to be brought before this commission as a private claim. I therefore reject it.<sup>79</sup>

<sup>79</sup> See, also, *People v. McLeod*, 25 Wend. (N. Y.) 483, 37 Am. Dec. 328 (1841); *Id.*, 1 Hill (N. Y.) 375, 37 Am. Dec. 328 (1841).

In speaking of the New York court, Mr. Webster said: "I was utterly surprised at the decision of that court on the habeas corpus. On the peril and at the risk of my professional reputation, I now say that the opinion of the court of New York in that case is not a respectable opinion, either on account of the result at which it arrives, or the reasoning on which it proceeds." Webster's Works, Vol. V, p. 129. See, also, 26 Wend. (N. Y.) 663, and 3 Hill (N. Y.) 635, for criticism and defence of Justice Cowen's opinion in 25 Wend. 483, 37 Am. Dec. 328 (1841).

Further instances are: The seizure of St. Marks (1 Wharton's Digest [2d Ed.] § 50b [1887]; 2 Moore's Digest, 402, 403 [1906]) holding that necessity justifies an invasion of foreign territory so as to subdue an expected assailant, and the seizure of Amelia Island, in 1817 (1 Wharton's Digest, § 50a; 1 Moore's Digest, 42, 76, 173, 175; 2 Moore's Dig. 80, 406). In the technical language of private as distinguished from public law, these transactions amounted to the abatement of a nuisance, the right to do which exists in the aggrieved party. Its exercise, however, is decidedly hazardous. 3 Black. Com. 5, and Pollock's Torts (10th Ed.) p. 439 (1916).

These instances were on land: the case of the *Virginus* was on the high seas.

"The *Virginus* was registered in the United States and carried the American flag; but, as it eventually appeared, she was really the property of certain Cuban insurgents, and was employed in aid of the rebellion in Cuba. On the 9th of July, 1873, she arrived at Kingston, Jamaica, and on the 23d of October she cleared ostensibly for Limon Bay in Costa Rica, but really for the coast of Cuba. Being chased by a Spanish warship, she put into Port-au-Prince, Hayti. Thence she proceeded again to the coast of Cuba, and was again chased by a Spanish war vessel, the *Tornado*, and was captured ten or fifteen miles from the coast of Jamaica, on the 31st of October. She was taken to Santiago de Cuba, where a court was assembled for the trial of the persons found on board—155 in number. Of these four were tried on the 3d of November, and shot on the 4th, thirty-seven on the 7th, and sixteen on the 8th. Among those executed were nine Americans and sixteen British subjects.

"The government of the United States, supposing that its rights on the high seas had been violated, demanded reparation. And by an agreement of the 29th of November, Spain stipulated to restore the *Virginus* and the survivors of the passengers and crew, and to salute the flag of the United States on the 25th of December following, unless Spain should in the mean time prove that the vessel was not entitled to carry said flag. The matter was submitted to the Attorney General of the United States, who, after



careful examination, reported on the 12th of December that the registry of the *Virginus* was fraudulent, and that she had therefore no right to carry the American flag. But he added: 'I am also of opinion that she was as much exempt from interference on the high seas by any other power, on that ground, as though she had been lawfully registered. Spain, no doubt, has a right to capture a vessel, with an American register, and carrying the American flag, found in her own waters assisting, or endeavoring to assist, the insurrection in Cuba, but she has no right to capture such a vessel on the high seas upon an apprehension that, in violation of the neutrality or navigation laws of the United States, she was on her way to assist said rebellion. Spain may defend her territory and people from the hostile attacks of what is, or appears to be, an American vessel; but she has no jurisdiction whatever over the question as to whether or not such vessel is on the high seas in violation of any law of the United States.' Spain having proved her point, the salute to the flag was dispensed with. The vessel was delivered to the United States authorities on the 16th of December, 1873; but on her way north, sank, off Cape Fear, on the 26th of that month.

"Both the United States and England demanded reparation for the persons of their respective nationalities who had been executed by the captors of the *Virginus*; and this Spain eventually agreed to make. Even assuming that the vessel was lawfully seized, it was contended that there could be no justification of the summary execution of foreigners by order of a drum-head court-martial.

"The position of the Attorney General, that Spain had no right to capture such a vessel on the high seas, etc., has called forth much adverse criticism. Both Woolsey and Dana justified the capture at the time. 'The register of a foreign nation,' said Dana, 'is not, and by the law of nations is not recognized as being, a national voucher and guaranty of national character to all the world, and nations having cause to arrest a vessel, would go behind such a document to ascertain the jurisdictional fact which gives character to the document, and not the document to the fact.' It was the duty of the Spanish captain, says Woolsey, to defend the coasts of Cuba against a vessel which was known to be under the control of the insurgents, for which he had been on the lookout, and against which the only effectual security was capture on the high seas. Woolsey's *International Law* (6th Ed.) pp. 368, 369.

"In a pamphlet on the 'Case of the *Virginus*,' Mr. George T. Curtis took similar ground. 'We rest the seizure of this vessel,' he says, 'on the great right of self-defence, which, springing from the law of nature, is as thoroughly incorporated into the law of nations as any right can be. [No state of belligerency is needful to bring the right of self-defence into operation. It existed at all times—in peace as well as in war. The only questions that can arise about it relate to the modes and places of its exercise.]' "Freeman Snow, *Cases and Opinions on International Law*, pp. 179, 180 (1893).

See, also, on the question of self-defence, Great Britain's seizure of Danish Fleet in 1807, Hall's *International Law* (4th Ed.) 285.

The right to visit and search foreign merchant vessels upon the high seas does not exist in time of peace, other than as the result of treaty stipulation. It is essentially a war power and its exercise is rightly incident thereto.

## SECTION 4.—EXTRADITION \*\*

## RESPUBLICA v. DE LONGCHAMPS.

(Court of Oyer and Terminer at Philadelphia, 1784. 1 Dall. 111, 1 L. Ed. 59.)

McKEAN, Chief Justice.<sup>81</sup> Charles-Julian De Longchamps: \* \* \* These offences having been thus legally ascertained and fixed upon you, his Excellency, the President, and the Honorable the Supreme Executive Council, attentive to the honor and interest of the State, were pleased to inform the Judges of this Court, as they had frequently done before, that the Minister of France had earnestly repeated a demand, that you, having appeared in his house in the uniform of a French Regiment, and having called yourself an officer in the troops of his Majesty, should be delivered up to him for these outrages, as a Frenchman to be sent to France; and wished us in this stage of your prosecution, to take into mature consideration, and in the most solemn manner to determine:—

1st. Whether you could be legally delivered up by council, according to the claim made by the late minister of France?

2ndly. If you could not be thus legally delivered up, whether your offences in violation of the law of nations, being now ascertained and verified according to the laws of this commonwealth, you ought not to be imprisoned, until his most christian majesty shall declare, that the reparation is satisfactory?

And 3dly. If you can be thus imprisoned, whether any legal act can be done by council, for causing you to be so imprisoned?

To these queries we have given the following answer in writing:

"In compliance with the request of his excellency, the President, and the honorable the Supreme Executive Council, we postponed passing sentence upon Charles-Julian De Longchamps, until we had maturely considered the three questions above proposed for our determination. On the 10th and 12th days of July the several questions were argued before the court by five counsel, two on the affirmative and three on

<sup>80</sup> Extradition exists between the states of the American Union, in accordance with article 4, § 2, of the Constitution of the United States, which provides that:

"A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the Crime."

On interstate rendition, as distinguished from international extradition, see *State v. Patterson*, 116 Mo. 505, 22 S. W. 696, post, p. 413 (1893).

<sup>81</sup> For the statement of facts of this interesting case of first impression, see ante, p. 205.

The portion of the case here given relates to the question of extradition.

the negative side. We have kept the matter under advisement until this day, and now deliver our opinion thereupon.

1. "And as to the first question, we answer: That it is our opinion, that, in this case, Charles-Julian De Longchamps cannot be legally delivered up by council, according to the claim made by the minister of France. Though, we think, cases may occur, where council could pro bono publico, and to prevent atrocious offenders evading punishment, deliver them up to the justice of the country to which they belong, or where the offences were committed.

2. "Punishments must be inflicted in the same country where the criminals were tried and convicted, unless the record of the attainder be removed into the Supreme Court, which may award execution in the county where it sits; they must be such as the laws expressly prescribe; or where no stated or fixed judgment is directed, according to the legal discretion of the court; but judgments must be certain and definite in all respects. Therefore, we conclude, that the defendant cannot be imprisoned, until his most christian majesty shall declare, that the reparation is satisfactory.

3. "The answer to the last question is rendered unnecessary by the above answer to the second question." \* \* \*

#### UNITED STATES v. RAUSCHER.

(Supreme Court of the United States, 1896. 119 U. S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425.)

Mr. Justice MILLER delivered the opinion of the court.<sup>82</sup>

This case comes before us on a certificate of division of opinion between the judges holding the Circuit Court of the United States for the Southern District of New York arising after verdict of guilty, and before judgment, on a motion in arrest of judgment.

The prisoner, William Rauscher, was indicted by a grand jury, for that on the 9th day of October, 1884, on the high seas, out of the jurisdiction of any particular state of the United States, and within

<sup>82</sup> "The first case in America in which the question of the duty of the extradition of criminals, independently of any treaty obligations, was discussed, was that of the Chevalier de Longchamps in 1784. [*Respublica v. De Longchamps*, 1 Dallas, 120, 1 L. Ed. 59 (1784)]. \* \* \*

"It must be remembered, in explanation of the President's action in this matter, and perhaps of the severity of the sentence, that at this time there was special political reason in America for the desire to keep on good terms with France. The decision, however, upon the question of extradition was clearly right. No treaty required the rendition of the offender; his offence could only technically be called an offence against the King of France; the assault was committed on American soil, and the whole matter was clearly within the cognisance of American tribunals." Sir Edward Clarke, *A Treatise upon the Law of Extradition*, 84, 85-86 (1903).

<sup>83</sup> Part of Mr. Justice Miller's opinion, the concurring opinion of Mr. Justice Gray, and the dissenting opinion of Mr. Chief Justice Waite, are omitted.

the admiralty and maritime jurisdiction thereof, he, the said William Rauscher, being then and there second mate of the ship J. F. Chapman, unlawfully made an assault upon Janssen, one of the crew of the vessel of which he was an officer, and unlawfully inflicted upon said Janssen cruel and unusual punishment. This indictment was found under § 5347 of the Revised Statutes of the United States.

The statement of the division of opinion between the judges is in the following language:

"This cause coming on to be heard at this term, before judgment upon the verdict, on a motion in arrest of judgment, and also on a motion for a new trial before the two judges above mentioned, at such hearing the following questions occurred:

"First. The prisoner having been extradited upon a charge of murder on the high seas of one Janssen, under section 5339, Rev. Stat. (Comp. St. § 10445), had the Circuit Court of the Southern District of New York jurisdiction to put him to trial upon an indictment under section 5347, Rev. Stat. (Comp. St. § 10464), charging him with cruel and unusual punishment of the same man, he being one of the crew of an American vessel of which the defendant was an officer, and such punishment consisting of the identical acts proved in the extradition proceedings? \* \* \*

The treaty with Great Britain, under which the defendant was surrendered by that government to ours upon a charge of murder, is that of August 9, 1842, styled "A treaty to settle and define the boundaries between the territories of the United States and the possessions of Her Britannic Majesty in North America, for the final suppression of the African slave trade, and for the giving up of criminals, fugitive from justice, in certain cases." 8 Stat. 576.

With the exception of this caption, the tenth article of the treaty contains all that relates to the subject of extradition of criminals. That article is here copied, as follows:

"It is agreed that the United States and her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such

judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive."

Not only has the general subject of the extradition of persons, charged with crime in one country, who have fled to and sought refuge in another, been matter of much consideration of late years by the executive departments and statesmen of the governments of the civilized portion of the world, by various publicists and writers on international law, and by specialists on that subject, as well as by the courts and judicial tribunals of different countries, but the precise questions arising under this treaty, as presented by the certificate of the judges in this case, have recently been very much discussed in this country, and in Great Britain.

It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the states where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated as the general result of the writers upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.

Whether in the United States, in the absence of any treaty on the subject with a foreign nation from whose justice a fugitive may be found in one of the states, and in the absence of any act of Congress upon the subject, a state can, through its own judiciary or executive, surrender him for trial to such foreign nation, is a question which has been under consideration by the courts of this country without any very conclusive result. \* \* \*

Fortunately, this question, with others which might arise in the absence of treaties or acts of Congress on the subject, is now of very

<sup>24</sup> The learned Justice here cited and discussed the following cases: In the *Matter of Daniel Washburn*, 4 Johns. Ch. (N. Y.) 108, 8 Am. Dec. 548 (1819), in which Chancellor Kent held it to be the duty of the state to surrender fugitive criminals; *Com. ex rel. Short v. Deacon*, 10 Serg. & R. (Pa.) 125 (1823), in which Chief Justice Tilghman held the contrary opinion; *Holmes v. Jennison*, 14 Pet. 540, 10 L. Ed. 579 (1840), in which the Supreme Court was divided on the question; and *Ex parte Holmes*, 12 Vt. 681 (1840), and *People v. Curtis*, 50 N. Y. 321, 10 Am. Rep. 483 (1872), holding that an act of a state authorizing the surrender of fugitives from justice was in conflict with the Constitution of the United States.

little importance, since, with nearly all the nations of the world with whom our relations are such that fugitives from justice may be found within their dominions or within ours, we have treaties which govern the rights and conduct of the parties in such cases. These treaties are also supplemented by acts of Congress, and both are in their nature exclusive.

The case we have under consideration arises under one of these treaties made between the United States and Great Britain, the country with which, on account of our intimate relations, the cases requiring extradition, are likely to be most numerous. This treaty of 1842 is supplemented by the Acts of Congress of August 12, 1848, 9 Stat. 302, and March 3, 1869, 15 Stat. 337 (Comp. St. §§ 10121-10123) the provisions of which are embodied in sections 5270, 5272 and 5275 of the Revised Statutes (Comp. St. §§ 10110, 10118, 10121), under title LXVI, Extradition. \* \* \*

The treaty of 1842 being, therefore, the supreme law of the land, which the courts are bound to take judicial notice of and to enforce in any appropriate proceeding the rights of persons growing out of that treaty, we proceed to inquire, in the first place, so far as pertinent to the question certified by the circuit judges, into the true construction of the treaty. We have already seen that, according to the doctrine of publicists and writers on international law, the country receiving the offender against its laws from another country had no right to proceed against him for any other offense than that for which he had been delivered up. This is a principle which commends itself as an appropriate adjunct to the discretionary exercise of the power of rendition because it can hardly be supposed that a government which was under no treaty obligation nor any absolute obligation of public duty to seize a person who had found an asylum within its bosom and turn him over to another country for trial, would be willing to do this, unless a case was made of some specific offence, of a character which justified the government in depriving the party of his asylum. It is unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the demanding government without any limitation, implied or otherwise, upon its prosecution of the party. In exercising its discretion, it might be very willing to deliver up offenders against such laws as were essential to the protection of life, liberty and person, while it would not be willing to do this on account of minor misdemeanors or of a certain class of political offenses in which it would have no interest or sympathy. Accordingly, it has been the policy of all governments to grant an asylum to persons who have fled from their homes on account of political disturbances and who might be there amenable to laws framed with regard to such subjects, and to the personal allegiance of the party. In many of the treaties of extradition between the civilized nations of the world,

there is an express exclusion of the right to demand the extradition of offenders against such laws, and in none of them is this class of offenses mentioned as being the foundation of extradition proceedings. Indeed, the enumeration of offenses in most of these treaties, and especially in the treaty now under consideration, is so specific, and marked by such a clear line in regard to the magnitude and importance of those offenses, that it is impossible to give any other interpretation to it than that of the exclusion of the right of extradition for any others.

It is, therefore, very clear that this treaty did not intend to depart in this respect from the recognized public law which had prevailed in the absence of treaties, and that it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offenses enumerated in the treaty. This is not only apparent from the general principle that the specific enumeration of certain matters and things implies the exclusion of all others, but the entire face of the treaty, including the processes by which it is to be carried into effect, confirms this view of the subject. It is unreasonable to suppose that any demand for rendition framed upon a general representation to the government of the asylum (if we may use such an expression) that the party for whom the demand was made was guilty of some violation of the laws of the country which demanded him, without specifying any particular offense with which he was charged, and even without specifying an offense mentioned in the treaty, would receive any serious attention; and yet such is the effect of the construction that the party is properly liable to trial for any other offense than that for which he was demanded, and which is described in the treaty. There would, under that view of the subject, seem to be no need of a description of a specific offense in making the demand. But, so far from this being admissible the treaty not only provides that the party shall be charged with one of the crimes mentioned, to wit, murder; assault with intent to commit murder, piracy, arson, robbery, forgery or the utterance of forged paper, but that evidence shall be produced to the judge or magistrate of the country of which such demand is made, of the commission of such an offense, and that this evidence shall be such as according to the law of that country would justify the apprehension and commitment for trial of the person so charged. If the proceedings under which the party is arrested in a country where he is peaceably and quietly living, and to the protection of whose laws he is entitled, are to have no influence in limiting the prosecution in the country where the offense is charged to have been committed, there is very little use for this particularity in charging a specific offense, requiring that offense to be one mentioned in the treaty, as well as sufficient evidence of the party's guilt to put him upon trial for it. Nor can it be said that, in the exercise of such a delicate power under a treaty so well guarded in every particular, its

provisions are obligatory alone on the state which makes the surrender of the fugitive, and that that fugitive passes into the hands of the country which charges him with the offense, free from all the positive requirements and just implications of the treaty under which the transfer of his person takes place. A moment before he is under the protection of a government which has afforded him an asylum from which he can only be taken under a very limited form of procedure, and a moment after he is found in the possession of another sovereignty by virtue of that proceeding, but divested of all the rights which he had the moment before, and of all the rights which the law governing that proceeding was intended to secure.

If upon the face of this treaty it could be seen that its sole object was to secure the transfer of an individual from the jurisdiction of one sovereignty to that of another, the argument might be sound; but as this right, of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.

The opposite view has been attempted to be maintained in this country upon the ground that there is no express limitation in the treaty of the right of the country in which the offense was committed to try the person for the crime alone for which he was extradited, and that once being within the jurisdiction of that country, no matter by what contrivance or fraud or by what pretense of establishing a charge provided for by the extradition treaty he may have been brought within the jurisdiction, he is, when here, liable to be tried for any offense against the laws as though arrested here originally. This proposition of the absence of express restriction in the treaty of the right to try him for other offenses than that for which he was extradited, is met by the manifest scope and object of the treaty itself. The caption of the treaty, already quoted, declaring that its purpose is to settle the boundary line between the two governments; to provide for the final suppression of the African slave trade; adds, "and for the giving up of criminals, fugitive from justice, in certain cases." The treaty, then, requires, as we have already said, that there shall be given up, upon requisitions respectively made by the two governments, all persons charged with any of the seven crimes enumerated, and the provisions giving a party an examination before a proper tribunal, in which, before he shall



be delivered up on this demand, it must be shown that the offense for which he is demanded is one of those enumerated, and that the proof is sufficient to satisfy the court or magistrate before whom this examination takes place that he is guilty and such as the law of state of the asylum requires to establish such guilt, leave no reason to doubt that the fair purpose of the treaty is, that the person shall be delivered up to be tried for that offense and for no other.

If there should remain any doubt upon this construction of the treaty itself, the language of two acts of Congress, heretofore cited, incorporated in the Revised Statutes, must set this question at rest. It is there declared, Rev. Stat. § 5272, the two preceding sections having provided for a demand upon this country and for the inquiry into the guilt of the party, that "it shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person or persons as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly."

For the protection of persons brought into this country by extradition proceedings from a foreign country, section 5275 of the Revised Statutes provides:

"Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offences specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offences, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe keeping and protection of the accused.

The obvious meaning of these two statutes, which have reference to all treaties of extradition made by the United States, is that the party shall not be delivered up by this government to be tried for any other offense than that charged in the extradition proceedings; and that, when brought into this country upon similar proceedings, he shall not be arrested or tried for any other offense than that with which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought. This is undoubtedly a congressional construction of the purpose and meaning of extradition treaties such as the one we have under consideration, and whether it is or not, it is conclusive upon the judiciary of the right conferred upon persons brought from a foreign country into this under such proceedings.

That right, as we understand it, is that he shall be tried only for

the offense with which he is charged in the extradition proceedings, and for which he was delivered up, and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition.

This precise question has been frequently considered by courts of the highest respectability in this country. \* \* \*

Upon a review of these decisions of the federal and state courts, to which may be added the opinions of the distinguished writers which we have cited in the earlier part of this opinion, we feel authorized to state that the weight of authority and of sound principle are in favor of the proposition, that a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings. \* \* \*\*

<sup>85</sup> In 1864 President Lincoln surrendered to the Spanish authorities one Arguëlles, an alleged fugitive from justice, without any treaty stipulation. The case was unfavorably criticised at the time and since, so that it has not been followed as a precedent. See John Bassett Moore's *Extradition and Interstate Rendition*, vol. 1, p. 33, § 27 (1891).

"The history of extradition in England begins with the treaties made with the United States in October, 1842, and with France in 1843.

"Only one demand seems to have been made upon Great Britain before the date of these treaties, and that was by the United States in 1841, in the case of *The Creole*. \* \* \*" See for the facts of this case, ante, p. 273. Sir Edward Clarke thus states the case in his *Treatise upon the Law of Extradition* (4th Ed. 1903) p. 128:

"Nineteen slaves were identified as having participated in the mutiny and murder, and they were placed in confinement, the Governor refusing to give them up to the American Government. The rest were set at liberty. The nineteen were tried at Nassau for piracy, and acquitted. The law authorities in England were unanimously of opinion upon this case that they could not be given up in the absence of an Act of the English Parliament giving power to the executive."

The texts of the various extradition treaties in force to which Great Britain was a party at the date of the last edition of Sir Edward Clarke's *Treatise* in 1903 are therein contained, on pages lxxxii-ccccxi.

A list of the existing extradition treaties of the United States in force at the same date is given on pages cccxcii-ccccxiii, of that work. The texts of these treaties will also be found in William M. Malloy's *Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers, 1776-1909* (1910), 2 vols., and a third volume, *Treaties, Conventions, etc., 1910-1913* (1913), by Garfield Charles.

"The practice with respect to demands in extradition made upon Great Britain for the surrender of a person suspected of being in the United Kingdom is now regulated by the Extradition Act 1870 (33 & 34 Vict. c. 52). The requisition must be made upon one of the principal Secretaries of State by some person recognized by him as a diplomatic representative of the foreign state. Section 7. This includes any person recognized as a Consul General of the foreign state. Extradition Act 1873-36 & 37 Vict. c. 60, § 7. The demand need not be accompanied by any copies of depositions, or even of a warrant

## STATE v. PATTERSON.

(Supreme Court of Missouri, 1898. 116 Mo. 505, 22 S. W. 696.)

SHERWOOD, J.<sup>86</sup> The third question presented by the record is that in relation to the jurisdiction of the court to try defendant on the third count of the indictment; and this contention is made because it is said the affidavit of Huston, on which the requisition was based, was not sufficiently comprehensive to embrace the charge contained in that count, and this contention was set forth in the trial court by a plea to the jurisdiction. The decided cases show some divergence of opinion on the question whether a fugitive from justice, when brought back to the state where the alleged crime occurred, can be tried for crimes other than the one for which he was extradited, some authorities holding that the fugitive cannot be tried except for the offence named in the warrant of extradition; others that when a person is properly charged with crime in the courts of the state to which he is brought, they will not inquire into the means whereby his extradition was effected. 8 American and English Encyclopædia of Law, p. 648 et seq. As sustaining the latter view, a view entertained by the great

of arrest issued in the foreign state, but it is usual for the Secretary of State to require some *prima facie* evidence of guilt, or some proof of the conviction in the foreign state, to be laid before him. If he thinks the offence is not one of a political character, and that the surrender should be granted, he by order under his hand and seal signifies to the chief magistrate of the metropolitan police courts, or one of the other magistrates of the metropolitan police court in Bow Street (section 26), that such requisition has been made, and requires him to issue his warrant for the apprehension of the fugitive criminal (section 7)." Clarke's Treatise upon Extradition (4th Ed. 1903) 230.

The practice of the United States is regulated by Rev. St. sections 5270-5280 (8 Fed. Stat. Ann., pp. 68-90); the material portion of section 5270 (Comp. St. § 10110) being as follows:

"Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any state, may, upon complaint made under oath, charging any person found within the limits of any state, district, or territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

The standard work on extradition in general and rendition in particular between the states of the American Union is John Bassett Moore's *Treatise on Extradition and Interstate Rendition* in two volumes (1891).

<sup>86</sup> Only the opinion on this third point is given.

preponderance and a majority of the authorities, are: *Ham v. State*, 4 Tex. App. 645; *State v. Ross*, 21 Iowa, 467; *State ex rel. v. Stewart*, 60 Wis. 587, 19 N. W. 429, 50 Am. Rep. 388; *Waterman v. State*, 116 Ind. 51, 18 N. E. 63; *People v. Rowe*, 4 Parker Cr. Rep. 253; *Ker v. People*, 110 Ill. 627, 51 Am. Rep. 706; *Lagrange's Case*, 59 N. Y. 110, 17 Am. Rep. 317; *People ex rel. v. Cross*, 135 N. Y. 536, 32 N. E. 246, 31 Am. St. Rep. 850; *In re Miles*, 52 Vt. 609; *State v. Smith*, 1 Bail. (S. C.), 283, 19 Am. Dec. 679; *Dows' Case*, 18 Pa. 37; *Harland v. Territory*, 3 Wash. T. 131, 13 Pac. 453; *Commonwealth v. Wright*, 158 Mass. 149, 33 N. E. 82, 19 L. R. A. 206, 35 Am. St. Rep. 475; *Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717; *In re Noyes*, 17 Alb. Law J. 407; *Ker v. Illinois*, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421; *Mahon v. Justice*, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. Ed. 283; *Cook v. Hart*, 146 U. S. 183, 13 Sup. Ct. 40, 36 L. Ed. 934; 1 Bishop Criminal Procedure (3d Ed.) § 224b; 2 Moore on Extradition, § 643 et seq.

In the recent case of *Lascelles v. State*, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216 (1892), the Supreme Court of the state of Georgia, per Lumpkin, J., ruled that the defendant, though indicted for the offence of being a common cheat and swindler, and for larceny after trust, and extradited from the state of New York on those charges, could be indicted and tried for a forgery committed in that state prior to his extradition. This case was brought on error to the Supreme Court of the United States, *Lascelles v. Georgia*, 148 U. S. 537, 13 Sup. Ct. 687, 37 L. Ed. 549, where, after a review of the authorities, the judgment was affirmed. In that case, decided April 3, 1893, the Supreme Court of the United States, as did the Supreme Court of Georgia, clearly pointed out the distinction which should be taken between those cases of extradition arising between the several states of the Union under the Constitution and laws of Congress and those cases where a prisoner has been extradited from a foreign country under treaty stipulations, in which latter cases it has been ruled that a person thus extradited could only be tried for the specific offence which caused his extradition. *United States v. Rauscher*, 119 U. S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425.

In *Ker v. People*, 110 Ill. 627, 51 Am. Rep. 706, the defendant was kidnapped in Peru, and brought over to the state of California, where he was extradited on a requisition from the state of Illinois, on a charge of larceny, and returned to the state of Illinois whence he had fled, and there tried on a charge of embezzlement, and it was held that defendant had no valid ground of objection to the jurisdiction of the court which tried him. Carried on error to the Supreme Court of the United States, the judgment was affirmed. 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421.

In *Mahon v. Justice*, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. Ed. 283, the defendant was kidnapped in West Virginia and forcibly carried

back to Kentucky and held for trial of a crime alleged to have been committed in that state. The Governor of West Virginia demanded that defendant be restored, and meeting with refusal, resorted to habeas corpus in order to effect his restoration. The Circuit Court of the United States refused to discharge the defendant, and on appeal to the Supreme Court this judgment was affirmed. In that case it was contended that a right of asylum in the state to which he had fled, was possessed by the fugitive, which the federal courts should enforce; but this right was declared in that case to have no existence under the laws of the United States, nor did they make any provision for the return of parties who without lawful authority had been abducted from another state; and that such forcible abduction from another state did not affect or impair the jurisdiction of the state to which they were brought, to try them for crimes committed therein.

That the jurisdiction of the court in which the indictment is found is not impaired by the method used to bring the accused before it, was the rule at common law and was declared in the early case of *Ex parte Scott*, 9 Barn. & C. 446. The result of the authorities heretofore cited is in the same direction.

There are a few others opposed to this view; among them are *State v. Hall*, 40 Kan. 338, 19 Pac. 918, 10 Am. St. Rep. 200; *Ex parte McKnight*, 48 Ohio St. 588, 28 N. E. Rep. 1034, 14 L. R. A. 128; *Cannon's Case*, 47 Mich. 481, 11 N. W. 280; but we are quite satisfied, both upon reason and authority, that the rule announced in the former cases is the correct one and should prevail.

Therefore judgment affirmed. All concur.<sup>87</sup>

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#### CHARLTON v. KELLY.

(Supreme Court of the United States, 1913. 229 U. S. 447, 33 Sup. Ct. 945, 57 L. Ed. 1274, 46 L. R. A. [N. S.] 397.)

This is an appeal from a judgment dismissing a petition for a writ of habeas corpus and remanding the petitioner to custody under a warrant for his extradition as a fugitive from the justice of the kingdom of Italy.

The proceedings for the extradition of the appellant were begun upon a complaint duly made by the Italian Vice Consul, charging him with the commission of a murder in Italy. A warrant was duly issued

<sup>87</sup> The leading cases on interstate rendition are: *Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717 (1860); *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250 (1885); *Mahon v. Justice*, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. Ed. 283 (1888); *Lascelles v. Georgia*, 148 U. S. 537, 13 Sup. Ct. 687, 37 L. Ed. 549 (1893). *State v. Pattersen*, *supra*, states the law more briefly and cites authorities. As to the legal meaning of the phrase "fugitive from justice," see *Kingsbury's Case*, 106 Mass. 223 (1870), and *Jones v. Leonard*, 50 Iowa, 106, 32 Am. Rep. 116 (1878).

by the Hon. John A. Blair, one of the judges of New Jersey, qualified to sit as a committing magistrate in such a proceeding, under section 5270, Rev. Stat. (Comp. St. § 10110). At the hearing, evidence was produced which satisfied Judge Blair that the appellant was a fugitive from justice and that he was the person whose return to Italy was desired, and that there was probable cause for holding him for trial upon the charge of murder, committed there. He thereupon committed the appellant, to be held until surrendered under a warrant to be issued by the Secretary of State. A transcript of the evidence and of the findings was duly certified as required by section 5270, Rev. Stat., and a warrant in due form for his surrender was issued by the Secretary of State. Its execution has, up to this time, been prevented by the habeas corpus proceedings in the court below and the pendency of this appeal. \* \* \*

Mr. Justice LURTON, after making the foregoing statement, delivered the opinion of the court. \* \* \*

The objections which are relied upon for the purpose of defeating extradition may be conveniently summarized and considered under four heads:

1. That evidence of the insanity of the accused was offered and excluded.
2. That the evidence of a formal demand for the extradition of the accused was not filed until more than forty days after the arrest.
3. That appellant is a citizen of the United States, and that the treaty in providing for the extradition of "persons" accused of crime does not include persons who are citizens or subjects of the nation upon whom the demand is made.
4. That if the word "person" as used in the treaty includes citizens of the asylum country, the treaty, in so far as it covers that subject, has been abrogated by the conduct of Italy in refusing to deliver up its own citizens upon the demand of the United States, and by the enactment of a municipal law, since the treaty, forbidding the extradition of citizens.

We will consider these objections in their order: \* \* \*

3. By article 1 of the extradition treaty with Italy the two governments mutually agree to deliver up all persons, who, having been convicted of or charged with any of the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum in the other, etc. It is claimed by counsel for the appellant that the word "persons" as used in this article does not include persons who are citizens of the asylum country.

That the word "persons" etymologically includes citizens as well as those who are not, can hardly be debatable. \* \* \*

The conclusion we reach is, that there is no principle of international law by which citizens are excepted out of an agreement to surrender "persons," where no such exception is made in the treaty itself. Upon

the contrary, the word "persons" includes *all* persons when not qualified as it is in some of the treaties between this and other nations. That this country has made such an exception in some of its conventions and not in others, demonstrates that the contracting parties were fully aware of the consequences unless there was a clause qualifying the word "persons." This interpretation has been consistently upheld by the United States, and enforced under the several treaties which do not exempt citizens. That Italy has not conformed to this view, and the effect of this attitude will be considered later. But that the United States has always construed its obligation as embracing its citizens is illustrated by the action of the executive branch of the government in this very instance. A construction of a treaty by the political department of the government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight. \* \* \*

4. We come now to the contention that by the refusal of Italy to deliver up fugitives of Italian nationality, the treaty has thereby ceased to be of obligation on the United States. The attitude of Italy is indicated by its Penal Code of 1900 which forbids the extradition of citizens, and by the denial in two or more instances to recognize this obligation of the treaty as extending to its citizens. \* \* \*

The attitude of the Italian government indicated by proffering this request for extradition "in accordance with article V of the Treaty of 1868," is, as shown by the communication of July 1st set out above, substantially this:

First. That crimes committed by an American in a foreign country were not justiciable in the United States, and must, therefore, go unpunished unless the accused be delivered to the country wherein the crime was committed for trial.

Second. Such was not the case with Italy, since under the laws of Italy, crimes committed by its subjects in foreign lands were justiciable in Italy.

Third. That as a consequence of the difference in the municipal law, "it was logical that so far as parity in the matter of extraditing their respective citizens or subjects is concerned, each party should, in the absence of specific provisions in the Convention itself, be guided by the spirit of its own legislation."

This adherence to a view of the obligation of the treaty as not requiring one country to surrender its nationals while it did the other, presented a situation in which the United States might do either of two things, namely: Abandon its own interpretation of the word "persons" as including citizens, or adhere to its own interpretation and surrender the appellant, although the obligation had, as to nationals, ceased to be reciprocal. The United States could not yield its own interpretation of the treaty, since that would have had the most serious

consequence on five other treaties in which the word "persons" had been used in its ordinary meaning, as including all persons, and, therefore, not exempting citizens. If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligation as if there had been no such breach. 1 Kent's Comm. p. 175. \* \* \*

That the political branch of the government recognizes the treaty obligation as still existing is evidenced by its action in this case. In the memorandum giving the reasons of the Department of State for determining to surrender the appellant, after stating the difference between the two governments as to the interpretation of this clause of the treaty, Mr. Secretary Knox said:

"The question is now for the first time presented as to whether or not the United States is under obligation under treaty to surrender to Italy for trial and punishment citizens of the United States fugitives from the justice of Italy, notwithstanding the interpretation placed upon the treaty of Italy with reference to Italian subjects. In this connection it should be observed that the United States, although, as stated above, consistently contending that the Italian interpretation was not the proper one, has not treated the Italian practice as a breach of the treaty obligation necessarily requiring abrogation, has not abrogated the treaty or taken any step looking thereto, and has, on the contrary, constantly regarded the treaty as in full force and effect and has answered the obligations imposed thereby and has invoked the rights therein granted. It should, moreover, be observed that even though the action of the Italian government be regarded as a breach of the treaty, the treaty is binding until abrogated, and therefore the treaty not having been abrogated, its provisions are operative against us.

"The question would, therefore, appear to reduce itself to one of interpretation of the meaning of the treaty, the government of the United States being now for the first time called upon to declare whether it regards the treaty as obliging it to surrender its citizens to Italy, notwithstanding Italy has not and insists it can not surrender its citizens to us. It should be observed, in the first place, that we have always insisted not only with reference to the Italian extradition treaty, but with reference to the other extradition treaties similarly phrased that the word 'persons' includes citizens. We are, therefore, committed to that interpretation. The fact that we have for reasons already given ceased generally to make requisition upon the government of Italy for the surrender of Italian subjects under the treaty, would not require

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of necessity that we should, as a matter of logic or law, regard ourselves as free from the obligation of surrendering our citizens, we laboring under no such legal inhibition regarding surrender as operates against the government of Italy. Therefore, since extradition treaties need not be reciprocal, even in the matter of the surrendering of citizens, it would seem entirely sound to consider ourselves as bound to surrender our citizens to Italy even though Italy should not, by reason of the provisions of her municipal law be able to surrender its citizens to us."

The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land and as affording authority for the warrant of extradition.

Judgment affirmed.\*\*

\*\* The duty of the Secretary of State has usually been ministerial or administrative. In the Case of Jan Janoff Pouren, whose extradition was requested in 1908 by Russia, Secretary of State Root examined the record as a judicial officer on appeal, returning it to the Commissioner before Pouren had been tried and held for extradition, in order to admit testimony which had not been submitted by counsel for the prisoner, but which, in Secretary Root's opinion, would, if admitted, have shown that the offenses in question were of a political nature.

The action, and the reason for the action, are thus stated by Secretary Root, in a memorandum dated October 23, 1908:

"In this case the decision of the committing magistrate in favor of extradition was filed in the State Department on the 11th of September, 1908. Pending the consideration of the record facts were brought to my attention in the form of affidavits tending to show that the case comes under the provisions of article III of the Extradition Convention of March 28, 1837, which provides:

"If it be made to appear that extradition is sought with a view to try or punish the person demanded for an offense of a political character, surrender shall not take place."

"On the 7th of October these affidavits were transmitted to the Russian Embassy. Attention was called to the fact they tended to establish, with an inquiry as to whether the demanding government desired to controvert the affidavits or to offer any observation regarding them.

"On the 13th of October the record was remitted to the Commissioner, with instructions to reopen the case and give the parties an opportunity to introduce further testimony upon the matters of fact exhibited in the affidavits.

"The counsel for the Russian government has now invoked the action of the Circuit Court of the United States to prevent the Commissioner from taking the testimony which I have indicated, upon the ground that the Commissioner's jurisdiction ceased with his original decision and could not be revived by the remission of the case under my direction.

"This is a purely technical question and cannot be permitted to stand in the way of doing substantial justice in the case. The responsibility of finally determining whether the man is to be extradited or not rests with me, and I am clear that I ought not to direct his extradition without having, before me the testimony upon the matter indicated in these affidavits, which I consider to be necessary to enable me to determine whether the case comes within the provision of the treaty regarding political affairs. I deemed it proper, however, to give to the demanding government an opportunity, if it saw fit, to cross-examine the witnesses upon the matters to which they have sworn in the affidavits, and to introduce countervailing testimony. For this purpose the matter was remitted to the Commissioner. As the demanding government has not chosen to avail itself of this opportunity and objects to having any

## In re CASTIONI.

(Queen's Bench. [1891] L. R. 1 Q. B. Div. 149.)

Application for habeas corpus. The motion was made on behalf of Angelo Castioni, for an order nisi calling upon the Solicitor to the Treasury, Franklin Lushington, Esq., a metropolitan police magistrate, and the consul general of Switzerland, as representatives of the Swiss Republic, to show cause why a writ of habeas corpus should not issue to bring up the body of Castioni in order that he might be discharged from custody.

The prisoner Castioni had been arrested in England on the requisition of the Swiss government, and brought before the magistrate at the police court at Bow Street, and by him committed to prison for the purpose of extradition, on a charge of willful murder, alleged to have been committed in Switzerland.

The facts, which were contained in depositions sent from Switzerland, in the depositions taken before the magistrate at Bow Street, and in affidavits used on the hearing of the motion were shortly as follows:

The prisoner was charged with the murder of Luigi Rossi, by shooting him with a revolver on September 11, 1890, in the town of Bellinzona, in the canton of Ticino, in Switzerland. The deceased, Rossi, was a member of the State Council of the canton of Ticino, and was about twenty-six years of age. The prisoner, Castioni, was a citizen of the same canton; he had resided for seventeen years in England, and arrived at Bellinzona on September 10, 1890. For some time previous to this date much dissatisfaction had been felt and expressed by a large number of the inhabitants of Ticino at the mode in which the political party then in power were conducting the government of the canton. A request was presented to the government for a revision of the constitution of the canton, under art. 15 of the constitution, which provides that "The constitution of the canton may be revised wholly or partially. \* \* \* (b) At the request of 7,000 citizens presented with the legal formalities. In this case the council shall within one month submit to the people the question whether or not they wish to revise the constitution," and a law of May 9, 1877, pre-

testimony taken in the pending proceeding and denies the jurisdiction of the Commissioner to take it, and as I do not deem it suitable to discuss with that government this purely technical question of internal procedure, I shall obviate the necessity of further proceedings in the Circuit Court and avoid the course to which the demanding Government objects by dismissing the present proceeding without prejudice to the right of the demanding Government to initiate a new proceeding in which the Commissioner will have undoubted jurisdiction to take the evidence." *Foreign Relations of the United States, 1909, p. 517.*

In accordance with these views, Secretary Root refused to issue the warrant of extradition.

scribes the course to be adopted for the execution of letter (b) of art. 15.

The government having declined to take a popular vote on the question of the revision of the constitution, on September 11, 1890, a number of the citizens of Bellinzona, among whom was Castioni, seized the arsenal of the town, from which they took rifles and ammunition, disarmed the gendarmes, arrested and bound or handcuffed several persons connected with the government, and forced them to march in front of the armed crowd to the municipal palace. Admission to the palace was demanded in the name of the people, and was refused by Rossi and another member of the government, who were in the palace. The crowd then broke open the outer gate of the palace, and rushed in, pushing before them the government officials whom they had arrested and bound; Castioni, who was armed with a revolver was among the first to enter. A second door, which was locked, was broken open, and at this time, or immediately after, Rossi, who was in the passage, was shot through the body with a revolver, and died very soon afterwards. Some other shots were fired, but no one else was injured. Two witnesses, who were present when the shot was fired, and were called before the magistrate at Bow Street, identified Castioni as the person who fired the shot. One of the witnesses called for the prisoner was an advocate named Bruni, who had taken a leading part in the attack on the municipal palace. In cross-examination he said: "The death of Rossi was a misfortune, and not necessary for the rising." There was no evidence that Castioni had any previous knowledge of Rossi. The crowd then occupied the palace, disarmed the gendarmes who were there, and imprisoned several members of the government. A provisional government was appointed, of which Bruni was a member, and assumed the government of the canton, which it retained until dispossessed by the armed intervention of the federal government of the Republic.

The magistrate was of opinion that the identification of Castioni was sufficient, and held upon the evidence that the bar to extradition specified in section 3 of the Extradition Act, 1870,<sup>88</sup> did not exist, and committed Castioni to prison.

DENMAN, J.<sup>89</sup> \* \* \* I am unable to entertain a doubt that this is a case in which we ought to order that the prisoner be discharged.

There has been no legal decision as yet upon the meaning of the

<sup>88</sup> 33 & 34 Vict. c. 52, § 3: "The following restrictions shall be observed with respect to the surrender of fugitive criminals:

"A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate, or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character. \* \* \*

<sup>89</sup> Parts of the opinions of Denman and Hawkins, JJ., and the concurring opinion of Stephen, J., are omitted.

words contained in the act of 1870, upon the true meaning of which this case mainly depends. \* \* \*

I look at the words of the act themselves and I think that they are against any such narrow technical mode of dealing with the case. The words of section 3, subd. 1, are "a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character." The section itself begins: "The following restrictions shall be observed with respect to the surrender of fugitive criminals." \* \* \*

It seems to me that it is a question of mixed law and fact—mainly indeed of fact—as to whether the facts are such as to bring the case within the restriction of section 3, and to show that it was an offence of a political character. I do not think it is disputed, or that now it can be looked upon as in controversy, that there was at this time existing in Ticino a state of things which would certainly show that there was more than a mere small rising of a few people against the law of the state. I think it is clearly made out by the facts of this case, that there was something of a very serious character going on—amounting, I should go so far as to say, in that small community, to a state of war. There was an armed body of men who had seized arms from the arsenal of the state; they were rushing into the municipal council chamber in which the government of the state used to assemble; they demanded admission; admission was refused; some firing took place; the outer gate was broken down; and I think it also appears perfectly plain from the evidence in the case that Castioni was a person who had been taking part in that movement at a much earlier stage. He was an active party in the movement; he had taken part in the binding of one member of the government. Some time before he arrived with his pistol in his hand at the seat of government, he had gone with multitudes of men, armed with arms from the arsenal, in order to attack the seat of government, and I think it must be taken that it is quite clear that from the very first, he was an active party, one of the rebellious party who was acting and in the attack against the government. Now, that being so, it resolves itself into a small point, depending on the evidence which was taken before the magistrate, and anything that we can collect from the evidence that we have before us and from the whole circumstances of the case. \* \* \*

I have carefully followed the discussion as to the facts of the case, and if it were necessary I could go through them all one by one, and point out, I think, that, looking at the way in which that evidence was given, and at the evidence itself, there is nothing in my judgment to displace the view which I take of the case, that at the moment at which Castioni fired the shot, the reasonable presumption is, not that it is a matter of absolute certainty (we cannot be absolutely certain about anything as to men's motives) but the reasonable assumption is

that he, at the moment knowing nothing about Rossi, having no spite or ill will against Rossi, as far as we know, fired that shot; that he fired it thinking it would advance, and that it was an act which was in furtherance of, and done intending it to be in furtherance of the very object which the rising had taken place in order to promote, and to get rid of the government, who, he might, until he had absolutely got into the place, have supposed were resisting the entrance of the people to that place. That, I think, is the fair and reasonable presumption to draw from the facts of the case. I do not know that it is necessary to give any opinion as to the exact moment when the shot was fired; there is some conflict about it. There is evidence that there was great confusion; there is evidence of shots fired after the shot which Castioni fired; and all I can say is, that looking at it as a question of fact, I have come to the conclusion that at the time at which that shot was fired he acted in the furtherance of the unlawful rising to which at that time he was a party, and an active party—a person who had been doing active work from a very much earlier period, and in which he was still actively engaged. That being so, I think the writ ought to issue, and that we should be acting contrary to the spirit of this enactment, and to the fair meaning of it, if we were to allow him to be detained in custody longer.

HAWKINS, J. I am of the same opinion. The prisoner is asked to be given up on a charge of that which undoubtedly is an extradition crime under this treaty—that is, for the crime of murder, and undoubtedly he ought to be so given up, provided there is *prima facie* evidence of the crime of murder having been committed, unless, indeed, it is shown that the offence of murder in respect of which his surrender is asked, is one which was a political offence. Now, the question whether there is a *prima facie* evidence that Castioni committed an extradition crime—that is, the crime of murder—is one which I may dispose of in a very few words. Nobody can doubt that Rossi was shot by a revolver fired by Castioni; about that there seems to be no real question. Under what circumstances he shot him, and when, possibly would be matters which would be capable of argument before the tribunal before whom he might be tried. Of course, if it could be established before the court that he had deliberately taken a pistol, and that he had aimed it at Rossi without any justification of any sort or kind, and had caused the death of Rossi, there would have been an abundant case—a case on which he ought to have been tried according to our law for the crime of murder, and punished in respect of that crime; but it is said—and said, I think, rightly—that he ought not to be given up upon this ground—that the offence of which he was guilty, if he was guilty of that offence, was of a political character. That is, the murder with which he is charged was in itself of a political character. Now, the matter has been before the magistrate, and the magistrate, acting upon the information and the evidence before him, has come to the conclusion that two things exist: First

of all, that there is abundance of evidence to justify him in committing the man to be tried for murder—that is to say, there would have been had his crime been committed in this country; and secondly, he has come to the conclusion, rightly or wrongly, on which I shall have a word or two to say, that the offence was not of a political character, and that therefore he ought to be given up. The matter now comes before us—I will not say to review the whole of his decision—but to ask ourselves as to whether or not, having regard to the whole of the circumstances which are now brought to our attention, and which are proved by the depositions and other evidence in the case, we come to the same conclusion as the magistrate, or whether we deliberately arrive at an opposite conclusion. \* \* \*

Now, I entirely dissent, and I think all reasonable persons would dissent, from the proposition that any act done in the course of a political rising, or in the course of any insurrection is necessarily of a political character. Everybody would agree, I think, with this—that it is not everything done during the period during which a political rising exists that could be said to be of a political character. A man might be joining in an insurrection, joining in a rising, joining in that which in itself is a pure political matter, but notwithstanding that he was engaged in a political rising, if he were deliberately, for a matter of private revenge or for the purpose of doing injury to another, to shoot an unoffending man, because he happened himself to be one of an insurgent crowd and had a revolver in his hand, no reasonable man would question that he was guilty of the crime of murder, because that offence so committed by him could not be said to have any relation at all to a political crime, namely, a crime which in law ought to be punished with the punishment awarded for such a crime.

Now what is the meaning of crime of a political character? I have thought over this matter very much indeed, and I have thought whether any definition can be given of the political character of the crime—I mean to say, in language which is satisfactory. I have found none at all, and I can imagine for myself none so satisfactory, and to my mind so complete, as that which I find in a work which I have now before me, and the language of which for the purpose of my present judgment I entirely adopt, and that is the expression of my brother Stephen in his *History of the Criminal Law of England* in volume 2, pp. 70, 71. I will not do more than refer to the interpretations, other than those with which he agrees, which have been given upon this expression, “political character”; but I adopt his definition absolutely. “The third meaning which may be given to the words, and which I take to be the true meaning, is somewhat more complicated than either of those I have described. An act often falls under several different definitions. For instance, if a civil war were to take place, it would be high treason by levying war against the Queen. Every case in which a man was shot in action would be murder. Whenever a house was burnt for military purposes arson would be committed. To take

cattle, etc., by requisition would be robbery. According to the common use of language, however, all such acts would be political offences, because they would be incidents in carrying on a civil war. I think, therefore, that the expression in the Extradition Act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances. I do not wish to enter into details beforehand on a subject which might at any moment come under judicial consideration." The question has come under judicial consideration, and having had the opportunity before this case arose of carefully reading and considering the views of my learned brother, having heard all that can be said upon the subject, I adopt his language as the definition that I think is the most perfect to be found or capable of being given as to what is the meaning of the phrase which is made use of in the Extradition Act.

Now, was this act done by Castioni of a political character? That there was a general rising of one party there can be no doubt. They were as it were levying war against the Government. That they anticipated violence or violent resistance there can be little doubt. The very fact that five men of the opposite party were bound and put in front of those who were making the attack shews the object. "We expect an attack to be made upon us; we expect personal violence; and these five persons are the most likely if they are put in front to deter those who would offer violence to us from doing so." I think it is immaterial whether or not one gate was broken open, or whether the gates had been burst open or not. The question really is whether or not this was an act done by this prisoner in his character of a political insurgent at that time, and I do not think it signifies whether or not he had come into Bellinzona on the day before, or in the morning of the day on which this occurrence took place. If he was a citizen of the place, taking his part in a movement of a political character, which he chose to join in because he thought it was for the benefit of the political side to which he desired to attach himself, I cannot come to the conclusion that he is to be deprived of the privilege of the refuge afforded to him simply because, even after the palace was broken into, having a revolver in his hand, he did make use of it in a way which is very much indeed to be deplored, because I find no evidence which satisfies me that his object in firing at Rossi was to take that poor man's life, or to pay off any old grudge which he had against him, or to revenge himself for anything in the least degree which Rossi or any one of the community had ever personally done to him. When it is said that he took aim at Rossi, there is not a particle of evidence that Rossi was even known to him by name.

I cannot help thinking that everybody knows there are many acts of a political character done without reason, done against all reason; but at the same time, one cannot look too hardly and weigh in golden

scales the acts of men hot in their political excitement. We know that in heat and in heated blood men often do things which are against and contrary to reason; but none the less an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who can calmly reflect upon it after the battle is over.

For the reasons I have expressed, I am of opinion that this rule ought to be made absolute, and that the prisoner ought to be discharged.<sup>91</sup>

<sup>91</sup> In *Re Ezeta* (D. C.) 62 Fed. 972, 998, 999 (1894), Judge Morrow says: "In the *Castioni* Case, supra, decided in 1891, the question was discussed by the most eminent counsel at the English bar, and considered by distinguished judges, without a definition being framed that would draw a fixed and certain line between a municipal or common crime and one of a political character. \* \* \* Applying, by analogy, the action of the English court in that case to the four cases now before me, under consideration, the conclusion follows that the crimes charged here, associated as they are with the actual conflict of armed forces, are of a political character."

For further illustrations of political and non-extraditable offences see *Cazo's Case*, 1887, in 1 *Moore on Extradition*, 324; *The St. Alban's Raid*, 1864, Id. 322; *Burley's Case*, 1864, Id. 319.

*"Political Offences:* 'Most codes extend their definitions of treason to acts not really against one's country. They do not distinguish between acts against the government and acts against the oppressions of the government. The latter are virtues, yet have furnished more victims to the executioner than the former. \* \* \* The unsuccessful strugglers against tyranny have been the chief martyrs of treason laws in all countries. \* \* \* Treasons, then, taking the simulated with the real, are sufficiently punished by exile.' *Jefferson to Carmichael and Short*, 1792, 1 *Am. St. Pap. For. Rel.* 258.

"In recent years there has been much discussion as to the nature of the crime committed in the assassination of the head of a government and of other public officials; whether it is to be put upon the footing of ordinary murder, or whether it shall be classed among those political offences which are exempt from extradition proceedings. Is it possible to make a distinction, as Mr. Jefferson suggests, between acts directed against tyranny, and those of a mere common-law character? Some such distinction has probably influenced statesmen in their dealings with the question of extradition. But as offences of this class have become more common and have invaded the dominions of the most liberal governments, public opinion would seem to be undergoing a change in regard to them.

"Soon after the assassination of President Garfield, the United States government entered into two treaties of extradition—that with Belgium of 1882, and that with Luxembourg of 1883—in which it is stipulated that 'an attempt against the life of the head of a foreign government or against that of any member of his family, when such attempt comprises the act either of murder or assassination or of poisoning, shall not be considered a political offence or an act connected with such an offence.' An extradition treaty between the United States and Russia, 1893, contains a similar clause.

"By an agreement between the governments of Russia and Prussia in 1888, for the basis of an extradition convention, attempts against the life of the emperor of Russia or the members of his family are to be considered as extraditable offences. And further, 'the fact that the crime or offence, in respect whereof extradition is demanded, has been committed for a political object, shall in no case be a reason for refusing extradition.'" 2 *Lowe's Life of Bismarck*, 19.

On this subject, see 1 *Moore's Extradition*, 303-326.

*Freeman Snow's Cases and Opinions on International Law*, p. 171, note (1893).

It is not usual for nations to surrender their own subjects even although



## In re MEUNIER.

(Queen's Bench, 1894. L. R., 1894, 2 Q. B. 415.)

Application for a writ of habeas corpus to bring up and discharge a prisoner named Meunier, who had been committed by Sir John Bridge, the Chief Magistrate at Bow Street, for surrender to the French Government under the Extradition Acts, 1870 and 1873 (33 & 34 Vict. c. 52; 36 & 37 Vict. c. 60.)

The prisoner was charged with wilfully causing two explosions in France, one at the Café Véry in Paris, which caused the death of two persons, and the other at certain barracks. It was proved by the witnesses whose depositions were taken in France, as well as by a statement voluntarily made by the prisoner himself to the inspector of police who arrested him in London, that the prisoner was an anarchist. \* \* \*

CAVE, J.<sup>92</sup> I am of opinion that this application for a writ of habeas corpus must be refused. \* \* \*

The last point taken is that, so far as regards the outrage at the

they may be guilty of the crime with which they are charged. To prevent disputes of this nature it is customary to exclude such citizens from the operation of the treaty, by an express clause to that effect. See Trimble's Case, 1884, 1 Moore on Extradition, 168.

"The exemption of citizens from extradition has been maintained on various grounds. The only one which need seriously be noticed is that by the laws of most countries provision is made for the trial and punishment of their citizens for offences committed abroad, and that a state should not deliver up one of its citizens to be tried before a foreign tribunal when he can be punished at home under its own laws. By England and the United States alone are offences, even when committed by their citizens or subjects, treated as entirely local." 1 Moore's Extradition, 153.

"In negotiating extradition treaties these two states have therefore been willing to stipulate for the rendition of their own subjects or citizens. Indeed, the United States for a time refused to enter into extradition treaties on any other basis; but since 1852 this objection appears to have been waived, and a large number of our treaties of extradition, as that with Mexico, exempts each party from the obligation to surrender its own citizens.

"But as this exemption from the obligation to surrender citizens was doubtless inserted in these treaties in deference to the opinion of other states, it is not probable that it was intended as an absolute prohibition upon the President of the United States; indeed, the wording of the clause would seem to imply a discretion on the part of the contracting parties.

"In 1890, the Institute of International Law, after an exhaustive discussion of the subject of extradition, adopted a series of resolutions, the sixth of which was as follows:

"Between countries whose criminal legislation rests on similar foundations, and which have confidence in each other's judicial institutions, the extradition of their own citizens would be a means of securing the good administration of criminal justice, because it ought to be desirable that the authorities of the *forum delicti commissi* should, if possible, be called upon to try the case."

"See on this subject: 1 Moore's Extradition, 152; Dana's Wheaton, pp. 189-191, notes."

Freeman Snow's Cases and Opinions on International Law (1893) p. 160, note.

<sup>92</sup> The statement of facts is abridged and part of the opinion is omitted.

barracks, the offence charged is one of a political character, and therefore the accused is not liable to be surrendered under the Extradition Acts; for it is said that the outrage was an attack on Government property, and was an attempt to destroy the quarters occupied by the troops of the French Government. It appears to me that, in order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not. In the present case there are not two parties in the State, each seeking to impose the Government of their own choice on the other; for the party with whom the accused is identified by the evidence, and by his own voluntary statement, namely, the party of anarchy, is the enemy of all Governments. Their efforts are directed primarily against the general body of citizens. They may, secondarily and incidentally, commit offences against some particular Government; but anarchist offences are mainly directed against private citizens. I agree, as to this question also, with the view taken by Sir John Bridge; and I am of opinion that the crime charged was not a political offence within the meaning of the Extradition Act.

For these reasons I am of opinion that the contention on behalf of the prisoner fails on all grounds, and that the application for a writ of habeas corpus must be refused.

COLLINS, J. I am of the same opinion, and on the same grounds. Application refused.<sup>98</sup>

<sup>98</sup> In accordance with the doctrine laid down in the principal case, crimes committed by anarchists against heads of states and governments, which would be regarded as political offenses if committed by political parties struggling to overthrow the government, are regarded as nonpolitical offenses, and therefore persons committing such crimes are subject to extradition.

## CHAPTER V

## TREATIES

SECTION 1.—DEFINITION OF TREATY AND EXTENT OF  
TREATY-MAKING POWER

## FOSTER et al. v. NEILSON.

(Supreme Court of the United States, 1829. 2 Pet. 253, 7 L. Ed. 415.)

Mr. Chief Justice MARSHALL<sup>1</sup> delivered the opinion of the Court.

This suit was brought by the plaintiffs in error in the court of the United States, for the eastern district of Louisiana, to recover a tract of land lying in that district, about thirty miles east of the Mississippi, and in the possession of the defendant. The plaintiffs claimed under a grant for 40,000 arpens of land, made by the Spanish governor, on the 2d of January, 1804, to Jayme Joydra, and ratified by the king of Spain on the 29th of May, 1804. The petition and order of survey are dated in September, 1803, and the return of the survey itself was made on the 27th of October in the same year. The defendant excepted to the petition of the plaintiffs, alleging that it does not show a title on which they can recover; that the territory, within which the land claimed is situated, had been ceded, before the grant, to France, and by France to the United States; and that the grant is void, being made by persons who had no authority to make it. The court sustained the exception, and dismissed the petition. The cause is brought before this Court by a writ of error.

The case presents this very intricate, and at one time very interesting question: To whom did the country between the Iberville and the Perdido rightfully belong, when the title now asserted by the plaintiffs was acquired?

This question has been repeatedly discussed with great talent and research, by the government of the United States and that of Spain. The United States have perseveringly and earnestly insisted, that by the treaty of St. Ildefonso, made on the 1st of October in the year 1800, Spain ceded the disputed territory as part of Louisiana to France; and that France, by the treaty of Paris, signed on the 30th of April, 1803, and ratified on the 21st of October in the same year (8 Stat. 200), ceded it to the United States. Spain has with equal perseverance and earnestness, maintained, that her cession to France comprehended that territory only which was at that time denominated

<sup>1</sup> The statement of facts and part of the opinion are omitted.

Louisiana, consisting of the island of New Orleans, and the country she received from France west of the Mississippi. \* \* \*

In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous.

We think then, however individual judges might construe the treaty of St. Ildefonso, it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed.

The convulsed state of European Spain affected her influence over her colonies; and a degree of disorder prevailed in the Floridas, at which the United States could not look with indifference. In October, 1810, the president issued his proclamation, directing the governor of the Orleans territory to take possession of the country as far east as the Perdido, and to hold it for the United States. This measure was avowedly intended as an assertion of the title of the United States; but as an assertion, which was rendered necessary in order to avoid evils which might contravene the wishes of both parties, and which would still leave the territory "a subject of fair and friendly negotiation and adjustment."

In April, 1812, congress passed "an act to enlarge the limits of the state of Louisiana." This act describes lines which comprehend the land in controversy, and declares that the country included within them shall become and form a part of the state of Louisiana.

In May of the same year, another act was passed, annexing the residue of the country west of the Perdido to the Mississippi territory.

And in February, 1813, the president was authorized "to occupy and hold all that tract of country called West Florida, which lies west of the river Perdido, not now in possession of the United States."

On the 3d of March, 1817, congress erected that part of Florida which had been annexed to the Mississippi territory, into a separate territory, called Alabama.

The powers of government were extended to, and exercised in those parts of West Florida which composed a part of Louisiana and Mississippi, respectively; and a separate government was erected in Alabama. 3 Stat. 371.

In March, 1819, congress passed "an act to enable the people of Alabama to form a constitution and state government." And in De-

cember, 1819, she was admitted into the Union, and declared one of the United States of America. The treaty of amity, settlement, and limits, between the United States and Spain, was signed at Washington, on the 22d day of February, 1819, but was not ratified by Spain till the 24th day of October, 1820; nor by the United States until the 22d day of February, 1821. So that Alabama was admitted into the Union as an independent state, in virtue of the title acquired by the United States to her territory, under the treaty of April, 1803.

After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the legislature. Had this suit been instituted immediately after the passage of the act for extending the bounds of Louisiana, could the Spanish construction of the treaty of St. Ildefonso have been maintained? Could the plaintiff have insisted that the land did not lie in Louisiana, but in West Florida; that the occupation of the country by the United States was wrongful; and that his title under a Spanish grant must prevail, because the acts of congress on the subject were founded on a misconstruction of the treaty? If it be said, that this statement does not present the question fairly, because a plaintiff admits the authority of the Court, let the parties be changed. If the Spanish grantee had obtained possession so as to be the defendant, would a Court of the United States maintain his title under a Spanish grant, made subsequent to the acquisition of Louisiana, singly on the principle that the Spanish construction of the treaty of St. Ildefonso was right, and the American construction wrong? Such a decision would, we think, have subverted those principles which govern the relations between the legislative and judicial departments, and mark the limits of each. \* \* \*

A treaty is in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. Const. art. 6,

cl. 2. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court. \* \* \*

We are of opinion then, that the court committed no error in dismissing the petition of the plaintiff, and that the judgment ought to be affirmed with costs.<sup>3</sup>

<sup>3</sup> See also *U. S. v. Arredondo*, 6 Pet. 691, 8 L. Ed. 547 (1832); *Gracia v. Lee*, 12 Pet. 511, 9 L. Ed. 1176 (1838).

"Whether or not Greer county is part of the state of Texas depends upon where the northern boundary line of our state, dividing it from Indian Territory, should be located. This is a question to be settled by the political and not the judicial department of our state government. It is judicially known to us that the political authority has always claimed the territory composing Greer county as part of the domain of our state, and has exercised acts of control over it; such as organizing it into a county and attaching it to another of our counties for judicial purposes, etc. We cannot undertake to limit the jurisdiction thus recognized and asserted by the political department, and until that department ceases to exercise such authority we must treat this county as subject to the jurisdiction of the state of Texas. *Bedel v. Loomis*, 11 N. H. 15 (1840); *State v. Dunwell*, 3 R. I. 127 (1855); *Guadalupe County v. Wilson County*, 58 Tex. 228 (1882); *Foster v. Neilson*, 2 Pet. 254 [7 L. Ed. 415 (1829)]; *United States v. Arredondo*, 6 Pet. 691 [8 L. Ed. 547 (1832)]." *Willie, C. J.*, in *Harrold v. Arrington*, 64 Tex. 233 (1885).

In *Re Cooper*, 148 U. S. 472, 12 Sup. Ct. 453, 36 L. Ed. 232 (1892), the court held, *inter alia*, that a treaty is the law of the land where it prescribes a rule for determining rights of citizens or subjects; that courts may not determine whether government's action is proper in pending negotiations; that the Supreme Court has no power to determine political questions and that courts are bound by the government's act asserting dominion over any part of the (Behring) Sea.

So in *The James G. Swan* (D. C.) 50 Fed. 111 (1892), the court held that the President and Congress are vested with all the responsibility and powers of the government for determination of questions as to the maintenance and extension of our national dominion, and inasmuch as they had assumed jurisdiction and sovereignty over the waters of Behring Sea outside of the three-mile limit, the people and the courts are bound by such action.

In *Wilson v. Shaw*, 204 U. S. 24, 32, 27 Sup. Ct. 233, 51 L. Ed. 851 (1907), the title of the United States to the Panama Canal Zone was involved. Mr. Justice Brewer, speaking for the court, said on this subject:

"He contends that whatever title the government has was not acquired as provided in the act of June 28, 1902, by treaty with the Republic of Colombia. A short but sufficient answer is that subsequent ratification is equivalent to original authority. The title to what may be called the Isthmian or Canal Zone, which at the date of the act was in the Republic of Colombia, passed by an act of secession to the newly formed Republic of Panama. The latter was recognized as a nation by the President. A treaty with it, ceding the Canal Zone, was duly ratified. 33 Stat. 2234. Congress has passed several acts based upon the title of the United States, among them one to provide a temporary government, 33 Stat. 429; another, fixing the status of merchandise coming into the United States from the Canal Zone, 33 Stat. 843 [Comp. St. § 5323]; another, prescribing the type of canal. 34 Stat. 611. These show a full ratification by Congress of what has been done by the Executive. Their concurrent action is conclusive upon the courts. We have no supervising control over the political branch of the government in its action within the limits

PEOPLE *ex rel.* ATTORNEY GENERAL *v.* GERKE & CLARK.

(Supreme Court of California, 1855. 5 Cal. 381.)

Appeal from the District Court of the Fourth Judicial District, San Francisco County.

On the 23d of August, 1853, one Auguste Deck, a citizen of Prussia, died intestate, in the city of San Francisco, leaving undisposed of, a large amount of real estate.

On the 14th of September following, letters of administration were granted by the probate court to the defendant, Gerke.

Clark afterwards purchased from the absent heirs a large portion of the property.

An information was filed by the Attorney General in the court below, citing the defendants to show cause why Deck's estate should not escheat to the state of California. The court below entered judgment, *pro forma*, in favor of the people. Defendants appealed.

HEYDENFELDT, J. By a convention between the United States and the kingdom of Prussia, made in the year 1828 (8 Stat. 378), the fourteenth article provides: "And where, on the death of any person holding real estate, within the territory of the one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation."

The Attorney General, in support of the information filed in this case, denies the power of the federal government to make such a provision by treaty, and the determination of this case depends upon the solution of that question. Cases have frequently arisen where aliens have claimed to inherit by virtue of treaty provisions analogous to the one under consideration, and in all of them, so far as I have examined, the stipulations were enforced in favor of the foreign claimants. See *Chirac v. Chirac*, 2 Wheat. 259, 4 L. Ed. 234; *Orr v. Hodgson*, 4 Wheat. 453, 4 L. Ed. 613; *Society for The Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662; *Hughes v. Edwards*, 9 Wheat. 489, 6 L. Ed. 142; *Carneal v. Bank*, 10 Wheat. 181, 6 L. Ed. 297.

But in none of these cases was the question raised as to the power of the federal government to make the treaty. It has been the practice of the government from an early period after the ratification of the Constitution, and its power is now, I believe, for the first time disputed.

of the Constitution. *Jones v. United States*, 137 U. S. 202 [11 Sup. Ct. 80, 34 L. Ed. 691 (1890)], and cases cited in the opinion; *In re Cooper*, 143 U. S. 472, 490, 503 [12 Sup. Ct. 453, 36 L. Ed. 232 (1892)]."

The language which grants the power to make treaties, contains no word of limitation; it does not follow that the power is unlimited. It must be subject to the general rule, that an instrument is to be construed so as to reconcile and give meaning and effect to all its parts. If it were otherwise, the most important limitation upon the powers of the federal government would be ineffectual, and the reserved rights of the States would be subverted. This principle of construction as applied, not only in reference to the Constitution of the United States, but particularly in the relation of all the rest of it, to the treaty making grant, was recognized both by Mr. Jefferson and John Adams, two leaders of opposite schools of construction. See Jefferson's Works, vol. III, p. 135; and vol. VI, p. 560.

It may, therefore, be assumed that, aside from the limitations and prohibitions of the Constitution upon the powers of the federal government, "the power of treaty was given, without restraining it to particular objects, in as plenipotentiary a form as held by any sovereign in any other society." This principle, as broadly as I have deemed proper to lay it down, results from the form and necessities of our government, as elicited by a general view of the federal compact. Before the compact, the states had the power of treaty making as potentially as any power on earth; it extended to every subject whatever. By the compact, they expressly granted it to the federal government in general terms, and prohibited it to themselves.

The general government must, therefore, hold it as fully as the states held who granted it, with the exceptions which necessarily flow from a proper construction of the other powers granted, and those prohibited by the Constitution. The only questions, then, which can arise in the consideration of the validity of a treaty, are: First. Is it a proper subject of treaty according to international law or the usage and practice of civilized nations? Second. Is it prohibited by any of the limitations in the Constitution?

Taking for illustration the present subject of treaty, no one will deny that, to the commercial states of the Union, and indeed to the citizens of any state who are engaged in foreign commerce, a stipulation to remove the disability of aliens to hold property is of paramount importance, or, at any rate, it may be so considered by the states, and demanded as a part of their commercial polity.

Now, as by the compact the states are absolutely prohibited from making treaties, if the general government has not the power, then we must admit a lameness and incompleteness in our whole system, which renders us inferior to any other enlightened nation, in the power and ability to advance the prosperity of the people we govern.

Mr. Calhoun, in his discourse on the Constitution and government of the United States, has given to this power a full consideration, and I cannot doubt that the view which I have taken, is sustained by his

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reasoning. (1) According to his opinion, the following may be classed as the limitations on the treaty making power: First. It is limited strictly to questions *inter alios*, "all such clearly appertain to it." Second. "By all the provisions of the Constitution which inhibit certain acts from being done by the Government or any of its departments." Third: "By such provisions of the Constitution as direct certain acts to be done in a particular way, and which prohibit the contrary." Fourth. "It can enter into no stipulation calculated to change the character of the government, or to do that which can only be done by the Constitution making power; or which is inconsistent with the nature and structure of the government or the objects for which it was formed."

Having stated these as the only limitations, the author adds: "Within these limits all questions which may arise between us and other powers, be the subject matter what it may, fall within the limits of the treaty making power, and may be adjusted by it."

One of the arguments at the bar against the extent of this power of treaty is, that it permits the federal government to control the internal policy of the states, and, in the present case, to alter materially the statutes of distribution.

If this was so to the full extent claimed, it might be a sufficient answer to say, that it is one of the results of the compact, and, if the grant be considered too improvident for the safety of the states, the evil can be remedied by the constitution making power. I think, however, that no such consequence follows as is insisted. The statutes of distribution are not altered or affected. Alienage is the subject of the treaty. Its disability results from political reasons which arose at an early period of the history of civilization, and which the enlightened advancement of modern times, and the changes in the political and social condition of nations, have rendered without force or consequence. The disability to succeed to property is alone removed, the character of the person is made politically to undergo a change, and then the statute of distribution is left to its full effect, unaltered and unimpaired in word or sense. If there is one object more than another which belongs to our political relations, and which ought to be the subject of treaty regulations, it is the extension of this comity which is so highly favored by the liberal spirit of the age, and so conducive in its tendency to the peace and amity of nations.

Even if the effect of this power was to abrogate to some extent the legislation of the states, we have authority for admitting it, if it does not exceed the limitations which we have cited from the work of Mr. Calhoun, and laid down as the rule to which we yield our assent.

During the War of the Revolution, the states had passed acts of confiscation, acts against the collection of debts due to the subjects of Great Britain, and acts for the punishment of treason. By the treaty of peace, the effects of these various acts were provided against, and

as late as 1792, long after the ratification of the Constitution, Mr. Jefferson, in answer to the complaint of the British Minister, Mr. Hammond, distinctly recognized the doctrine, that treaties are the supreme law of the land, and that state legislation must yield to them; and he therein cites the acts of state Legislatures and the decisions of state judges, who all conform to the same opinion. See vol. III, Jefferson's Works, 365.

I can see no danger which can result from yielding to the federal government the full extent of powers which it may claim from the plain language, intent, and meaning of the grant under consideration. Upon some subjects, the policy of a state government, as shown by her legislation, is dependent upon the policy of foreign governments, and would be readily changed upon the principle of mutual concession. This can only be effected by the action of that branch of the state sovereignty known as the general government, and when effected, the state policy must give way to that adopted by the governmental agent of her foreign relations.

It results from these views, that the treaty of 1828, with Prussia, is valid, and that aliens, subjects of Prussia, are protected by its provisions.

The judgment is reversed, and the cause remanded.

BRYAN, J. (concurring). I agree with my Associate, that the doctrine has been settled in the United States courts, in cases relating to analogous treaties to the one in question, that the courts of the country should extend to aliens the full protection which the treaty seeks to give them, in the acquisition or distribution of property.

In *Chirac v. Chirac*, 2 Wheat. 259, 4 L. Ed. 234, the treaty with France of 1778 (8 Stat. 12) was passed upon, and it was decided by the United States court, that it secured to the citizens and subjects of either power, the privilege of holding lands in the territory of the other. This was reaffirmed in *Carneal v. Banks*, 10 Wheat. 189, 6 L. Ed. 297. A similar provision in the treaty with Great Britain of 1794 (8 Stat. 116), was also sanctioned by the Supreme Court of the United States, in *Hughes v. Edwards*, 9 Wheat. 489, 6 L. Ed. 142. So far as the authority of the federal courts is concerned, they appear to have uniformly administered the law upon the meaning given by construction to the language of the treaty, seeming never to have, in any respect, doubted the power of the general government to provide by treaty with a foreign power for the mutual protection of the property belonging to the citizens or subjects of each in the territory of the other. The treaty making power of the federal government must, from necessity, be sufficiently ample so as to cover all of the usual subjects of treaties between different powers. If we were to deny to the treaty making power of our Government the exercise of jurisdiction over the property of deceased aliens, upon the ground of interference with the course of descents, or the laws of distribution of a state where property may

exist; by parity of reasoning we should not make commercial treaties with foreign nations; because, it might be said, some of their provisions would injure the business of a portion of the citizens of one of the states of the Union.

If the treaty making power which resides in the federal government is not sufficient to permit it to arrange with a foreign nation the distribution of an alien's property, then that power resides nowhere, (since it is denied to the states,) and we must confess our system of government so weak and faulty, as to be incapable of extending to its citizens in foreign lands that protection which is most common amongst a majority of modern civilized nations.

I agree with my Associate in the conclusion, that the treaty making power of the federal government was sufficient to enable it to insert the article in the treaty with Prussia, which has before been quoted; and that the alien heirs of Deck are protected by its provisions, and are entitled to withdrawal of the proceeds of the estate.

I therefore concur in the reversal of the judgment.

MURRAY, C. J. I neither concur nor dissent from the opinion of the court, not having heard the argument or examined the questions sufficiently to arrive at any satisfactory conclusion.<sup>3</sup>

<sup>3</sup> For the binding effect of a *modus vivendi* made by the government of the United States without the advice and consent of the Senate, see *Watts v. United States*, 1 Wash. T. 288 (1870).

In *Geofroy v. Riggs*, 133 U. S. 258, 266-267, 10 Sup. Ct. 295, 33 L. Ed. 642 (1890), post, p. 446, Mr. Justice Field said, on behalf of the Supreme Court:

"That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement. The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co. v. Lowe*, 114 U. S. 525, 541, 5 Sup. Ct. 995, 29 L. Ed. 264. But, with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. *Ware v. Hylton*, 3 Dall. 199, 1 L. Ed. 568; *Chirac v. Chirac*, 2 Wheat. 259, 4 L. Ed. 234; *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628; 8 Opinions Attys. Gen. 417; *People v. Gerke*, 5 Cal. 381."

## SECTION 2.—TIME OF GOING INTO EFFECT

## THE ELIZA ANN.

(High Court of Admiralty, 1812. 1 Dod. 244.)

These were three cases of American ships, laden with hemp, iron, and other articles, and seized in Hanoe Bay, on the 11th of August, 1812, by his Majesty's ship *Vigo*, which was then lying there, with other British ships of war. A claim was given, under the direction of the Swedish minister, for the ships and cargoes, "as taken within one mile of the main land of Sweden, and within the territory of his Majesty the King of Sweden, contrary to and in violation of the law of nations, and the territory and jurisdiction of his said Majesty."

Sir W. Scott.<sup>4</sup> These vessels came into Hanoe Bay, for the purpose of taking the benefit of British convoy, and were seized in consequence of the order for the detention of American property. This order has been since followed up by a declaration of war; the ships, therefore, would be liable to condemnation, unless it can be shown that they are entitled to some special protection. \* \* \*

A claim, however, has been given by the Swedish minister. Now, in order to support and give effect to this claim, two things are necessary to be established. First, it is requisite that Sweden should appear to have been in a state of perfect neutrality at the time when the seizure was made. Secondly, it must be shown that the act of violence was committed within the limits of Swedish territory. For, if the scene of hostility did not lie within the territories of the neutral state, then has there been no violation of its neutral rights, and consequently there exists no ground of complaint, and no foundation for the claim.

The first question then is, how far, in August, 1812, Sweden was to be considered as a neutral country. \* \* \*

This was the state of things originally; British ships were excluded from the ports of Sweden, and the island of Hanoe was occupied by British forces.

After this, a declaration of war was issued by the government of Sweden. \* \* \*

This war has, however, been happily terminated by a treaty of peace, which was signed by the plenipotentiaries of the two countries, on the 18th of July, ratified by the Prince Regent of Great Britain on the 4th of August, and by the King of Sweden on the 17th of the same month. From the result of these dates it has been contended, that the war had ceased, and that friendship had been re-established before the

<sup>4</sup> Part of the opinion is omitted.

time when these vessels were seized. The question, therefore, comes to this, whether a ratification is or is not necessary to give effect and validity to a treaty signed by plenipotentiaries. Upon abstract principles we know that, either in public or private transactions, the acts of those who are vested with a plenary power are binding upon the principal. But, as this rule was in many cases found to be attended with inconvenience, the later usage of states has been to require a ratification, although the treaty may have been signed by plenipotentiaries. According to the practice now prevailing, a subsequent ratification is essentially necessary; and a strong confirmation of the truth of this position is that there is hardly a modern treaty in which it is not expressly so stipulated; and, therefore, it is now to be presumed, that the powers of plenipotentiaries are limited by the condition of a subsequent ratification. The ratification may be a form, but it is an essential form; for the instrument, in point of legal efficacy, is imperfect without it. I need not add, that a ratification by one power alone is insufficient; that, if necessary at all, it must be mutual; and that the treaty is incomplete till it has been reciprocally ratified.

It is said, however, that the treaty, when ratified, refers back to the time of its signature by the plenipotentiaries, and that it does so in this case more especially on account of the terms in which it is drawn. The words in one of the articles of the treaty, "*Dès ce moment tout sujet de mésintelligence, qui ait pu subsister sera regardé comme entièrement cessant et détruit,*" have been pointed out, and from these it has been contended, that all hostilities were to cease the moment the treaty was signed. But I take that not to be the case; the positive and enacting part of the articles is, that there shall be a firm and inviolable peace between the two countries; the other part is descriptive only of the pacific intention of the parties, and of their agreement to bury in oblivion all the causes of the war. It does not stand in the same substantive way as the former part of the article, and must be considered as mere explanatory description. The nature of a treaty of peace is well explained by Vattel (book iv, c. 2), who lays it down that "a treaty of peace can be no more than an agreement. Were the rules (he says) of an exact and precise justice to be observed in it, each punctually receiving all that belongs to him, a peace would become impossible." He goes on to say, that, "as in the most just cause we are never to lose sight of the restoration of peace but are constantly to tend towards this salutary view, no other way is left than to agree on all the claims and grievances on both sides, and to extinguish all differences by the most equitable convention which the juncture will admit of." It is, therefore, an agreement to waive all discussion concerning the respective rights of the parties, and to bury in oblivion all the original causes of the war. It is an explanation of the nature of that peace and good understanding which is to take place between the two countries, whenever that event shall be happily accomplished. It would be a stretch be-

yond the limits to which a fair interpretation of these words could be carried, to say they were intended to convey any other meaning. I am of opinion, therefore, that the ratification is the point from which the treaty must take effect. "Dès ce moment" must be referred to the moment at which the treaty received its valid existence by mutual ratification. It is perfectly clear that it was so considered on the part of Sweden. The British officer who was sent to the Swedish coast was still received with the same caution as in the time of war, and was blindfolded before he was permitted to enter Carlsham. Hanoë remained in British possession, and the only communication between that island and the main land of Sweden was by flags of truce. Though it was reasonable to expect that Sweden would return to the relations of amity with this country, yet it is quite clear that she had not at that time confirmed the treaty, and, therefore, could not be entitled to the benefit of a neutral character.

But, in order to give validity to the present claim, another proposition must necessarily be maintained. \* \* \*

I am of opinion that the claim which has been given fails upon the two essential points, both in respect of the neutrality of Sweden, and of the neutrality of the place of capture, and consequently that these ships and cargoes are liable to condemnation.

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### LLOYD v. BOWRING.

(King's Bench, 1920. 38 Times Law Rep. 397.)

The plaintiff in this case claimed moneys alleged to be due under two policies of insurance, together with interest until payment or judgment.

Mr. Barrington-Ward, K. C., and Mr. C. J. Conway appeared for the plaintiff; and Mr. R. A. Wright, K. C., and Mr. Cloughton Scott for the defendant.

On November 16, 1917, the plaintiff took out a policy of insurance which was underwritten by the defendant and other underwriters. By the policy each underwriter bound himself to pay the amount of his separate subscription "if peace is not declared between Great Britain and Germany on or before June 30, 1919." On the same date the plaintiff took out another policy, also underwritten by the defendant and others, by which each underwriter bound himself to pay the amount of his separate subscription if peace was not declared between Great Britain and Germany on or before September 30, 1919.

The plaintiff now contended that peace had not been declared between Great Britain and Germany either on or before June 30, 1919, or on or before September 30, 1919. He had claimed payment under the policies, but the defendant had refused to pay; and notice had been

given to the defendant that interest also would be claimed on the amounts due.

The defendant admitted the policies, but contended that peace was declared between Great Britain and Germany on or before June 30, 1919—viz., on June 28. Alternatively, he pleaded that the date on which peace between Great Britain and Germany had been declared had not yet been determined, and that the action was therefore premature.

Mr. Barrington-Ward, in opening the case referred to *Kotzias v. Tyser*, 36 The Times L. R. 194, in which Mr. Justice Roche had decided that peace had not been "concluded" until January of the present year, and he submitted that the phrase "peace is not declared" could not be distinguished from the phrase "peace is not concluded."

Mr. Wright submitted that on June 28, 1919, peace was signed at Versailles, and from that moment commercial relations could, subject to certain restrictions, be resumed with Germany; and at that moment the state of war undoubtedly came to an end. The policy was a business document made between business men for a business purpose, and must be construed as such, irrespective of the more technical meaning that might be given to the words. Ratification of the treaty was a mere formality, and the essential fact was the signing of peace on June 28. He referred to Hall's International Law (6th Ed.) p. 554.

Mr. Justice SANKEY, in his judgment, said that the question was, when could peace be said to have been declared. The defendant contended that peace was declared on June 28, 1919; the plaintiff contended that it was not declared until January, 1920. In his view, the judgment of Mr. Justice Roche, in *Kotzias v. Tyser*, supra, concluded this case; he was bound to follow it, and he was satisfied that it was right.

His Lordship then referred to the Termination of War Act, 1918, and to a proclamation which appeared in the London Gazette for February 10, 1920, ordering that January 10, 1920, should be treated as the date of the termination of the war. In *Kotzias v. Tyser*, supra, the word used was "conclude," here the word was "declared"; and he thought that the present was the stronger case of the two, for a thing could not be "declared" to exist until it had actually come into existence.

There must therefore be judgment for the plaintiff on the main question. \* \* \*

<sup>5</sup> In *Rattray v. Holden*, 1920, 86 Times Law Rep. 798, 799, the court was called upon to construe a policy of insurance containing the words "the signing of peace between Great Britain and Germany." In the course of his opinion, Mr. Justice Darling said:

"Strictly speaking, there was not peace until the war ended, and the termination of the war with Germany was fixed by Order in Council as being on January 10, 1920. Until there was a termination of the war there could not be peace, for peace and war could not coexist. He doubted very much whether they could 'sign peace.' They could sign a treaty, however. These

## HARCOURT et al. v. GAILLARD et al.

(Supreme Court of the United States, 1827. 12 Wheat. 523, 6 L. Ed. 716.)

A British grant of land within the limits of the old Thirteen Colonies was made to the ancestor of the plaintiff on January 24, 1777, and the question in issue was whether the title to the land in controversy was in the British government or not at the date of the grant.

Mr. Justice JOHNSON delivered the opinion of the court: \* \* \*

But this is not the material fact in the case; it is this, that this limit was claimed and asserted by both of those states [South Carolina and Georgia] in the Declaration of Independence, and the right to it was established by the most solemn of all international acts, the treaty of peace. It has never been admitted by the United States, that they acquired anything by way of cession from Great Britain by that treaty. It has been viewed only as a recognition of pre-existing rights, and on that principle the soil and sovereignty, within their acknowledged limits, were as much theirs at the Declaration of Independence as at this hour. By reference to the treaty, it will be found that it amounts to a simple recognition of the independence and the limits of the United States, without any language purporting a cession or relinquishment of right on the part of Great Britain. In the last article of the treaty of Ghent will be found a provision respecting grants of land made in the islands then in dispute between the two states, which affords an illustration of this doctrine. By that article, a stipulation is made in favor of grants before the war, but none for those which were made during the war. And such is unquestionably the law of nations. War is a suit prosecuted by the sword; and where the question to be decided is one of original claim to territory, grants of soil made flagrante bello by the party that fails can only derive validity from treaty stipulations.<sup>7</sup>

were not artistic words at all; they were very loose words, and if they could not construe them strictly the plaintiff's case was a bad one. They could not sign peace when there was no peace, and there was no peace with Germany until by Order in Council January 10 was fixed as the date. The Act evidently contemplated loose expressions used in contracts. January 10 appeared to him to be the date with regard to which this contract was made and his judgment would be for the defendant with costs."

\* Part of the opinion is omitted.

<sup>7</sup> In *McIlvaine v. Cox's Lessee*, 4 Cranch, 209, 212, 2 L. Ed. 598 (1808), the Supreme Court of the United States say: "That the several states which composed this Union, so far at least as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign states, and that they did not derive them from concessions made by the British king. The treaty of peace contains a recognition of their independence, not a grant of it. From hence it results, that the laws of the several state governments were the laws of sovereign states, and as such were obligatory upon the people of such state from the time they were enacted." See also, *Inglis v. Trustees of Sailor's Snug Harbor*, 3 Pet. 99, 7 L. Ed. 617 (1830).



## HAVER v. YAKER.

(Supreme Court of the United States, 1869. 9 Wall. 32, 19 L. Ed. 571.)

Error to the Court of Appeals of Kentucky; the case being thus:

One Yaker, a Swiss by birth, who had come many years ago to the United States and become a naturalized citizen thereof, died in Kentucky in 1853, intestate, seized of real estate there. He left a widow, who was a resident and citizen of Kentucky, and certain heirs and next of kin, aliens and residents in Switzerland.

By the laws of Kentucky in force in 1853, the date of his death, aliens were not allowed to inherit real estate except under certain conditions, within which Yaker's heirs did not come, and if the matter was to depend on those laws, the widow was, by the laws then in force in Kentucky, plainly entitled to the estate.

However, in 1850, a treaty was "concluded and signed" by the respective plenipotentiaries of the two countries, between the Swiss Confederation and the United States (11 Stat. 587) upon the proper construction of which, as Yaker's heirs asserted—although the widow denied that the construction put upon the treaty by the heirs was a right one—these heirs were entitled to take and hold the estate. The treaty provided by its terms that it should be submitted on both sides to the approval and ratification of the respective competent authorities of each contracting party, and that the ratifications should be exchanged at Washington as soon as circumstances should admit. It was so submitted, but was not duly ratified, nor were the respective ratifications exchanged in Washington till November 8, 1855, at which time the ratification and exchange was made. And on the next day the President, by proclamation—the treaty having been altered in the Senate—made the treaty public.

In 1859 the Swiss heirs, who had apparently not heard before of their kinsman's death, instituted proceedings to have the real estate of their kinsman, now in possession of the widow, assigned to them, and arguing that on a right construction of the treaty it was theirs.

But a preliminary question, and in case of one resolution of it, a conclusive objection to their claim was here raised; the question, namely, at what time the treaty of 1850-55, as it regarded private rights, became a law. Was it when it bore date, or was it only when the ratifications were exchanged between the parties to it? If not until it was ratified, then there was no necessity of deciding whether by its terms, the heirs of Yaker had any just claim to this real estate, because in no aspect of the case could the treaty have a retroactive effect so as to defeat the title of the widow, which vested in her, by the law of Kentucky of 1853, on the death of her husband.

The Court of Appeals of Kentucky, where the heirs set up the treaty as a basis of their title, decided that it took effect only when ratified,

and so deciding against their claim, the case was now here for review under the twenty-fifth section of the Judiciary Act (Act Sept. 24, 1789, c. 20, 1 Stat. 85).

Carlisle & McPherson, for the heirs, citing Kent's Commentaries (vol. 1, p. 170), and *United States v. Reynes*, 9 How. 148, 289, 13 L. Ed. 74, contended that a treaty binds the contracting parties from its conclusion, and that this is understood to be from the day it is signed. If that view was right, the treaty was operative at the date of Yaker's death, and as they argued carried the estate to the heirs.

Montgomery Blair, opposed a brief of Porter & Beck being filed on the same side, argued that while the position of the other side might be admitted so far as respected the contracting governments, the position was not true as respected private rights. And this for a good reason. For that with us a treaty must be agreed to by the Senate, and this in secret session, before it becomes a law. While before the Senate it may be amended and largely altered. This particular treaty, the President's proclamation shows, was amended, and for aught that appears to the contrary, the very article upon which the heirs of Yaker now found their claim, may have been the only amendment made, and it may have been inserted long after Yaker's death and the accrual of the widow's rights.

If this view is right we need not inquire into the meaning of the treaty.

Mr. Justice DAVIS delivered the opinion of the court.

It is undoubtedly true, as a principle of international law, that, as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date. Wheaton's International Law, by Dana, 336, bottom paging. But a different rule prevails where the treaty operates on individual rights. The principle of relations does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications, and this we understand to have been decided by this court, in *Arredondo's Case*, reported in 6 Pet. 749, 8 L. Ed. 547. The reason of the rule is apparent. In this country, a treaty is something more than a contract, for the federal Constitution (article 6) declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it, as was done with the treaty under consideration. As the individual citizen, on whose rights of property it operates, has no means of knowing anything of it while before the Senate, it would be wrong in principle to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law, so as to make the ratification of the treaty relate back to its

signing, thereby divesting a title already vested, would be manifestly unjust, and cannot be sanctioned.

These views dispose of this case, and we are not required to determine whether this treaty, if it had become a law at an earlier date, would have secured the plaintiffs in error the interest which they claim in the real estate left by Yaker at his death.

Judgment affirmed.\*

### J. RIBAS É HIJO v. UNITED STATES.

(United States District Court for the District of Porto Rico, 1901. 1 Porto Rico Federal Reports, 71.)

The Congress of the United States declared that war existed with Spain from April 21, 1898. On August 12, 1898, hostilities between Spain and the United States were suspended, upon the signature of a project of agreement embodying the terms of a basis for the establishment of peace.

Before the cessation of hostilities, the United States seized a vessel named Paz, belonging to the plaintiff, for the storage of coal. The plaintiff claimed that the vessel was used for twelve months and two weeks, that is to say, from July 26, 1898, to August 12, 1899.

The answer of the United States admitted the alleged use from July 28, 1898, to May, 1899, but denied liability upon the ground that the vessel belonging to the plaintiff was enemy property, and was so seized by the military forces of the United States.

\* Mr. Justice Wayne, in *Davis v. Police Jury*, 9 How. 280, 289, 13 L. Ed. 138 (1850), says:

"All treaties, as well those for cessions of territory as for other purposes, are binding upon the contracting parties, unless when otherwise provided in them, from the day they are signed. The ratification of them relates back to the time of signing. Vattel, B. 4, c. 2, § 22; Mart Summary, B. 8, c. 7, § 5.

"It is true that, in a treaty for the cession of territory, its national character continues, for all commercial purposes; but full sovereignty, for the exercise of it, does not pass to the nation to which it is transferred until actual delivery. But it is also true, that the exercise of sovereignty by the ceding country ceases except for strictly municipal purposes, especially for granting lands. And for the same reason in both cases;—because, after the treaty is made, there is not in either the union of possession and the right to the territory which must concur to give *plenum dominium et utile*. To give that, there must be the *jus in rem* and the *jus in re*, or what is called in the common law of England the *juris et seisinæ conjunctio*. 'This general law of property applies to the right of territory no less than to other rights, and all writers upon the law of nations concur, that the practice and conventional law of nations have been conformable to this principle.' Puffendorf, par Barbeyrac, lib. 4, c. 9, § 8, note 2.

"In this case, after the treaty was made, and until Louisiana was delivered to France, its possession continued in Spain. The right to the territory, though in France, was imperfect until ratified, but absolute by ratification from the date of the treaty."

The learned justice cited with approval, indeed he based his argument and opinion upon the judgment of Sir William Scott in *The Fama*, 5 C. Rob. 106 (1804), ante, p. 181.

The plaintiff brought action for ten thousand dollars, for the seizure and use of the vessel. The District Court dismissed the suit, and the plaintiff petitioned for a rehearing of the cause of action.<sup>9</sup>

HOLT, Judge, delivered the following opinion:

A rehearing is asked upon the ground that the court has found, as a matter of fact, that the use continued until April, 1899, and as the protocol, followed by the President's proclamation, was dated August 12, 1898, the complainants say they should recover on a quantum meruit the value of the use of the vessel between these dates. This was a seizure in time of war, and not in time of peace. It was, as has been said, a special case arising from the necessary operation of war, and the war power of the government concluded it was necessary to take and use the property. Even conceding that the seizure did not terminate all right of the Spanish owner in the property, or to any use of it, yet the protocol and proclamation did not end the war. The protocol worked a mere truce. The President has not the power to terminate the war by treaty without the advice or consent of the Senate of the United States. If a treaty be silent as to when it is to become effective, the weight of authority is that it does not become so until ratified, and this was not done until in April, 1899, and the war did not end by treaty until then; and all the use made by the government of the vessel was justified by the rules of war and international law, without compensation. The motion is overruled and rehearing denied.<sup>10</sup>

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### SECTION 3.—INTERPRETATION OF TREATIES

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#### GEOFROY v. RIGGS.

(Supreme Court of the United States, 1890. 133 U. S. 258, 10, Sup. Ct. 295, 33 L. Ed. 642.)

In Equity. The bill alleged that the suit was "a purely friendly suit." The defendants demurred to the bill, and it was dismissed. The complainants appealed. The court stated the case as follows:

On the 19th day of January, 1888, T. Lawrason Riggs, a citizen of the United States and a resident of the District of Columbia, died at Washington, intestate, seized in fee of real estate of great value in the District. The complainants are citizens and residents of France and nephews of the deceased. On the 12th of March, 1872, the sister of

<sup>9</sup> The shortened statement of the facts has been substituted for that of the report.

<sup>10</sup> Affirmed in *J. Ribas y Hijo v. U. S.*, 194 U. S. 315, 24 Sup. Ct. 727, 48 L. Ed. 994 (1904).

the deceased, then named Kate S. Riggs, intermarried with Louis de Geofroy, of France. She was at the time a resident of the District of Columbia and a citizen of the United States. He was then and always has been a citizen of France. The complainants are the children of this marriage, and are infants now residing with their father in France. One of them was born July 14, 1873, at Pekin, in China, whilst his father was the French minister plenipotentiary to that country, and was there only as such minister. The other was born October 18, 1875, at Cannes, in France. Their mother, who was a sister of all the defendants except Medora, wife of the defendant E. Francis Riggs, died February 7, 1881. The deceased, T. Lawrason Riggs, left one brother, E. Francis Riggs, and three sisters, Alice L. Riggs, Jane A. Riggs and Cecilia Howard, surviving him, but no descendants of any deceased brother or deceased sister except the complainants.

The defendants, with the exception of Cecilia Howard, are, and always have been, citizens of the United States and residents of the District of Columbia. Cecilia Howard, in 1867, intermarried with Henry Howard, a British subject, and since that time has resided with him in England.

The real property described in the bill of complaint cannot be divided without actual loss and injury, and the interest of the complainants, if they have any, as well as of the defendants, in the property would be promoted by its sale and a division of the proceeds.

To the bill of complaint setting up these facts and praying a sale of the premises described and a division of the proceeds among the parties to the suit according to their respective rights and interests the defendants demurred, on the ground that the complainants were incapable of inheriting from their uncle any interest in the real estate. The Supreme Court of the District of Columbia sustained the demurrer and dismissed the bill. From the decree the case is brought to this court on appeal.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court.

The complainants are both citizens of France. The fact that one of them was born in Pekin, China, does not change his citizenship. His father was a Frenchman, and by the law of France a child of a Frenchman, though born in a foreign country, retains the citizenship of his father. In this case, also, his father was engaged, at the time of the son's birth, in the diplomatic service of France, being its minister plenipotentiary to China, and by public law the children of ambassadors and ministers accredited to another country retain the citizenship of their father.

The question presented for solution, therefore, is whether the complainants, being citizens and residents of France, inherit an interest in the real estate in the District of Columbia of which their uncle, a citizen of the United States and a resident of the District, died seized.

In more general terms the question is: can citizens of France take land in the District of Columbia by descent from citizens of the United States?

The complainants contend that they inherit an estate in the property described, by force of the stipulation of article 7 of the convention between the United States and France, concluded February 23, 1853 (10 Stat. 996), and the provisions of the act of Congress of March 3, 1887 (Comp. St. §§ 3498-3500), to restrict the ownership of real estate in the territories to American citizens. \* \* \* The 7th article of that convention is as follows:

"In all states of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament, or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfer, inheritance, or any others different from those paid by the latter, or to taxes which shall not be equally imposed.

"As to the states of the Union, by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right.

"In like manner, but with the reservation of the ulterior right of establishing reciprocity in regard to possession and inheritance, the government of France accords to the citizens of the United States the same rights within its territory in respect to real and personal property, and to inheritance, as are enjoyed there by its own citizens." 10 Stat. 996.

This article is not happily drawn. It leaves in doubt what is meant by "states of the Union." Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as territories and the District of Columbia. And yet separate communities, with an independent local government, are often described as states, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. Halleck on Int. Law, c. 3, §§ 5, 6, 7. The term is used in general jurisprudence and by writers on public law as denoting organized political societies with an established government. Within this definition the District of Columbia, under the government of the United States, is as much a state as any of those political communities which compose the United States. Were there no other territory under the government of the United States, it would not be questioned that the District of Columbia would be a state within the meaning of international law; and it is not perceived that it is any less a state within that meaning because other states and other terri-

tory are also under the same government. In *Hepburn v. Ellzey*, 2 Cranch, 445, 452, 2 L. Ed. 332, the question arose whether a resident and a citizen of the District of Columbia could sue a citizen of Virginia in the Circuit Court of the United States. The court, by Chief Justice Marshall, in deciding the question, conceded that the District of Columbia was distinct political society, and therefore a state according to the definition of writers on general law; but held that the act of Congress in providing for controversies between citizens of different states in the Circuit Courts, referred to that term as used in the Constitution, and therefore to one of the States composing the United States. A similar concession, that the District of Columbia, being a separate political community, is, in a certain sense, a state, is made by this court in the recent case of *Metropolitan Railroad Co. v. District of Columbia*, 132 U. S. 1, 9, 10 Sup. Ct. 19, 33 L. Ed. 231, decided at the present term.

Aside from the question in which of these significations the terms are used in the convention of 1853, we think the construction of article 7 is free from difficulty. In some states aliens were permitted to hold real estate, but not to take by inheritance. To this right to hold real estate in some states reference is had by the words "permit it" in the first clause, and it is alluded to in the second clause as not permitted in others. This will be manifest if we read the second clause before the first. This construction, as well observed by counsel, gives consistency and harmony to all the provisions of the article, and comports with its character as an agreement intended to confer reciprocal rights on the citizens of each country with respect to property held by them within the territory of the other. To construe the first clause as providing that Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as citizens of the United States, in states, so long as their laws permit such enjoyment, is to give a meaning to the article by which nothing is conferred not already possessed, and leaves no adequate reason for the concession by France of rights to citizens of the United States, made in the third clause. We do not think this construction admissible. It is a rule, in construing treaties as well as laws, to give a sensible meaning to all their provisions if that be practicable. "The interpretation, therefore," says Vattel, "which would render a treaty null and inefficient cannot be admitted;" and again, "it ought to be interpreted in such a manner as that it may have its effect, and not prove vain and nugatory."<sup>11</sup> Vattel, book II, c. 17. As we read the article it declares that in all the states of the Union by whose laws aliens are permitted to hold real estate, so long as such laws remain in force, Frenchmen shall enjoy the right

<sup>11</sup> "L'interprétation qui rendrait un acte nul et sans effet, ne peut donc être admise. \* \* \* Il faut l'interpréter de manière qu'il puisse avoir son effet, qu'il ne se trouve pas vain et illusoire." 2 Droit des Gens, 265, édition Paris, 1863, par Pradier-Fodéré.

of possessing personal and real property by the same title and in the same manner as citizens of the United States. They shall be free to dispose of it as they may please—by donation, testament, or otherwise—just as those citizens themselves. But as to the states by whose existing laws aliens are not permitted to hold real estate, the treaty engages that the President shall recommend to them the passage of such laws as may be necessary for the purpose of conferring that right.

In determining the question in what sense the terms "states of the Union" are used, it is to be borne in mind that the laws of the District and of some of the territories, existing at the time of the convention was concluded in 1853, allowed aliens to hold real estate. If, therefore, these terms are held to exclude those political communities, our government is placed in a very inconsistent position—stipulating that citizens of France shall enjoy the right of holding, disposing of, and inheriting, in like manner as citizens of the United States, property, real and personal, in those States whose laws permit aliens to hold real estate; that is, that in those States citizens of France, in holding, disposing of, and inheriting property, shall be free from the disability of alienage; and, in order that they may in like manner be free from such disability in those states whose existing laws do not permit aliens to hold real estate, engaging that the President shall recommend the passage of laws conferring that right; while at the same time, refusing to citizens of France holding property in the District and in some of the territories, where the power of the United States is in that respect unlimited, a like release from the disability of alienage, thus discriminating against them in favor of citizens of France holding property in states having similar legislation. No plausible motive can be assigned for such discrimination. A right which the government of the United States apparently desires that citizens of France should enjoy in all the states, it would hardly refuse to them in the District embracing its capital, or in any of its own territorial dependencies. By the last clause of the article the government of France accords to the citizens of the United States the same rights within its territory in respect to real and personal property and to inheritance as are enjoyed there by its own citizens. There is no limitation as to the territory of France in which the right of inheritance is conceded. And it declares that this right is given in like manner as the right is given by the government of the United States to citizens of France. To ensure reciprocity in the terms of the treaty, it would be necessary to hold that by "states of the Union" is meant all the political communities exercising legislative powers in the country, embracing not only those political communities which constitute the United States, but also those communities which constitute political bodies known as Territories and the District of Columbia. It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they



are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions; one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. *Hauenstein v. Lynham*, 100 U. S. 483, 487, 25 L. Ed. 628. The stipulation that the government of France in like manner accords to the citizens of the United States the same rights within its territory in respect to real and personal property and inheritance as are enjoyed there by its own citizens, indicates that that government considered that similar rights were extended to its citizens within the territory of the United States, whatever the designation given to their different political communities.

We are, therefore, of opinion that this is the meaning of the article in question—that there shall be reciprocity in respect to the acquisition and inheritance of property in one country by the citizens of the other, that is, in all political communities in the United States where legislation permits aliens to hold real estate, the disability of Frenchmen from alienage in disposing and inheriting property, real and personal, is removed, and the same right of disposition and inheritance of property, in France, is accorded to citizens of the United States, as are there enjoyed by its own citizens. This construction finds support in the first section of the act of March 3, 1887, c. 340, 24 Stat. 476 (Comp. St. § 3498). That section declares that it shall be unlawful for any person or persons not citizens of the United States, or who have not declared their intention to become citizens, to thereafter acquire, hold or own real estate, or any interest therein, in any of the territories of the United States or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts previously created. There is here a plain implication that property in the District of Columbia and in the territories may be acquired by aliens by inheritance under existing laws; and no property could be acquired by them in the District by inheritance except by virtue of the law of Maryland as it existed when adopted by the United States during the existence of the convention of 1800 or under the 7th article of the convention of 1853. Our conclusion is, that the complainants are entitled to take by inheritance an interest in the real property in the District of Columbia of which their uncle died seized. The decree of the court below will, therefore, be

Reversed and the cause remanded, with direction to overrule the demurrer of the defendants; and it is so ordered.<sup>12</sup>

<sup>12</sup> For the interpretation of treaties in general, and in particular for the interpretation of the Jay Treaty of November 19, 1794, see *Marryat v. Wilson*, 1 Bos. & P. 430 (1799).

For the practical application of the principles of interpretation of a treaty, see *Chilean-Peruvian Accounts*, Award of the Arbitrator under Protocol

Dated March 2, 1874, between Chile and Peru (1875), 2 Moore's International Arbitrations (1898) 2085.

See also the award of Alexander Porter Morse, Arbitrator in the Case of Charles A. van Bokkelen, 1888, 2 Moore's International Arbitrations, 1807. It is, unfortunately, too long to print.

In *Adams v. Akerlund*, 168 Ill. 632, 688, 48 N. E. 454 (1897), Mr. Justice Magruder said: "Where treaties concern the rights of individuals, it is frequently necessary for the courts to ascertain by construction the meaning intended to be conveyed by the terms used. *U. S. v. Rauscher*, 119 U. S. 407 [7 Sup. Ct. 234, 30 L. Ed. 425 (1886)]; *Wilson v. Wall*, 6 Wall. 83 [18 L. Ed. 727 (1867)]; *Head Money Cases*, 112 U. S. 580 [5 Sup. Ct. 247, 28 L. Ed. 798 (1884)]. In thus giving a construction to the language of treaties, the courts will adopt the same general rules which are applicable in the construction of statutes, contracts and written instruments generally, in order to effectuate the purpose and intention of the makers. 26 Am. & Eng. Ency. of Law, p. 553. Moreover, it is another well-settled rule, laid down by the Supreme Court of the United States, that, 'where a treaty admits of two constructions, one restricted as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred.' *Hauenstein v. Lynham*, 100 U. S. 483 [25 L. Ed. 628 (1879)]; *Schultze v. Schultze*, 144 Ill. 290 [83 N. E. 201, 19 L. R. A. 90, 36 Am. St. Rep. 482 (1893)]."

In *Tucker v. Alexandroff*, 183 U. S. 424, 437 [22 Sup. Ct. 195, 46 L. Ed. 264 (1901)], Mr. Justice Brown uses the following language: "We think, then, that the rights of the parties must be determined by the treaty, but that this particular convention, being operative upon both powers and intended for their mutual protection, should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose. Taylor on International Law, § 383. As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests or civilization, and as their main object is not only to avoid war and secure a lasting and perpetual peace, but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of perpetual amity, so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence. It is said by Chancellor Kent in his Commentaries, Vol. 1, p. 174: 'Treaties of every kind are to receive a fair and liberal interpretation according to the intention of the contracting parties, and are to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts.'"

If treaties between nations standing upon the same social and intellectual plane are to be liberally construed, it stands to reason that when one contracting party is a powerful and enlightened, the other a backward, weak and therefore dependent nation, the latter must yield much to the spirit. Or as Mr. Justice Gray said, in *Jones v. Mehan*, 175 U. S. 1, 11, 20 Sup. Ct. 1, 44 L. Ed. 49 (1899): "The treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers but in the sense in which they would naturally be understood by the Indians. *Worcester v. Georgia*, 6 Pet. 515 [8 L. Ed. 483 (1832)]; *The Kansas Indians*, 5 Wall. 737, 760 [18 L. Ed. 667 (1866)]; *Choctaw Nation v. U. S.*, 119 U. S. 1, 27, 28 [7 Sup. Ct. 75, 30 L. Ed. 306 (1886)]."

But, however liberally the treaty may be interpreted, it is the agreement made by the parties, not by the court, that is to be interpreted. The spirit will, indeed, be found out, but a new clause will not be read in the treaty. For example, in *The Amiable Isabella*, 6 Wheat. 1, 5 L. Ed. 191 (1821), Mr. Justice Story refused to read into the treaty of 1795 with Spain the form of a passport which the contracting parties had, it would seem, inadvertently left out. In like manner the Supreme Court in a recent case refused to consider a "proviso" (to which ratification was made subject) as part of the treaty, because the proviso was omitted in the official publication of the treaty. *New York Indians v. U. S.*, 170 U. S. 1, 18 Sup. Ct. 531, 42 L. Ed. 927 (1897). Where, however, a written declaration was annexed to the treaty at the time of its ratification, the declaration was held as obligatory as if the provision

## SECTION 4.—RELATION OF TREATIES

## I. TO STATES, PARTIES THERETO

## ARCHIBALD HAMILTON &amp; CO. v. EATON.

(United States Circuit Court, District of North Carolina, 1796. 1 Hughes, 249, Fed. Cas. No. 5,980.)<sup>13</sup>

This was an action of debt upon a penal bill bearing date the 11th day of August, 1776, for the penal sum of 800£, proclamation money, to be discharged by the payment of 400£, like money, payable on the 1st day of August, 1778, with lawful interest from that date. The plaintiffs, Archibald and John Hamilton, trading under the firm of Archibald Hamilton & Co., were subjects of Great Britain, but were residents of North Carolina before and at the time of the declaration of Independence, July 4, 1776. The defendant, John Eaton, was a citizen of the United States, and of North Carolina, and was a citizen of North Carolina before the said Declaration of Independence.

There were several pleas to this action. It is useless, as the case turned on that, to state any other than the first and principal one of those pleas, which was, that a law of the state had required that all persons, subjects of the state, living therein, who had traded to Great Britain or Ireland, should take an oath of allegiance or depart out of the state; that the plaintiffs had departed out of the state, leaving their debt due them; that another law of the State had appointed commissioners to sequester debts of citizens due to subjects of Great Britain to the use of the state, which commissioners had duly sequestered this debt, which the defendant had paid to them for the use of the state; and that, therefore, by the laws of war and the law of nations, the defendant did not owe this debt.

To this plea it was replied, that by the treaty of peace, which was entered into between Great Britain and the United States (8 Stat. 80), which terminated the War of the Revolution in 1783, it had been stipulated by the two powers, that "creditors on either side shall meet with no lawful impediment to the recovery of bona fide debts heretofore contracted."

had been inserted in the body of the treaty itself, because the declaration was annexed with full knowledge and consent of both parties to the treaty. *Doe v. Braden*, 16 How. 635, 14 L. Ed. 1090 (1853).

On the question of the interpretation of treaties in general, see a very learned and comprehensive note by J. C. Bancroft Davis, U. S. Treaties and Conventions, 1889, pp. 1227-1229 (printed with additions, 2 Butler's Treaty-Making Power, note 6, pp. 145-148).

<sup>13</sup> This case is also reported in Mart. 2d Ed. (1 N. O.) 83.

To this replication there was a demurrer, and there was a joinder in the demurrer. \* \* \*

ELLSWORTH, C. J.<sup>14</sup> It is admitted that the bond on which this suit is brought, was executed by the defendant to the plaintiffs; and that the plaintiffs have not been paid. But the defendant pleads, that since the execution of the bond a war has existed, in which the plaintiffs were enemies; and that during the war this debt was confiscated and the money paid into the treasury of the state. And the plaintiffs reply, that by the treaty which terminated the war, it was stipulated, that "creditors on either side should meet with no lawful impediment to the recovery of bona fide debts heretofore contracted."

Debts contracted to an alien are not extinguished by the intervention of war with his nation. His remedy is suspended while the war lasts, because it would be dangerous to admit him into the country, or to correspond with agents in it; and also because the transfer of treasure from the country to his nation, would diminish the ability of the former, and increase that of the latter, to prosecute the war. But with the termination of hostilities, these reasons and the suspension of the remedy cease.

As to the confiscation here alleged it is doubtless true, that enemy's property so far as consists in barring the creditor, and compelling payment from the debtors for the use of the public, can be confiscated; and that on principles of equity, though perhaps not of policy, they may be. For their confiscation as well as that of property of any kind, may serve as an indemnity for the expenses of war, and as a security against future aggression. That such confiscations have fallen into disuse, has resulted not from the duty which one nation, independent of treaties, owes to another, but from commercial policy, which European nations have found a common, and indeed a strong interest, in supporting. Civil war, which terminates in a severance of empire, does, perhaps, less than any other, justify the confiscation of debts; because of the special relation and confidence subsisting, at the time they were contracted, and it may have been owing to this confiscation as well as others, that the American states, in the late Revolution, so generally forbore to confiscate the debts of British subjects. In Virginia, they were only sequestered; in South Carolina, all debts to whomsoever due were excepted from confiscation; as were in Georgia, those of "British merchants and others residing in Great Britain." And in the other states, except this, I do not recollect that British debts were touched. Certain it is, that the recommendation of Congress on the subject of confiscation did not extend to them. North Carolina, however, judging for herself, in a moment of severe pressure, exercised the sovereign power of passing an act of confiscation, which extended, amongst others, to the debts of the plaintiffs, providing, however, at the same time, as to all debts which should be paid into the treasury, under that

<sup>14</sup> The opinion of Sitgreaves, District Judge, is omitted.

act, that the state would indemnify the debtors, should they be obliged to pay again.

Allowing, then, that the debt in question was in fact of right confiscated, can the plaintiffs recover by the treaty of 1783?

The fourth article of that treaty is in the following words: "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted."

There is no doubt but the debt in question was a "bona fide" debt, and theretofore contracted, i. e., prior to the treaty. To bring it within the article, it is also requisite that the debtor and creditors should have been on different sides, with reference to the parties to the treaty, and as the defendant was confessedly a citizen of the United States, it must appear that the plaintiffs were subjects of the King of Great Britain; and it is pretty clear, from the pleadings and the laws of the state, that they were so. It is true that on the 4th of July, 1776, when North Carolina became an independent State, they were inhabitants thereof, though natives of Great Britain; and they might have been claimed and holden as citizens, whatever were their sentiments or inclinations. But the state afterwards, in 1777, liberally gave to them, with others similarly circumstanced, the option of taking the oath of allegiance, or of departing the state under a prohibition to return, with the indulgence of a time to sell their estates, and to collect and remove their effects. They chose the latter; and ever after adhered to the King of Great Britain, and must therefore be regarded as on the British side.

It is also pertinent to the inquiry, whether the debt in question be within the before-recited article, to notice an objection which has been stated by the defendant's counsel, viz., that at the date of the treaty, what is now sued for as a debt, was not a debt, but a nonentity; payment having been made, and a discharge effected, under the act of confiscation; and therefore that the stipulation concerning debts did not reach it.

In the first place, it is not true that in this case there was no debt at the date of the treaty. A debt is created by contract, and exists till the contract is performed. Legislative interference, to exonerate a debtor from the performance of his contract, whether upon or without conditions, or to take from the creditor the protection of law, does not in strictness destroy the debt, though it may, locally, be the remedy for it. The debt remains, and in a foreign country payment is frequently enforced.

Secondly, it was manifestly the design of the stipulation, that where debts had been theretofore contracted, there should be no bar to their recovery, from the operation of laws passed subsequent to the contracts. And to adopt a narrower construction, would be to leave credi-

tors to a harder fate than they have been left to, by any modern treaty.

Upon a view, then, of all the circumstances of this case, it must be considered as one within the stipulation, that there should be "no lawful impediment to a lawful recovery." And it is not to be doubted, that impediments created by the act of confiscation, are lawful impediments. They must therefore be disregarded, if the treaty is a rule of decision. Whether it is so or not, remains to be considered.

Here it is contended by the defendant's counsel, that the confiscation act has not been repealed by the state; that the treaty could not repeal or annul it; and therefore that it remains in force, and secures the defendant. And further, that a repeal of it would not take from him a right vested, to stand discharged.

As to the opinion, that a treaty does not annul a statute, so far as there is an interference, it is unsound. A statute is a declaration of the public will, and of high authority; but it is controlled by the public will and subsequently declared. Hence the maxim, that when two statutes are opposed to each other, the latter abrogates the former. Nor is it material, as to the effect of the public will, what organ it is declared by, provided it be an organ constitutionally authorized to make the declaration. A treaty when it is in fact made, is, with regard to each nation that is a party to it, a national act, an expression of the national will, as much so as a statute can be. And it does, therefore, of necessity, annul any prior statute, so far as there is an interference. The supposition that the public can have two wills at the same time, repugnant to each other, one expressed by a statute, and another by a treaty, is absurd.

The treaty now under consideration was made, on the part of the United States, by a Congress composed of deputies from each state, to whom were delegated by the articles of confederation, expressly, "the sole and exclusive right and power of entering into treaties and alliances;" and being ratified and made by them, it became a complete national act, and law of every state.

If, however, a subsequent sanction of this state was at all necessary to make the treaty law here, it has been had and repeated. By a statute passed in 1787 the treaty was declared to be law in this state, and the courts of law and equity were enjoined to govern their decisions accordingly. And in 1789, was adopted here the present Constitution of the United States, which declared, that all treaties made, or which should be made, under the authority of the United States, should be the supreme law of the land; and that the judges in every state should be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding. Surely, then, the treaty is now law in this state, and the confiscation act, so far as the treaty interferes with it, is annulled.

Still it is urged, that annulling the confiscation act cannot annul

the defendant's right of discharge, against which the act was in force.

It is true, that the repeal of a law does not make void what has been well done under it. But it is also true, admitting the right here claimed by the defendant, to be as substantial as a right of property can be, that he may be deprived of it, if the treaty so requires. It is justifiable and frequent, in the adjustment of national differences, to concede for the safety of the state, the rights of individuals. And they are afterwards indemnified or not, according to circumstances. What is most material to be here noted is, that the right or obstacle in question, whatever it may amount to, has been created by law, and not by the creditors. It comes within the description of "lawful impediments"; all of which, in this case, the treaty, as I apprehend, removes.

Let judgment be for the plaintiffs.<sup>15</sup>

<sup>15</sup> "The efficacy of the treaty is declared and guaranteed by the Constitution of the United States. That instrument took effect on the fourth day of March, 1789. In 1796, but a few years later, this court said: 'If doubts could exist before the adoption of the present national government, they must be entirely removed by the sixth article of the Constitution, which provides that "all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." There can be no limitation on the power of the people of the United States. By their authority the State constitutions were made, and by their authority the Constitution of the United States was established: and they had the power to change or abolish the State constitutions or to make them yield to the general government and to treaties made by their authority. A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a State Legislature can stand in its way. If the constitution of a State (which is the fundamental law of the State and paramount to its Legislature) must give way to a treaty and fall before it, can it be questioned whether the less power, an act of the State Legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual State, and their will alone is to decide. If a law of a State contrary to a treaty is not void, but voidable only, by a repeal or nullification by a State Legislature, this certain consequence follows—that the will of a small part of the United States may control or defeat the will of the whole.' *Ware v. Hylton*, 3 Dall. 199 [1 L. Ed. 568 (1796)].

"It will be observed that the treaty-making clause is retroactive as well as prospective. The treaty in question, in *Ware v. Hylton*, was the British treaty of 1783, which terminated the war of the American Revolution. It was made while the Articles of Confederation subsisted. The Constitution, when adopted, applied alike to treaties 'made and to be made.'

"We have quoted from the opinion of Mr. Justice Chase in that case, not because we concur in everything said in the extract, but because it shows the views of a powerful legal mind at that early period, when the debates in the convention which framed the Constitution must have been fresh in the memory of the leading jurists of the country.

"In *Chirac v. Chirac*, 2 Wheat. 259 [4 L. Ed. 234 (1817)], it was held by this court that a treaty with France gave to her citizens the right to purchase and hold land in the United States, removed the incapacity of alienage and placed them in precisely the same situation as if they had been citizens of this country. The State law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case. The same doctrine was reaffirmed touching this treaty in *Carneal v. Banks*,

## II. TO THE STATUTES OF STATES, PARTIES THERETO

## FOSTER et al. v. NEILSON.

(Supreme Court of the United States, 1829. 2 Pet. 253, 7 L. Ed. 415.)

See ante, p. 429, for a report of the case.

## WHITNEY v. ROBERTSON.

(Supreme Court of the United States, 1888. 124 U. S. 190, 8 Sup. Ct. 456, 31 L. Ed. 386.)

This was an action to recover back duties alleged to have been illegally exacted. Verdict for the defendant and judgment on the verdict. The plaintiffs sued out this writ of error.

Mr. Justice FIELD delivered the opinion of the court.

The plaintiffs are merchants, doing business in the city of New York, and in August, 1882, they imported a large quantity of "centrifugal and molasses sugars," the produce and manufacture of the island of San Domingo. These goods were similar in kind to sugars produced in the Hawaiian Islands, which are admitted free of duty under the treaty with the king of those islands, and the act of Congress, passed to carry the treaty into effect. They were duly entered

10 Wheat. 181 [6 L. Ed. 297 (1825)], and with respect to the British treaty of 1794, in *Hughes v. Edwards*, 9 Wheat. 489 [6 L. Ed. 142 (1824)]. A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a State. *Orr v. Hodgeson*, 4 Wheat. 453 [4 L. Ed. 613 (1819)]. By the British treaty of 1794, 'all impediment of alienage was absolutely levelled with the ground despite the laws of the States. It is the direct constitutional question in its fullest conditions. Yet the Supreme Court held that the stipulation was within the constitutional powers of the Union. *Fairfax's Devisees v. Hunter's Lessee*, 7 Cranch, 627 [8 L. Ed. 453 (1813)] see *Ware v. Hylton*, 3 Dall. 242 [1 L. Ed. 568 (1796)].' 8 Op. Attys. Gen. 417. Mr. Calhoun, after laying down certain exceptions and qualifications which do not affect this case, says: 'Within these limits all questions which may arise between us and other powers, be the subject-matter what it may, fall within the treaty-making power and may be adjusted by it.' Treaties on the Const. and Gov. of the U. S. 204.

"If the national government has not the power to do what is done by such treaties, it cannot be done at all for the States are expressly forbidden to 'enter into any treaty, alliance, or confederation.' Const. art. 1, § 10.

"It must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and constitution. This is a fundamental principle in our system of complex national polity. See, also, *Shanks v. Dupont*, 3 Pet. 242 [7 L. Ed. 666 (1830)]; *Foster & Elam v. Neilson*, 2 Pet. 253 [7 L. Ed. 415 (1829)]; *The Cherokee Tobacco*, 11 Wall. 616 [20 L. Ed. 227 (1870)]; Mr. Pinkney's Speech, 3 Elliot's Constitutional Debates, 231; *People v. Gerke & Clark*, 5 Cal. 381 [1855].

"We have no doubt that this treaty is within the treaty-making power conferred by the Constitution. And it is our duty to give it full effect." Per Mr. Justice Swayne in *Hauenstein v. Lynham*, 100 U. S. 483, 488-490, 25 L. Ed. 628 (1879).



at the custom house at the port of New York, the plaintiffs claiming that by the treaty with the republic of San Domingo the goods should be admitted on the same terms, that is, free of duty, as similar articles, the produce and manufacture of the Hawaiian Islands. The defendant, who was at the time collector of the port, refused to allow this claim, treated the goods as dutiable articles under the acts of Congress, and exacted duties on them to the amount of \$21,936. The plaintiffs appealed from the collector's decision to the Secretary of the Treasury, by whom the appeal was denied. They then paid under protest the duties exacted, and brought the present action to recover the amount.

The complaint set forth the facts as to the importation of the goods, the claim of the plaintiffs that they should be admitted free of duty because like articles from the Hawaiian Islands were thus admitted, the refusal of the collector to allow the claim, the appeal from his decision to the Secretary of the Treasury and its denial by him, and the payment under protest of the duties exacted, and concluded with a prayer for judgment for the amount. The defendant demurred to the complaint, the demurrer was sustained, and final judgment was entered in his favor, to review which the case is brought here.

The treaty with the king of the Hawaiian Islands provides for the importation into the United States, free of duty, of various articles, the produce and manufacture of those islands, in consideration, among other things, of like exemption from duty, on the importation into that country, of sundry specified articles which are the produce and manufacture of the United States. 19 Stat. 200, 625. The language of the first two articles of the treaty, which recite the reciprocal engagements of the two countries, declares that they are made in consideration "of the rights and privileges" and "as an equivalent therefor," which one concedes to the other.

The plaintiffs rely for a like exemption of the sugars imported by them from San Domingo upon the 9th article of the treaty with the Dominican Republic, which is as follows: "No higher or other duty shall be imposed on the importation into the United States of any article the growth, produce, or manufacture of the Dominican Republic, or of her fisheries; and no higher or other duty shall be imposed on the importation into the Dominican Republic of any article the growth, produce, or manufacture of the United States, or their fisheries, than are or shall be payable on the like articles the growth, produce, or manufacture of any other foreign country, or its fisheries." 15 Stat. 473, 478.

In *Bartram v. Robertson* (decided at the last term) 122 U. S. 116, 7 Sup. Ct. 1115, 30 L. Ed. 1118, we held that brown and unrefined sugars, the produce and manufacture of the island of St. Croix, which is part of the dominions of the King of Denmark, were not exempt from duty by force of the treaty with that country, because similar goods from the Hawaiian Islands were thus exempt. The first article of the

treaty with Denmark provided that the contracting parties should not grant "any particular favor" to other nations in respect to commerce and navigation, which should not immediately become common to the other party, who should "enjoy the same freely if the concession were freely made, and upon allowing the same compensation if the concession were conditional." 8 Stat. 340. The fourth article provided that no "higher or other duties" should be imposed by either party on the importation of any article which is its produce or manufacture, into the country of the other party, than is payable on like articles, being the produce or manufacture of any other foreign country. And we held in the case mentioned that "those stipulations, even if conceded to be self-executing by the way of a proviso or exception to the general law imposing the duties, do not cover concessions like those made to the Hawaiian Islands for a valuable consideration. They were pledges of the two contracting parties, the United States and the King of Denmark, to each other, that in the imposition of duties on goods imported into one of the countries which were the produce or manufacture of the other, there should be no discrimination against them in favor of goods of like character imported from any other country. They imposed an obligation upon both countries to avoid hostile legislation in that respect. But they were not intended to interfere with special arrangements with other countries founded upon a concession of special privileges."

The counsel for the plaintiffs meet this position by pointing to the omission in the treaty with the Republic of San Domingo of the provision as to free concessions, and concessions upon compensation, contending that the omission precludes any concession in respect of commerce and navigation by our government to another country, without that concession being at once extended to San Domingo. We do not think that the absence of this provision changes the obligations of the United States. The 9th article of the treaty with that republic, in the clause quoted, is substantially like the 4th article in the treaty with the King of Denmark. And as we said of the latter, we may say of the former, that it is a pledge of the contracting parties that there shall be no discriminating legislation against the importation of articles which are the growth, produce, or manufacture of their respective countries, in favor of articles of like character, imported from any other country. It has no greater extent. It was never designed to prevent special concessions, upon sufficient considerations, touching the importation of specific articles into the country of the other. It would require the clearest language to justify a conclusion that our government intended to preclude itself from such engagements with other countries, which might in the future be of the highest importance to its interests.

But, independently of considerations of this nature, there is another and complete answer to the pretensions of the plaintiffs. The act

of Congress under which the duties were collected authorized their exaction. It is of general application, making no exception in favor of goods of any country. It was passed after the treaty with the Dominican Republic, and, if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control. A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy, is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing. If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance. In *Taylor v. Morton*, 2 Curt. 454, 459, Fed. Cas. No. 13,799, this subject was very elaborately considered at the circuit by Mr. Justice Curtis, of this court, and he held that whether a treaty with a foreign sovereign had been violated by him; whether the consideration of a particular stipulation of the treaty had been voluntarily withdrawn by one party so that it was no longer obligatory on the other; whether the views and acts of a foreign sovereign had given just occasion to the legislative department of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise, were not judicial questions; that the power to determine these matters had not been confided to the judiciary, which has no suitable means to exercise it, but to the executive and legislative departments of our government; and that they belong to diplomacy and legislation, and not to the administration of the laws. And he justly observed,

as a necessary consequence of these views, that if the power to determine these matters is vested in Congress, it is wholly immaterial to inquire whether by the act assailed it has departed from the treaty or not, or whether such departure was by accident or design, and, if the latter, whether the reasons were good or bad.

In these views we fully concur. It follows, therefore, that when a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous treaty not already executed. Considerations of that character belong to another department of the government. The duty of the courts is to construe and give effect to the latest expression of the sovereign will. In *Head Money Cases*, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798, it was objected to an act of Congress that it violated provisions contained in treaties with foreign nations, but the court replied that so far as the provisions of the act were in conflict with any treaty, they must prevail in all the courts of the country; and, after a full and elaborate consideration of the subject, it held that "so far as a treaty made by the United States with any foreign nation can be the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal." Judgment affirmed.<sup>16</sup>

<sup>16</sup> The doctrine of Mr. Justice Curtis in *Taylor v. Morton*, Circuit Court, District of Massachusetts, 2 Curt. 454, Fed. Cas. No. 13,799 (1855), is unanswerable.

The officials of a nation must, in the absence of legislation to the contrary, follow the last expression of the will of the legislature controlling the subject-matter and procedure of the case before them. The international obligation, however, is not affected by the national act, unless the foreign nation chooses to renounce the right or privilege to which it would be entitled under the treaty if the act had not been passed.

This point was not overlooked by Mr. Justice Curtis, and he recognized the right of a foreign nation to prosecute its claim through the channels of diplomacy or through what is commonly called the last resort of princes.

In *Botiller v. Dominguez*, 130 U. S. 238, 247, 9 Sup. Ct. 525, 32 L. Ed. 928 (1889), it is said: "With regard to the first of these propositions it may be said, that so far as the act of Congress is in conflict with the treaty with Mexico, that is a matter in which the court is bound to follow the statutory enactments of its own government. If the treaty was violated by this general statute, enacted for the purpose of ascertaining the validity of claims derived from the Mexican Government, it was a matter of international concern, which the two states must determine by treaty, or by such other means as enables one state to enforce upon another the obligations of a treaty. This court in a class of cases like the present has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard. *The Cherokee Tobacco*, 11 Wall. 616 [11 L. Ed. 227 (1870)]; *Taylor v. Morton*, 2 Curt. 454 [Fed. Cas. No. 13,799 (1855)]; *Head Money Cases*, 112 U. S. 580, 598 [5 Sup. Ct. 247, 28 L. Ed. 798 (1884)]; *Whitney v. Robertson*, 124 U. S. 190, 195 [8 Sup. Ct. 456, 31 L. Ed. 386 (1888)]."

## III. TO THE JUDICIARY OF THE STATES, PARTIES THERETO

## WALKER v. BAIRD et al.

(Privy Council. [1892] App. Cas. 491.)

Appeal from an order of the Supreme Court (March 18, 1891), to the effect that the appellant's defence did not disclose a sufficient answer to the respondents' action.

The statement of claim and defence are set out in their Lordships' judgment.

The judgment of the court below was that, in an action of this description, to which the parties are British subjects, for a trespass committed within British territory in time of peace, it is no sufficient answer to say, in exclusion of the jurisdiction of the municipal courts, that the trespass was an "act of state" committed under the authority of an agreement or *modus vivendi* with a foreign power; and that in such a case, as between the Queen's subjects, the question of the validity, interpretation, and effect of all instruments and evidences of title and authority rest in the first place with the courts of competent jurisdiction within which the cause of action arises.

The judgment of their Lordships was delivered by Lord HERSCHELL:

This is an appeal from an order of the Supreme Court of Newfoundland. The respondents by their statement of claim alleged that the appellant wrongfully entered their messuage and premises, and took possession of their lobster factory and of the gear and implements therein, and kept possession of the same for a long time, and prevented the respondents from carrying on the business of catching and preserving lobsters at their factory.

By the statement of defence the appellant said that he was captain of H. M. S. Emerald, and the senior officer of the ships of Her Majesty the Queen employed during the current season on the Newfoundland fisheries; that to him, as such senior officer and captain, was committed by the Lords Commissioners of the Admiralty, by command of Her Majesty, the care and charge of putting in force and giving effect to an agreement embodied in a *modus vivendi* for the lobster fishing in Newfoundland during the said season, which as an act and matter of state and public policy had been by Her Majesty entered into with the government of the Republic of France; that the said agreement provided, amongst other things, that on the coasts of Newfoundland where the French enjoy rights of fishing conferred by the treaties, no lobster factories which were not in operation on the 1st of July, 1889, should be permitted, unless by the joint consent of the commanders of the British and French naval stations; that the said lobster factory of the plaintiffs being situate on the said part of the coasts of Newfoundland, and being one that was not in operation on the said 1st of July,

1889, and one which was without the consent aforesaid being used and worked by the plaintiffs as a lobster factory whilst the said agreement was in force, and such use and working thereof being prohibited by the said agreement and in contravention of its terms, the defendant in performance of his duties did for the cause assigned enter into and take possession of the messuage and premises in the statement of claim mentioned, and of certain gear and implements; that such entry into and taking possession of the said messuage and premises, gear, and implements, were made and done by the defendant in his public political capacity, and in exercise of the powers and authorities, and in performance of the duties committed to him, and were acts and matters of state done and performed under the provisions of the said *modus vivendi*; that the action taken by the defendant in putting in force the provisions of the said *modus vivendi* had with full knowledge of all the circumstances and events been approved and confirmed by Her Majesty as such act and matter of state and public policy, and as being in accordance with the instructions of Her Majesty's government. The defendant submitted that the matters set forth in his answer to the statement of claim, and on which he rested his right to enter and take possession of the premises, were acts and matters of state arising out of the political relations between Her Majesty the Queen and the government of the Republic of France, that they involved the construction of treaties and of the said *modus vivendi* and other acts of state, and were matters which could not be inquired into by the court.

The plaintiffs objected that the defence did not set forth any answer or ground of defence to the action, and it was ordered by the court that the points of law should be first disposed of. The Supreme Court of Newfoundland, after hearing argument, held that the statement of defence disclosed no answer to the plaintiffs' claim, but gave the defendant leave to amend.

In their Lordships' opinion this judgment was clearly right, unless the defendant's acts can be justified on the ground that they were done by the authority of the Crown for the purpose of enforcing obedience to a treaty or agreement entered into between Her Majesty and a foreign power. The suggestion that they can be justified as acts of state, or that the court was not competent to inquire into a matter involving the construction of treaties and other acts of state, is wholly untenable.

The learned Attorney General, who argued the case before their Lordships on behalf of the appellant, conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever it was necessary in order to compel obedience to the provisions of a treaty. The proposition he contended for was a more limited one. The power of making treaties of peace is, as he truly said, vested by our constitution in

the Crown. He urged that there must of necessity also reside in the Crown the power of compelling its subjects to obey the provisions of a treaty arrived at for the purpose of putting an end to a state of war. He further contended that if this be so, the power must equally extend to the provisions of a treaty having for its object the preservation of peace, that an agreement which was arrived at to avert a war which was imminent was akin to a treaty of peace, and subject to the same constitutional law. Whether the power contended for does exist in the case of treaties of peace, and whether if so it exists equally in the case of treaties akin to a treaty of peace, or whether in both or either of these cases interference with private rights can be authorized otherwise than by the legislature, are grave questions upon which their Lordships do not find it necessary to express an opinion. Their Lordships agree with the court below in thinking that the allegations contained in the statement of defence do not bring the case within the limits of the proposition for which alone the appellant's counsel contended.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed with costs.

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#### UNITED STATES v. THE PEGGY.

(Supreme Court of the United States, 1801. 1 Cranch, 103, 2 L. Ed. 49.)<sup>17</sup>

Error to the Circuit Court for the District of Connecticut, on a question of prize.

The facts found and stated by Judge Law, the District Judge, were as follows:

"That the ship Trumbull, duly commissioned by the President of the United States, with instructions to take any armed French vessel or vessels sailing under authority, or pretence of authority from the French republic, which shall be found within the jurisdictional limits of the United States, or elsewhere on the high seas, &c. as set forth in said instructions; and said ship did on the 24th day of April last (April 1800) capture the schooner Peggy, after running her ashore a few miles to the westward of Port au Prince, within the dominions and territory of General Toussaint, and has brought her into port as set forth in the libel, and it further appears that all the facts, contained in the claim, are true;<sup>18</sup> whereupon this court are of opinion that as it appears that

<sup>17</sup> The statement of facts is abridged.

<sup>18</sup> The material facts stated in the claim are, that the schooner was the property of citizens of the French republic; that she was permitted by Toussaint to receive on board the cargo, which was on board at the time of capture; that she had dispatches from Toussaint to France; that she sailed by his authority, on the 23d of April, for France, navigated by ten men, including Buisson, the claimant, and Gillibert, the commander, and having on board four

the said schooner was solely upon a trading voyage and sailed under the permission of Toussaint with dispatches for the French government, under a convoy furnished by Toussaint, with directions to touch at Leogane for supplies, and that the arms she had on board must be presumed to be only for self defence; neither does it appear she had ever made, or attempted to make, any depredations, and that she was not such an armed vessel as was meant and intended by the laws of the United States should be subject to capture and condemnation; and that the situation she was in, at the time of capture, being aground within the territory and jurisdiction of Toussaint, she was not on the high seas, so as to be intended to be within the instructions given to the commanders of American ships of war: Therefore, adjudge said schooner is not a lawful prize, and decree that said schooner with her cargo be restored to claimant." \* \* \*

The CHIEF JUSTICE [MARSHALL] delivered the opinion of the court.

In this case the court is of opinion that the schooner Peggy is within the provisions of the treaty entered into with France and ought to be restored. This vessel is not considered as being definitely condemned. The argument at the bar which contends that because the sentence of the circuit court is denominated a final sentence, therefore its condemnation is definitive in the sense in which that term is used in the treaty, is not deemed a correct argument. A decree or sentence may be interlocutory or final in the court which pronounces it, and receives its appellation from its determining the power of that particular court over the subject to which it applies, or being only an intermediate order subject to the future control of the same court. The last decree of an inferior court is final in relation to the power of that court, but not in relation to the property itself, unless it be acquiesced under. The terms used in the treaty seem to apply to the actual condition of the property and to direct a restoration of that which is still in controversy between the parties. On any other construction the word definitive would be rendered useless and inoperative. Vessels are seldom if ever condemned but by a final sentence. An interlocutory order for a sale is not a condemnation. A stipulation then for the restoration of vessels not yet condemned, would on this construction comprehend as many cases as a stipulation for the restoration of such as

small three-pound carriage guns, solely for defence against piratical assaults, and being under convoy of a tender, furnished by Toussaint: that on the 23d of April, she was run ashore, a few miles to the westward of Port au Prince, within the dominion, jurisdiction and territory of General Toussaint, so that she was fast and tight aground, at which time, and in which situation, the boats and crew of the Trumbull attacked and took possession of her, and got her off; that Toussaint then was, and still is, on terms of amity, commerce and friendship with the United States, duly entered into and ratified by treaty; that the schooner was on a lawful voyage, for the sole purpose of trade, and not commissioned, or in a condition to annoy or injure the trade or commerce of the United States.

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are not yet definitively condemned. Every condemnation is final as to the court which pronounces it, and no other difference is perceived between a condemnation, and a final condemnation, than that the one terminates definitively the controversy between the parties and the other leaves that controversy still depending. In this case the sentence of condemnation was appealed from, it might have been reversed and therefore was not such a sentence as in the contemplation of the contracting parties, on a fair and honest construction of the contract was designated as a definitive condemnation.

It has been urged that the court can take no notice of the stipulation for the restoration of property not yet definitively condemned, that the judges can only enquire whether the sentence was erroneous when delivered, and that if the judgment was correct it cannot be made otherwise by any thing subsequent to its rendition.

The constitution of the United States (article 6) declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted. It is certainly true that the execution of a contract between nations is to be demanded from, and, in the general, superintended by the executive of each nation, and therefore, whatever the decision of this court may be relative to the rights of parties litigating before it, the claim upon the nation, if unsatisfied, may still be asserted. But yet where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress; and although restoration may be an executive, when viewed as a substantive, act independent of, and unconnected with, other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and, of consequence, improper.

It is in general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice, ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case the court must decide according to existing laws,

and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.<sup>19</sup>

## SECTION 5.—EXTINCTION

### SUTTON. v. SUTTON.

(Court of Chancery, 1830, 1 Russ. & M. 668.)

**THE MASTER OF THE ROLLS** [Sir John LEACH].<sup>20</sup> The relations which had subsisted between Great Britain and America, when they formed one empire, led to the introduction of the ninth section of the treaty of 1794, and made it highly reasonable that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property; and, the privileges of natives being reciprocally given, not only to the actual possessors of lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace.

The act of the 37 G. 3 gives full effect to this article of the treaty in the strongest and clearest terms; and if it be, as I consider it, the true construction of this article, that it was to be permanent; and independent of a state of peace or war, then the act of Parliament must be held, in the twenty-fourth section, to declare this permanency; and when a subsequent section provides that the act is to continue in force so long only as a state of peace shall subsist, it cannot be construed to be directly repugnant and opposed to the twenty-fourth section, but is to be understood as referring to such provisions of the act only as would in their nature depend upon a state of peace.

I am of opinion, therefore, in favour of the title, and consider that the heirs and assigns of every American who held lands in Great Britain at the time mentioned in the Act of the 37 G. 3, are, as far as regards those lands, to be treated, not as aliens, but as native subjects. \* \* \*<sup>21</sup>

<sup>19</sup> In *La Ninfa*, 75 Fed. 513, 21 O. C. A. 434 (1896), it was held, according to the headnote, that:

"An award by arbitrators under a treaty between the United States and another nation, by which the contracting nations agree that the decision of the tribunal of arbitration shall be a final settlement of all questions submitted, becomes the supreme law of the land, and is as binding on the courts as an act of Congress. *La Ninfa* (D. C.) 49 Fed. 575, reversed."

<sup>20</sup> The statement of facts and part of the opinion is omitted.

The ninth article of the Jay treaty of 1794 enabled the subjects and citizens of either country to hold lands in the other and to sell and devise them as if they were natives.

<sup>21</sup> This same ninth article was previously considered in an American case. In *Fox v. Southack*, 1815, 12 Mass. 143, 148, Jackson, J., says: "It is not

SOCIETY FOR PROPAGATION OF THE GOSPEL IN FOREIGN PARTS v. TOWN OF NEW HAVEN et al.

(Supreme Court of the United States, 1823. 8 Wheat. 464, 5 L. Ed. 662.)

See ante, p. 93, for a report of the case.

PROTOCOLS OF CONFERENCES BETWEEN GREAT BRITAIN, AUSTRIA, FRANCE, GERMANY, ITALY, RUSSIA, AND TURKEY, RELATIVE TO THE INVIOABILITY OF TREATIES, AND THE REVISION OF THE TREATY OF MARCH 30, 1856, SO FAR AS REGARDS THE NEUTRALIZATION OF THE BLACK SEA, THE STRAITS OF THE DARDANELLES AND BOSPHORUS, AND THE NAVIGATION OF THE DANUBE, 1871.

ANNEX TO PROTOCOL No. 1.

(61 British and Foreign State Papers, 1870-1871, 1193, 1198, 1199.)

The plenipotentiaries of the North German Confederation, Austria-Hungary, Great Britain, Italy, Russia, and Turkey, assembled today in conference, recognize that it is an essential principle of the law of nations that no Power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, except as the result of the consent of the contracting parties, by means of an amicable understanding.

In faith of which the said plenipotentiaries have signed the present protocol.

Done at London, this 17th day of January, 1871.<sup>22</sup>

necessary for the determination of this cause to decide whether the ninth article of that treaty was annulled by the late war; as, if it were so, that circumstance would not give any new rights to the plaintiff. There seems, however, to be no doubt that this article is one of those stipulations which are distinguished by some of the writers on the law of nations as real in their own nature, and which are accomplished by the act of ratification, so that they cannot be dissolved by any subsequent event. 'Pactum liberatorium, quo pax remisso aut transactio, facta est, qua jus extinctum reviviscere non potest.' Commentary on H. Cocceius on Grotius, B. 2, c. 16, § 16."

<sup>22</sup> France adhered to this declaration March 13, 1871.

By the Treaty of Paris of March 30, 1856, concluded between Great Britain, France, Austria, Prussia, Sardinia, Russia, and Turkey, it was provided, among other things, that the Black Sea should be neutralized; that its waters and ports were open to the merchant marine of every nation, but forbidden to vessels of war, not only of the riparian States, but of all other Powers (article 11); that neither Russia nor Turkey should establish or maintain military arsenals upon the coasts thereof (article 13).

These provisions were imposed upon Russia by its enemies, and were exceedingly galling to Russia, which took advantage of the War of 1870 between France, Prussia and the German States, to declare itself freed from their observance. Great Britain protested vigorously.

A conference of representatives of the signatories of the Treaty of Paris,

## HOOPER v. UNITED STATES.

(United States Court of Claims, 1887. 22 Ct. Cl. 408.)

DAVIS, J.<sup>23</sup> This court has now delivered three opinions upon general issues raised in the French Spoliations Cases. The first related to the broad questions as to the validity, against France, of the claims as a class, and the resulting liability of the United States to the claimants; the second was directed more especially to forms of pleading, the value of evidence, and rights of insurers; while the third disposed of a motion made by the defendants for a rehearing of the general questions discussed in the first opinion. *Gray, administrator, v. United States*, 21 Ct. Cl. 340; *Holbrook, administrator, v. United States*, 21 Ct. Cl. 434; *Cushing, administrator, v. United States*, 22 Ct. Cl. 1.

A large number of cases have since been argued and submitted to the court, and certain general questions are found raised in many of them. Those questions we shall now proceed to discuss, as well as two points which were sent back by the court for further argument.

It is urged by the claimants that the treaties of 1778 (8 Stat. 6, 12) remained in force, notwithstanding the abrogating act of July 7, 1798 (1 Stat. 578), until the final ratification of the treaty of 1800 (8 Stat. 178), and that these treaties prescribe the rule by which all the spoliation claims are to be measured. This position is denied by the government.

For the purpose of this branch of the case, the period of the spoliations may be divided into two parts—that prior to July 7, 1798, and that subsequent thereto and prior to the ratification of the treaty of 1800.

As to the first period, we find the position on both sides to have been consistent, which a few citations covering different years will clearly show. \* \* \*

The treaties of 1778, particularly the treaty of commerce, which is the important one for our purposes, were in existence until the passage of the abrogating act. Whatever disputes occurred between this country and France during the disturbed period following the conclusion of the Jay Treaty arose from differences of interpretation of various clauses of the Franco-American Treaty, and on neither side do we find seriously advanced a contention that the treaties were not in existence and were not binding upon both nations. The United States distinctly urged their enduring force, while the French departed from this position only in this (if it be a departure), that the Jay Treaty introduced a modification into their treaty with us of which they were entitled to the benefit.

by the Treaty of London of 1871 agreed *inter alia* to the obligation of these articles, and annexed to the Treaty the protocol printed above.

<sup>23</sup> The statement of facts is omitted and only so much of the opinion is given as relates to annulment of treaties.

We are of opinion that the treaties of 1778, so far as they modified the law of nations, constituted the rule by which all differences between the two nations were to be measured after February 6, 1778, and before July 7, 1798.

As to the period after July 7, 1798:

On that date the abrogating act passed by the Congress was approved by the President and became a law within the jurisdiction of the Constitution; a law replacing to that extent the treaties, and binding upon all subordinate agents of the nation, including its courts, but not necessarily final as the annulment of an existing contract between two sovereign powers.

A treaty which on its face is of indefinite duration, and which contains no clause providing for its termination, may be annulled by one of the parties under certain circumstances. As between the nations it is in its nature a contract, and if the consideration fail, for example, or if its important provisions be broken by one party, the other may, at its option, declare it terminated. The United States have so held in regard to the Clayton-Bulwer Treaty, as to which Mr. Frelinghuysen, then Secretary of State, wrote Mr. Hall, minister in Central America (July 19, 1884):

"The Clayton-Bulwer Treaty was voidable at the option of the United States. This I think, has been demonstrated fully upon two grounds. First, that the consideration of the treaty having failed, its object never having been accomplished, the United States did not receive that for which they covenanted; and, second, that Great Britain has persistently violated her agreement not to colonize the Central American coast."

Here concur two clear reasons for annulment, failure of consideration and an active breach of contract.

Abrogation of a treaty may occur by change of circumstances, as:

"When a state of things which was the basis of the treaty, and one of its tacit conditions, no longer exists. In most of the old treaties were inserted the *clausula rebus sic stantibus*, by which the treaty might be construed as abrogated when material circumstances on which it rested changed. To work this effect it is not necessary that the facts alleged to have changed should be material conditions. It is enough if they were strong inducements to the party asking abrogation.

"The maxim '*Conventio omnis intelligitur rebus sic stantibus*' is held to apply to all cases in which the reason for a treaty has failed, for there has been such a change of circumstances as to make its performance impracticable except at an unreasonable sacrifice." Wharton's *Com. Am. Law*, § 161.

"Treaties, like other contracts, are violated when one party neglects or refuses to do that which moved the other party to engage in the transaction. \* \* \* When a treaty is violated by one party in one

or more of its articles, the other can regard it as broken and demand redress, or can still require its observance." Woolsey, § 112.

The United States annulled, or at least attempted to annul, the treaties with France upon the grounds, stated in the preamble of the statute, that the treaties had been repeatedly violated by France, that the claims of the United States for reparation of the injuries committed against them had been refused; that attempts to negotiate had been repelled with indignity and that there was still being pursued against this country a system of "predatory violence infracting the said treaties and hostile to the rights of a free and independent nation." Such were the charges upon which was based the enactment that "the United States are of right freed and exonerated from the stipulations of the treaty and of the consular convention heretofore concluded between the United States and France, and that the same shall not henceforth be regarded as legally obligatory on the government or citizens of the United States."

The treaties, therefore, ceased to be a part of the supreme law of the land, and when Chief Justice Marshall stated, in July, 1799, *Chirac v. Chirac*, 2 Wheat. 272, 4 L. Ed. 234, that there was no treaty in existence between the two nations, he meant only that within the jurisdiction of the Constitution the treaties had ceased to exist, and did not mean to decide, what it was exclusively within the power of the political branch of the government to decide, that, as a contract between two nations the treaties had ceased to exist by the act of one party, a result which the French ministers afterwards said could be reached only by a successful war.

The only question that we have now to consider is that of the international relation. The annulling act issued from competent authority and was the official act of the government of the United States. So far as it was in the power of one party to abrogate these treaties it was indisputably done by the act of July 7, 1798. Notwithstanding this statute, did not the treaties remain in effect to this extent, if no further, that they furnish a scale by which the acts of France, which we are charged to examine, are to be weighed; and in considering the legality of those acts are we not to follow the treaties where they vary the law of nations? The claimants in very learned and philosophical arguments contend for the affirmative. \* \* \*

We are of the opinion that the circumstances justified the United States in annulling the treaties of 1778; that the act was a valid one, not only as a municipal statute, but as between the nations; and that thereafter the compacts were ended. We fail to find any agreement by France as to these claims to submit to the treaty rules after July 7, 1798, the treaties not being recognized by us, and we conclude that the validity of claims not expressly mentioned in the treaty of 1800, which arose after July 7, 1798, is to be ascertained by the principles

of the law of nations, recognized at that time, and not by exceptional provisions found in the treaties of 1778. \* \* \*<sup>24</sup>

<sup>24</sup> See *Ropes v. Clinch*, 8 Blatchf. 304, Fed. Cas. No. 12,041 (1871), for the various ways in which Congress may destroy the operative effect of a treaty.

In *Terlinden v. Ames*, 184 U. S. 270, 282-284, 22 Sup. Ct. 484, 48 L. Ed. 534 (1902), Mr. Chief Justice Fuller said, in behalf of the court:

"This brings us to the real question, namely, the denial of the existence of a treaty of extradition between the United States and the Kingdom of Prussia, or the German Empire. In these proceedings the application was made by the official representative of both the Empire and the Kingdom of Prussia, but was based on the extradition treaty of 1852. The contention is that, as the result of the formation of the German Empire, this treaty had been terminated by operation of law.

"Treaties are of different kinds and terminable in different ways. The fifth article of this treaty provided, in substance, that it should continue in force until 1858, and thereafter until the end of a twelve months' notice by one of the parties of the intention to terminate it. No such notice has ever been given, and extradition has been frequently awarded under it during the entire intervening time.

"Undoubtedly treaties may be terminated by the absorption of powers into other nationalities and the loss of separate existence, as in the case of Hanover and Nassau, which became by conquest incorporated into the Kingdom of Prussia in 1866. Cessation of independent existence rendered the execution of treaties impossible. But where sovereignty in that respect is not extinguished, and the power to execute remains unimpaired, outstanding treaties cannot be regarded as avoided because of impossibility of performance.

"This treaty was entered into by His Majesty the King of Prussia in his own name and in the names of eighteen other states of the Germanic Confederation, including the Kingdom of Saxony and the free city of Frankfurt, and was acceded to by six other states, including the Kingdom of Württemberg, and the free Hanseatic city of Bremen, but not including the Hanseatic free cities of Hamburg and Lubeck. The war between Prussia and Austria in 1866 resulted in the extinction of the Germanic Confederation and the absorption of Hanover, Hesse Cassel, Nassau and the free city of Frankfurt by Prussia.

"The North German Union was then created under the presidency of the Crown of Prussia, and our minister to Berlin, George Bancroft, thereupon recognized officially not only the Prussian Parliament, but also the Parliament of the North German United States, and the collective German Customs and Commerce Union, upon the ground that by the paramount constitution of the North German United States, the King of Prussia, to whom he was accredited, was at the head of those several organizations or institutions; and his action was entirely approved by this government. Messages and Documents, Dep. of State, 1867-68, part I, p. 601; Dip. Correspondence, Secretary Seward to Mr. Bancroft, Dec. 9, 1867.

"February 22, 1868, a treaty relative to naturalization was concluded between the United States and His Majesty, the King of Prussia, on behalf of the North German Confederation, the third article of which read as follows: 'The convention for the mutual delivery of criminals, fugitives from justice, in certain cases, concluded between the United States on the one part and Prussia and other states of Germany on the other part, the sixteenth day of June, one thousand eight hundred and fifty-two, is hereby extended to all the states of the North German Confederation.' 15 Stat. 615. This recognized the treaty as still in force, and brought the republics of Lubeck and Hamburg within its scope."

## CHAPTER VI

## PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

## SECTION 1.—MAINTENANCE OF GENERAL PEACE

CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES.<sup>1</sup>

(First Hague Peace Conference of 1899, July 29, 1899. 32 Stat. 1779, 1785.)

Article 1. With a view to obviating, as far as possible, recourse to force in the relations between States, the signatory Powers agree to use their best efforts to insure the pacific settlement of international differences.

## SECTION 2.—GOOD OFFICES AND MEDIATION

## CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES.

(First Hague Peace Conference of 1899, July 29, 1899. 32 Stat. 1779, 1785-1786.)

Article 2. In case of serious disagreement or conflict, before an appeal to arms, the signatory Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.

Article 3. Independently of this recourse, the signatory Powers recommend that one or more Powers, strangers to the dispute, should,

<sup>1</sup> This Convention, negotiated at the First Peace Conference, meeting at The Hague, May 18-July 29, 1899, was adopted by the twenty-six powers there represented. It was ratified by each of the countries taking part in the conference, and the ratifications were deposited, in accordance with the terms of the agreement, with the Minister of Foreign Affairs, at The Hague.

In June, 1907, the Latin-American states not invited to the First Hague Conference, or participating in its labors, adhered to the Pacific Settlement Convention, so that it thereupon became the law of forty-four states.

In 1907, at the Second Hague Peace Conference, it was revised and enlarged, and met with the approval of the forty-four states assembled. States which have not ratified the revised Convention remain bound by the first. It is, therefore, to all intents and purposes, the law of all civilized states.

Since the institution of the Permanent Court of Arbitration provided for by the Pacific Settlement Convention, sixteen cases have been decided, and one is pending. For the texts of these cases, see George Grafton Wilson, *The Hague Arbitration Cases*, Boston (1915); James Brown Scott, *The Hague Court Reports*, New York (1916).



on their own initiative, and as far as circumstances may allow, offer their good offices or mediation to the States at variance.

Powers, strangers to the dispute, have the right to offer good offices or mediation, even during the course of hostilities.

The exercise of this right can never be regarded by one or the other of the parties in conflict as an unfriendly act.

Article 4. The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance.

Article 5. The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute, or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

Article 6. Good offices and mediation, either at the request of the parties at variance, or on the initiative of Powers strangers to the dispute, have exclusively the character of advice and never have binding force.

Article 7. The acceptance of mediation can not, unless there be an agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war.

If mediation occurs after the commencement of hostilities it causes no interruption to the military operations in progress, unless there be an agreement to the contrary. \* \* \*

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### SECTION 3.—INTERNATIONAL COMMISSIONS OF INQUIRY

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#### CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES.

(First Hague Peace Conference of 1899, July 29, 1899. 32 Stat. 1779, 1787, 1788.)

Article 9. In differences of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact, the signatory Powers recommend that the parties, who have not been able to come to an agreement by means of diplomacy, should as far as circumstances allow, institute an international commission of inquiry, to facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation.

Article 10. The international commissions of inquiry are constituted by special agreement between the parties in conflict.

The convention for an inquiry defines the facts to be examined and the extent of the commissioners' powers.

It settles the procedure.

On the inquiry both sides must be heard.

The form and the periods to be observed, if not stated in the inquiry convention, are decided by the commission itself. \* \* \*

Article 14. The report of the international commission of inquiry is limited to a statement of facts, and has in no way the character of an arbitral award. It leaves the conflicting Powers entire freedom as to the effect to be given to this statement.

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## SECTION 4.—INTERNATIONAL ARBITRATION

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### CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES.

(First Hague Peace Conference of 1899, July 29, 1899. 32 Stat., 1779, 1788, 1790, 1791, 1793, 1797, 1798.)

Article 15. International arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law.

Article 16. In questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle. \* \* \*

Article 23. Within the three months following its ratification of the present Act, each signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrators. \* \* \*

The members of the Court are appointed for a term of six years. \* \* \*

Article 24.<sup>2</sup> When the signatory Powers desire to have recourse to the Permanent Court for the settlement of a difference that has arisen between them, the arbitrators called upon to form the competent tribunal to decide this difference must be chosen from the general list of members of the Court.

<sup>2</sup> In the revision of this Convention, made in 1907 at the Second Hague Peace Conference, the following addition was made to the above paragraph: "If, within two months' time, these two Powers can not come to an agreement, each of them presents two candidates taken from the list of members of the Permanent Court, exclusive of the members selected by the parties and not being nationals of either of them. Drawing lots determines which of the candidates thus presented shall be umpire." Convention for the Pacific Settlement of International Disputes, signed at The Hague, October 18, 1907, art. 45, 36 Stat. 2223.

Failing the direct agreement of the parties on the composition of the arbitration tribunal, the following course shall be pursued:

Each party appoints two arbitrators, and these together choose an umpire.

If the votes are equal, the choice of the umpire is intrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject, each party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected.

The tribunal being thus composed, the parties notify to the Bureau their determination to have recourse to the Court and the names of the arbitrators.

The tribunal of arbitration assembles on the date fixed by the parties.

The members of the Court, in the discharge of their duties and out of their own country, enjoy diplomatic privileges and immunities. \* \* \*

Article 31. The Powers who have recourse to arbitration sign a special act (compromis), in which the subject of the difference is clearly defined, as well as the extent of the arbitrators' powers. \* \* \*

Article 52. The award, given by a majority of votes, is accompanied by a statement of reasons. It is drawn up in writing and signed by each member of the tribunal. \* \* \*

Article 54. The award, duly pronounced and notified to the agents of the parties at variance, puts an end to the dispute definitely and without appeal.<sup>8</sup>

Article 55. The parties can reserve in the compromis the right to demand the revision of the award.

In this case, and unless there be an agreement to the contrary, the demand must be addressed to the tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence on the award, and which, at the time the discussion was closed, was unknown to the tribunal and to the party demanding the revision.

Proceedings for revision can only be instituted by a decision of the tribunal expressly recording the existence of the new fact, recognizing in it the character described in the foregoing paragraph, and declaring the demand admissible on this ground.

The compromis fixes the period within which the demand for revision must be made.

Article 56. The award is only binding on the parties who concluded the compromis. \* \* \*

<sup>8</sup> In the 1907 revision of this Convention, the following article was inserted after the above.

"Article 82. Any dispute arising between the parties as to the interpretation and execution of the award shall, in the absence of an agreement to the contrary, be submitted to the tribunal which pronounced it." 86 Stat. 2190, 2232.

## APPENDIX TO PART ONE

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### In re CHAMBERLAIN'S SETTLEMENT.

#### CHAMBERLAIN v. CHAMBERLAIN.

(Chancery Division, 1921. 37 Times L. Rep. 968.)

By a settlement dated May 5, 1902, General Sir Crawford T. Chamberlain settled £5,000 on trust for investment and to pay the income of the trust funds to his nephew, Houston Stewart Chamberlain, during his life or until he should become bankrupt, or should assign or charge it, "or until some event shall happen \* \* \* whereby the said income or any part thereof, if belonging absolutely to him, would become vested or charged in favour of some other person or persons or a corporation"; and in the event of the determination during the life of H. S. Chamberlain of the above trust in his favour, the trustees were given a discretion to apply the income for the benefit of H. S. Chamberlain and his present or any after-taken wife and his issue, and subject thereto were directed to hold the capital and income of the trust funds upon trust for the benefit of the issue of H. S. Chamberlain and in default of issue upon trust as therein mentioned.

This summons was taken out by the trustees for the time being to have it determined whether the life interest of H. S. Chamberlain was forfeited by virtue of the charge imposed on the property of German nationals in this country on January 10, 1920, by article 297 of the Treaty of Peace with Germany or the Treaty of Peace Order, 1919.

The evidence was that H. S. Chamberlain was born in England on September 9, 1855. In 1870 he went to the Riviera and stayed there till 1878, studying under a Prussian tutor. In 1878 he was married at Geneva to a German, and resided at Geneva or Paris until 1882, and at Vienna from 1882 to 1906. In 1907 he divorced his wife in Germany, and in 1908 married his present wife, a daughter of Richard Wagner; and from that time he had resided at Bayreuth.

Before the war H. S. Chamberlain was well known in Germany for his writings on political and other subjects, in which he expressed strong pro-Teutonic and anti-Semitic views. During the war he was anti-British. He had no issue.

Early in 1921 his solicitors received a letter from him in which he stated that he had obtained a certificate of naturalization as a German on August 8, 1916. He added "that his application for naturalization was originally made the very day the news reached us of England's declaration of war against Germany, which forced me to decide once for all between the country of my birth and the country of my adoption, which is also the country of my affections since childhood, and the country which gives me my livelihood." The delay in obtaining the

certificate had, he said, been caused by the need to obtain the consent of the separate German states as well as special permission for naturalization during the war. Evidence was before the court as to H. S. Chamberlain's position in German law, but it was admitted at the hearing on behalf of H. S. Chamberlain that in a German court applying German law he would be recognized as a German citizen. \* \* \*

Mr. Justice P. O. LAWRENCE, in delivering judgment, said that the question was whether the respondent, Houston Stewart Chamberlain, had a German nationality within the meaning of the Treaty of Peace and of the Treaty of Peace Order, 1919. Section 2 of the Order provided that for the purposes of the Order the expression "nationals" in relation to any state included the subjects or citizens of that state. He (his Lordship) agreed with the decision of Mr. Justice Russell in *Stoeck v. Public Trustee*, 37 The Times L. R. 666, [1921] 2 Ch. 67, that the question whether a person was a "German national" within the meaning of the Treaty and Order fell to be determined exclusively by the German municipal law. It was clear from the evidence and was admitted that the respondent, according to German municipal law, by virtue of his naturalization, acquired the status of a German subject, although at the time he was the subject of a state at war with the German Empire. It was true that the courts of this country, in the circumstances of this case, would refuse to recognize the respondent's change of allegiance and would hold him still liable to all the obligations of a British subject (*Rex v. Lynch*, 19 The Times L. R. 163, [1903] 1 K. B. 444; and *Ex parte Freyberger*, 33 The Times L. R. 275, [1917] 2 K. B. 129); but, bearing in mind that the Treaty was an international agreement, one of the parties to which was Germany, he (his Lordship) did not think that there was anything incongruous in holding that the respondent was a German national within the meaning of the Treaty, although for all other purposes the courts of this country would refuse to recognize his German nationality. To hold otherwise would lead to the anomalous result that the expression "German national" in the Treaty would bear a different meaning in England from that which it bore in Germany. The true view of the construction of the Treaty was that the expression "German nationals" included, and was intended to include, all persons who according to German law answered that description, whether they also had any other nationality or not, and that it was left to each of the Allied and Associated Powers so to regulate matters within its own jurisdiction as to ensure that there should be no injustice or hardship. Therefore, if it was proved, as it had been in this case, that the person concerned was a German national according to German municipal law, then that person came within the operation of the Treaty and Order, although he might also be a national of some other state, even though that state was Great Britain, and even though, according to our law, he would be deemed not to be a German subject. He (his Lordship) therefore held that the respondent was a German national within the meaning of the Treaty and Order. The result was

that the accumulations in the hands of the trustees representing income which had accrued before January 10, 1920, ought to be paid to the Custodian, and the income accrued after that date was applicable under the discretionary trust which came into operation on that date by virtue of the charge created by the joint operation of the Treaty and Order.

### FASBENDER v. ATTORNEY GENERAL.

(Chancery Division, 1921. 88 Times L. Rep. 114.)

This action raised the question whether a woman of British parentage and nationality, who married a German national on November, 3, 1919, between the date of the Armistice and the date on which the Treaty of Peace came into force, thereby became a German national within the Treaty of Peace.

The plaintiff, now the wife of Ernest H. Fasbender, a German national, was born at Lincoln, the daughter of parents of British nationality. Before the outbreak of war she became engaged to her present husband, and after the Armistice, on October 10, 1919, she left England and went through the ceremony of marriage at Siegburg, near Cologne, on November 3, 1919. The plaintiff was possessed of certain property in England, which was taken by the Public Trustee as Custodian of Enemy Property, and he claimed that by her marriage, the plaintiff had become a German national, and that her property had become subject to the charge on the property of German nationals created by the Treaty of Peace Order, 1919. The Custodian declined to exercise in favour of the plaintiff the power vested in him by section 1 (xvi) of the Treaty of Peace Order, 1919, as amended by the Treaty of Peace (Amendment) Order, 1920, to release the plaintiff's property from the charge. The plaintiff contended that during the war a British subject was unable to divest himself or herself of his or her British nationality and become a subject of an enemy State, and relied on the decisions in *Rex v. Lynch*, 19 The Times L. R. 163, [1903] 1 K. B. 444, and *Ex parte Freyberger*, 33 The Times L. R. 275, [1917] 2 K. B. 129. She contended that the decisions in those cases applied equally to the case of a change of nationality caused by marriage. She began this action against the Attorney General claiming a declaration that her property rights and interests in his Majesty's dominions on January 10, 1920 (the date when the Treaty came into operation), were not subject to the charge under the Treaty of Peace with Germany or the Treaty of Peace Order, 1919. \* \* \*

Mr. Justice RUSSELL, in his considered judgment, said that two points were raised on behalf of the plaintiff—(1) that she could not, even if she wished, throw off her allegiance to the British crown in time of war, and therefore that she had not by her marriage ceased to be a British national on January 10, 1920; (2) that, if this were correct,

she was then a person of dual nationality, and that such a person, who possessed as one of her nationalities British nationality, was not a German national within the meaning of section 1 (xvi) of the Treaty of Peace Order, 1919. On the first point, a British subject could not, at common law, of his own act divest himself of his British nationality, whether this country were at peace or at war. The power to do so was first given by the Naturalization Act, 1870, which had now been superseded and repealed by the British nationality and Status of Aliens Act, 1914. By section 10 of the latter act it was enacted that "the wife of a British subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien." Section 11 provided that a woman, who, having been a British subject, had by her marriage become an alien, should not, by reason only of the death of husband or the dissolution of the marriage, cease to be an alien. Section 13 provided that a British subject who had been naturalized in a foreign state should thenceforth be deemed to have ceased to be a British subject. Section 14 provided that a person who was also a subject of a foreign state, as well as a British subject, or who, though born abroad, was a British subject, should be able to make a declaration of alienage, when of full age, and thereby cease to be a British subject.

His Lordship said that it was argued that the effect of section 10 was that a woman who was a British subject, by doing the particular act of marriage, might cease to be a British subject in the same way as, under sections 13 and 14, a British subject might cease to be so by doing particular acts. Accordingly, it was argued that the authorities, which had held that the acts provided for by sections 13 and 14 had no effect in time of war, applied to the marriage of a woman to an alien in time of war, and that she did not by marriage lose her nationality. The cases cited were *Rex v. Lynch*, *supra*, and *Ex parte Freyberger*, *supra*.

*Ex parte Freyberger*, *supra*, was a case under section 14 of the act of 1914. There *Freyberger*, a British subject by English law, was by Austrian law an Austrian subject. On attaining the age of 21 years he made a declaration of alienage under section 14, and claimed to be released from military service. It was held, both in the King's Bench Division and in the Court of Appeal, that he could not during a state of war divest himself of his British nationality by a declaration of alienage. The two cases were, of course, binding as to sections 13 and 14; but did they really touch section 10? They decided that formal acts, whose sole object was to terminate British nationality and acquire enemy nationality, could not in time of war be effective to produce those results. Section 10 was in a different form; no act was mentioned, except in a proviso, which did not concern this question; the section dealt merely with the status of married women, and enacted that the wife of an alien was to be deemed an alien. Except as to the immaterial proviso, the section was not an empowering section at all. By the section alienage attached in invitam to the wife as a by-product of

marriage. Alienage was not the sole object of marriage, or even its primary object; nor could it be reasonably said to fall within its object at all. On the other hand, sections 13 and 14 were empowering sections, and the steps mentioned were voluntary acts done by the British subject for the termination of his British nationality, and for no other purposes. It appeared to him that *Rex v. Lynch*, *supra*, and *Ex parte Freyberger*, *supra*, had no real application to section 10.

The plaintiff's marriage was undoubtedly valid under German law, and, unless he was prepared to hold (which he was not) that the marriage was a nullity under the laws of this country, the plaintiff was now the lawful wife of an alien. Thus she fell within the section, and was to be deemed an alien. This result flowed upon her in spite of herself, and not as the result of an action taken with the object of the withdrawal of allegiance to the British crown.

If he was right, no dual nationality existed, and the second point did not arise; but, if he was wrong on the first point, the second point was completely covered by the decision of Mr. Justice P. O. Lawrence in *In re Chamberlain's Settlement—Chamberlain v. Chamberlain*, *supra*. Mr. Romer, for the plaintiff, conceded that the decision covered the exact point, but he invited him not to follow it. Although he was not strictly bound by the decision, it was founded on a considered judgment, which was the only judgment on record dealing with the matter. In those circumstances judicial comity would have prompted him to follow it, and, had it been necessary for him to decide that part of the case, which it was not, he would without comment have followed that decision.

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### JOHNSTONE v. PEDLAR.

(House of Lords, 1921. L. R. [1921] 2 App. Cas. 262.)

Appeal from an order of the Court of Appeal in Ireland, reversing an order of the King's Bench Division in Ireland, and ordering judgment to be entered for the plaintiff in the action. [1920] 2 L. R. 450.

The respondent was an Irishman by birth, but had become a naturalized American citizen. In 1916 he returned to Ireland, and since then he had, with some interruptions, resided in that country. The action was brought by the respondent against the appellant, the Chief Commissioner of the Dublin Metropolitan Police, for the return of a sum of cash and a cheque, both the property of the respondent, which had been found upon his person and seized by the police on his being arrested in Ireland for illegal drilling, with damages for their detention, or alternatively for damages for the conversion of the said money and cheque.

The substantial defence to the action was that the plaintiff was an alien and the said moneys and cheque were taken and detained by an officer of the Crown by the direction of the Crown as an act of state

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for the defence of the realm and for the prevention of crime. \* \* \*

Viscount CABB. My Lords, counsel for the appellant contended for the broad proposition that, where the personal property of an alien friend resident in this country is seized and detained by an officer of the Crown, and his act is adopted and ratified by the Crown as an act of state, the alien is without legal remedy. In my opinion this proposition cannot be sustained.

When a wrong has been done by the King's officer to a British subject, the person wronged has no legal remedy against the sovereign, for "the King can do no wrong"; but he may sue the King's officer for the tortious act, and the latter cannot plead the authority of the sovereign, for "from the maxim that the King cannot do wrong it follows, as a necessary consequence, that the King cannot authorize wrong." *Tobin v. The Queen* (1864) 16 C. B. (N. S.) 310; *Feather v. The Queen*, 6 B. & S. 257, 295. On the other hand, where the person injured is an alien resident abroad, the above rule does not apply; and if the act causing the injury is adopted by the sovereign as an act of state, the alien is without redress except by diplomatic action taken through the government of his own country. *Buron v. Denman*, 2 Ex. 167; *Secretary of State for India v. Kamachee Boye Sahaba* (1859) 13 Moo. P. C. 22.

But there is a third case—namely, where the person aggrieved is an alien *ami* resident here; and I think that it is the established law that such a case falls within the first and not within the second of the above categories. In early times an alien had no rights in public law, and in private law his rights were much restricted. It was laid down by Littleton (section 198) that an alien could bring no action, real or personal, but as regards an alien *ami* this proposition was disputed by Coke, who said: "In this case the law doth distinguish betweene an alien, that is a subject to one that is an enemy to the King, and one that is subject to one that is in league with the King; and true it is that an alien *ennemie* shall maintaine neither reall nor personall action, donec terræ fuerint communes, that is, untill both nations be in peace; but an alien that is in league, shall maintain personall actions; for an alien may trade and traffique, buy and sell, and therefore of necessity he must be of ability to have personall actions; but he cannot maintaine either reall or mixt actions." Co. Litt. 129b. Certainly Littleton's rule was not recognized by the law merchant or in chancery; and before the end of the sixteenth century it was established that at common law an alien friend could own chattels and sue on a contract or in tort in the same manner as a British subject. Dyer 2b. No doubt a friendly alien is not for all purposes in the position of a British subject. For instance, he may be prevented from landing on British soil without reason given, *Musgrove v. Chun Teeong Toy*, [1891] A. C. 272; and having landed, he may be deported, at least if a statute authorizes his expulsion: *Attorney General for Canada v. Cain*, [1906] A. C. 542; and see *In re Adam*, [1837] 1 Moo. P. C. 460. But so long as he remains in this country with the

permission of the sovereign, express or implied, he is a subject by local allegiance with a subject's rights and obligations. *Hale's Pleas of the Crown*, vol. 1, p. 542; *Calvin's Case* (1608) 7 Rep. 6a; *De Jager v. Attorney General of Natal*, [1907] A. C. 326; *Porter v. Freudenberg*, per Lord Reading, C. J., [1915] 1 K. B. 857, 869; including the right to sue the King's officer for a legal wrong. \* \* \*

The above observations are sufficient to cover the present case, which your Lordships were invited to determine on broad lines. If it were necessary to go into the particular facts of this case, it would have to be considered whether the seizure by a police officer of money found on a person arrested within the realm can properly be described, even though ratified by a minister, as an "act of state." It has been said that such an act must be done outside British territory. *Cobbett's Leading Cases*, vol. 1, p. 18; see *Musgrave v. Pulido* (1879) 5 App. Cas. 102, 112, and again that the expression "act of state" denotes "a catastrophic change constituting a new departure," per Moulton, L. J., in *Salaman v. Secretary of State for India*, [1906] 1 K. B. 613, 640; but it is unnecessary in the present case to determine whether the meaning of the term is so restricted. It is enough to say that in this case the defence of "an act of state" cannot prevail. \* \* \*

LORD PHILLIMORE. My Lords, this case has merited, and has received, ample discussion; but at the conclusion I think I can put my reasons for a decision into a short compass.

When a subject sues another subject for a supposed tort, the defendant cannot plead as a defence that he did the act that is said to be a tort by authority of the King. The maxim, "The King can do no wrong," is to be applied to litigation in this way: No one complained of for an act which is said to be a tort can withdraw the cognizance of that claim from the Courts of the land by averring that he did the act by command of the King; because if it was a lawful act, such averment is unnecessary, and if it was an unlawful act, he cannot be admitted to say that he was told to do it by the King. The defence set up in the present case is sometimes called the defence of an act of state. As regards this way of looking at it, I cannot put the matter better or more tersely than as I found it put in one of the reasons given by the successful plaintiffs in their case as respondents before the Privy Council in *Walker v. Baird*, [1892] A. C. 491, 494: "Because between Her Majesty and one of her subjects there can be no such thing as an act of state." And this proposition was finally accepted in the case of *Walker v. Baird*, [1892] A. C. 491, 494.

The next matter, then, that remains for inquiry, is whether the subject for this purpose must be a natural-born or naturalized subject or whether the word also comprehends a temporary subject, that is, the citizen or subject of a friendly state residing in this country. As regards such aliens, the rules of international law and the common law of England and Ireland which agrees with international law are, I think, well established. To begin with the alien takes his character

from his state. If his state is at war with ours his individual friendliness avails him nothing unless it enures to procure for him the special favour of license from the King. If his state is in amity with ours he is considered an alien ami even though his personal intentions are hostile. His individual hostility does not entitle him to the character of an alien enemy. He can be executed for high treason, and is not entitled to be considered as a prisoner of war. By parity of reason neither does his individual hostility disentitle him to the rights conferred by law upon an alien ami, once he has entered this realm with permission from the King.

The King, however, can refuse any alien admission to the realm. This was established by the decision of the Privy Council in *Musgrove v. Chun Teeong Toy*, [1891] A. C. 272; and that permission may in some respects be conditioned. Every state may, according to international law, make special laws regulating the acts and property of aliens within the realm. By the common law of England and Ireland an alien could not hold real estate, not even chattels real, for more than a short term. The *droit d'aubaine* existed in France till the Revolution. Most countries, including our own, have from time to time passed Alien Acts.

But an alien ami is never *ex lex*; he is never subject to the arbitrary dispositions of the King. His rights may be limited, but whatever rights he has he can enforce by law just as an ordinary subject can. That is, I believe, both international law and the law of this country. No trace of any other doctrine is to be found in the text books, or in decided cases. The alien ami, once he is resident within the realm, is given the same rights for the protection of his person and property as a natural born or naturalized subject. \* \* \*

From these propositions it would seem to follow that an alien ami complaining of a tort is in the position of an ordinary subject, and that no more against him than against any other subject can it be pleaded that the wrong complained of was, if a wrong, done by command of the King or was a so-called act of state.

From the moment of his entry into the country the alien owes allegiance to the King till he departs from it, and allegiance, subject to a possible qualification which I shall mention, draws with it protection, just as protection draws allegiance.

Then is there anything special in this case? The respondent has indeed no merits. On his own admission, he might have been tried, convicted and executed for high treason. His conduct shows evidence of much hostile feeling. He has since been expelled and rightly expelled from the country. But at the time when his money was taken from him, he was residing in the country, like any other alien, with the tacit permission of the King. He owed temporary allegiance to the King and for that reason could have been tried for high treason; but he was entitled till his trial to ordinary protection. \* \* \*†

† The concurring opinions of Viscount Finley and Lords Atkinson and Sumner are omitted.

## PART II

### COMPULSIVE MEASURES OF REDRESS IN TIME OF PEACE

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#### CHAPTER I

#### NONINTERCOURSE

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#### THE PATRIOT.

(Circuit Court of the United States, D. Virginia, 1820. 1 Brock. 407;  
Fed. Cas. No. 13,985.)

This was a libel against the schooner Patriot, a British vessel, and her cargo, owned partly by a British subject, and partly by citizens of the United States, which arrived in the Chesapeake Bay, in June, 1812, three days after the declaration of war, between the United States and Great Britain, from the island of Guadaloupe, a British colony, contrary to the several acts of Congress, to interdict the commercial intercourse between the United States and Great Britain, her colonies and dependencies. The District Court of the United States at Norfolk, condemned the vessel and her cargo, and from this decree, the claimants appealed to this court.

The following opinion was delivered by

MARSHALL, C. J.<sup>1</sup> The schooner Patriot, a British vessel, then lying in the port of Norfolk, was purchased in February, 1812, by Oswald Lawson, a British subject, then, and for some time before, a resident of the town of Norfolk. This purchase was made by Lawson, at the instance of Henry Thomson, and Robert Dixson, citizens of the United States, whose object was, a mercantile voyage to the West Indies, and who advanced the whole purchase money, and took a bottomry bond, as security for the repayment thereof. The schooner sailed for the West Indies in February, 1812, with a cargo owned by Thomson & Dixon, which was placed under the control of Oswald Lawson, as supercargo. He sold his cargo in the West Indies, and took on board at Guadaloupe, a return cargo, consisting of sugars, belonging chiefly to Thomson & Dixon, with which he sailed from Guadaloupe in May 1812, bound to Halifax, in Nova Scotia, but with

<sup>1</sup> Parts of the opinion are omitted.

a determination to lie off the Capes of Virginia, until explicit instructions should be received from Thomson, one of the owners of the cargo, residing in Norfolk. She arrived off the Capes of Virginia in June, immediately after the declaration of war was known in Norfolk. Lawson, the supercargo and owner of the vessel, being ignorant of that event, despatched the mate with a letter of advice to Thomson, and determined to await the return of his messenger off the coast. In this interval, however, he entered the Capes, but sailed out of them again, without coming to anchor. The mate never returned, he being seized in Norfolk, as a prisoner of war. Two days after the mate had been landed, while the Patriot was lying off on the coast, about ten miles from land, and about forty south of the Capes, she fell in with a pilot boat, and took a pilot on board. The supercargo says, that he at first declined taking a pilot on board, as the vessel was not bound inward, but was persuaded by the pilot to do so, who represented the probability of an approaching storm from the coast. To avoid this storm, he determined to await within the Capes for instructions. The pilot taken on board, who was an apprentice of the owner of the boat, denies that such advice was given. The vessel was brought within the Capes, with the knowledge of Lawson, the owner and supercargo.

On its being known in Norfolk, that a British vessel was off the Capes, the revenue cutter was sent to take her, and fell in with her, about three miles within the Capes, in the road leading to Lynhaven Bay, and also to Hampton Roads. She was brought into Norfolk and libelled.

The first allegation of the libel is, that she was a British schooner, which had come within the limits and territories of the United States of America, having on board a cargo of the growth, etc., of a dependency of Great Britain, to wit, of the island of Guadaloupe.

The second allegation is, that the cargo was imported into the United States, contrary to the true intent and meaning of the acts of Congress.

The third charge alleges, that the cargo was taken on board, for the purpose of being imported into the United States, with the knowledge of the owner. \* \* \*

The forfeiture of the vessel and cargo, is claimed under the third section of the act "to interdict the commercial intercourse between the United States, and Great Britain, and France, and for other purposes," which was passed on the 1st of March, 1809, and was re-enacted "against Great Britain, her colonies and dependencies," on the 2d of March, 1811.<sup>2</sup>

By the third section of the act of 1809, the entrance into the harbours and waters of the United States is interdicted to all ships or other vessels, sailing under the flag of Great Britain, or France, or

<sup>2</sup> 2 Story's L. U. S. c. 91, § 3, p. 1115, and Id. c. 96, p. 1187.

owned, in whole or in part, by any subject or citizen of either. And if any such vessel shall "arrive, either with or without a cargo, within the limits of the United States, or of the territories thereof, such ship or vessel, together with the cargo, if any, which shall be found on board, shall be forfeited," etc.

Under this section the Patriot, which was a British vessel, and her cargo, part of which belonged to citizens of the United States, were condemned in the District Court.

The claimants have appeared, and contend that this sentence is erroneous; because,

1st. The Patriot had not arrived within the limits of the United States, at the time when she was seized by the revenue cutter.

The term "arrival," when applied to a vessel, is said to be equivalent to the term "importation," when applied to goods; and a vessel cannot be properly said to have arrived, within the meaning of the act, whose cargo might not, with equal propriety, be said to be imported.

Without denying or affirming that, in the laws of Congress, the term "importation," when applied to a cargo, is precisely equivalent to the term "arrival," when applied to a vessel, I will inquire, whether the meaning of the word itself be in any manner ambiguous. "To arrive" is a neuter verb, which, when applied to an object moving from place to place, designates the fact of "coming to" or "reaching" one place from another, or of coming to or reaching a place by travelling, or moving towards it. If the place be designated, then the object which reaches that place has arrived at it. A person who is coming to Richmond, has arrived when he enters the city. But it is not necessary to the correctness of this term, that the place at which the traveller arrives should be his ultimate destination, or the end of his journey. A person going from Richmond to Norfolk, by water, arrives within Hampton Roads, when he reaches that place; or, if he diverges from the direct course, he arrives in Petersburg, when he enters that town. This is, I believe, the universal understanding of the term. Thus, the duty law requires, that the master of every vessel bound to Bermuda Hundred, or City Point, shall, on his arrival in Hampton Roads, or at Sewall's Point, deposit his manifest with the collector of Norfolk, or of Hampton. It also requires, that the master of any vessel, bound to any port of the United States, shall, on his arrival within four leagues of the coast, upon demand, produce his manifest, in writing, to any officer of the customs who shall first come on board. No person can doubt, that in the first case, the vessel bound to City Point, has arrived in Hampton Roads, when she enters the Roads; and that a vessel bound to any port of the United States, say to Boston, has arrived within four leagues of the coast, when she comes within that distance of land. It would be useless to multiply quotations on this point. The literal sense of the word seems

too plain for controversy. When the law enacts, that a British vessel, which arrives within the limits of the United States shall be forfeited, the forfeiture attaches, according to its letter, the instant that a vessel comes, voluntarily, within those limits. Now, whatever doubt may exist respecting the application of this term to any part of the open sea, no doubt, I believe has ever been suggested respecting the Chesapeake Bay. That bay is clearly within the limits of the United States; and the forfeiture, under the letter of the act, is as complete as if it had attached, by the words, on her arrival within the Chesapeake Bay.

Is the spirit of the law more favourable to the claim than its letter? By the spirit of the law, I understand, the intention of the legislature, to be collected from the general language of the act, the scope of its provisions, and the objects to be attained.

The object of this section cannot be doubted. It is to exclude all vessels owned by British subjects, from the waters of the United States. Its language conveys this intention, and is obviously calculated to carry it into full effect. The other sections of the law, which are designed to prohibit all intercourse with Great Britain, and to exclude all British goods, show a rigorous determination on this whole subject, which forbids the suspicion that the intention of the legislature, or in other words, the spirit of the law, is more favourable to the claimants than its letter.

If this be the object of the act, can we doubt that it would have been completely defeated by allowing British vessels to come unmolested within the Chesapeake, and the other bays of the United States? If the Patriot might enter the Chesapeake with impunity, where is the line drawn, or who has drawn it, which she might not pass? Might she not pass the mouth of the James, the York, the Rappahannock, or the Potomac? Are any of these points more certainly within the limits of the United States, than this middle ground within the Capes? And if British vessels, laden with British goods, might with impunity lie within the Chesapeake, and the other bays of the United States, what would become of the Nonintercourse Act?

The Patriot being completely within the enacting clause, it is scarcely necessary to say that she has not brought herself within the exception. She was not "forced in by distress, or by the dangers of the sea." The only allegation which looks towards this subject is, that the owner was advised to take a pilot on board, because a storm might be expected. No storm had commenced. All was fair. But the pilot said one might be expected. Even this is denied by the pilot who was put on board. But, admitting the allegation to be true in its utmost extent, can this imagined fear, this apprehension of uncertain danger, satisfy the words, "forced in by the dangers of the sea"? If they may, language seems to have lost its use, and I am persuaded that nonintercourse laws would do very little good or harm.

I think, then, it cannot be doubted, that the Patriot, being stated in the claim to have belonged to a British subject, comes within the third section of the act. This would be my opinion, were it a case of the first impression. But the point is, I think, decided in *The Penobscot*, 7 Cranch, 356, 3 L. Ed. 369.

2d. The second point made for the claimants is, that the Nonintercourse Act of 1809, was not re-enacted by the Act of March 2, 1811, so far as respected British vessels. Although the third section of that act is expressly re-enacted, yet its re-enactment is limited. It is to be carried into effect, "against Great Britain, her colonies, and dependencies." So much of the act, then, as relates merely to British vessels, has been, it is said, permitted to expire. This strict exposition of the words is the more to be insisted on, because the law is highly penal.

Let this argument be examined.

The original act respected equally the vessels of France and Britain, and articles of their growth, produce, or manufacture. Its object was to interdict the entrance into the waters of the United States, to the vessels of both nations, and to forbid all commercial intercourse with either of them. The 1st and 2d sections of the act, relate solely to national ships. The 3d section is confined to vessels owned, wholly, or in part, by the subjects of Great Britain, or of France. The 4th, 5th, and other sections, relate to the dominions, etc., of the two countries, and to articles which are the growth, produce, or manufacture of either. They also contain provisions, calculated to secure the exclusion of those articles from the United States.

After making a painful experiment of the restrictive system against both nations, the law was permitted to expire, and the policy of the United States was in some degree varied. An act was passed on the 1st of May, 1810, promising, that if either beligerent would so revoke or modify its edicts, that they should cease to violate the neutral commerce of the United States, the sections of the nonintercourse law, which have been recapitulated, should, three months thereafter, be "revived, and have full force and effect, so far as relates to the dominions, colonies, and dependencies, and to the articles, the growth, produce, or manufacture of the dominions, colonies, and dependencies, of the nation refusing or neglecting to revoke, or modify, her edicts, in the manner aforesaid."

The President having issued his proclamation, on the 2d of November, 1810, announcing, as a fact, that the decrees of France were revoked, as required by the act of the 1st of May preceding, Congress, on the 2d of March, 1811, passed the act under which the Patriot and her cargo have been condemned. The case depends on the question, whether the 3d section is re-enacted so far as respects British vessels.



The language of the law, certainly, does not import a complete re-enactment of the whole of those sections. They are in terms re-enacted, "against Great Britain, her colonies, and dependencies." The question, whether these words comprehend the interdiction of our waters, to vessels owned by British subjects, is undoubtedly open for argument, and for consideration. In deciding it, we must search by legitimate means for the intention of the legislature, and be guided by that intention. Was it the intention of the legislature to revive the whole act, so far as it respected Great Britain, with, perhaps, the exception of its territorial operation, which may be created by omitting its provision respecting her possessions? Or only to revive those parts of the act, which relate exclusively to those breaches of it, which are connected with territory? Such, for example, as importing a cargo from "Great Britain, her colonies, or dependencies"?

That the act of 1809 is not revived generally, is satisfactorily accounted for, when we recollect that it was originally directed against both Great Britain and France, and that the legislature designed to re-enact it against Great Britain only. If we advert to this fact, and recollect the history of the times, we shall be but little inclined to the opinion, that Congress could have intended to leave our ports open to British vessels, when all commercial intercourse between the two countries was prohibited. It seems impossible to assign a motive for this particular relaxation. The policy of the United States, was directed with at least as much earnestness against the navigation, as against the manufactures, of Great Britain. But what seems conclusive on this point is, that the section is expressly revived, and yet contains not one word which relates to the territories of Great Britain, its colonies, or dependencies. The section is limited to ships owned wholly or in part by British subjects. Consequently, it applies to those vessels or to nothing.

The legislature might have revived the 3d section only. Had this been done, could it have been said that it was not revived as to vessels, because it was said to be revived against Great Britain, her colonies, and dependencies? Not a syllable in the section relates to colonies and dependencies; and not a syllable to Great Britain, except the prohibition to her vessels. To have said in that case, that the section was not revived as to vessels, would have been to ascribe to the legislature a declaration, that a particular section should be revived in a manner to have no effect whatever; or to make a law, with an exception co-extensive with its whole enactment. Such a construction must be totally inadmissible. The actual case is stronger than that supposed, because, in the actual case, other sections are revived, which might suggest a propriety of adding the words "colonies and dominions" to Great Britain.

It cannot, I think, be necessary to add anything to this argument. \* \* \*

An argument which produces the only serious doubt which can arise in this case, remains to be noticed. It is, that the 3d section of the Nonintercourse Act was repealed by the declaration of war. \* \* \*

I have considered this case with no disposition favourable to the condemnation of this cargo. But, according to the view I have taken of the subject, the cargo is liable to forfeiture, in consequence of being in a British vessel, which has arrived within the limits of the United States, while the nonintercourse law was in force. I shall not regret it, if a higher tribunal shall be of a different opinion.

The sentence of the District Court is affirmed with costs.<sup>3</sup>

<sup>3</sup> In *The Sally*, 8 Cranch, 382, 384. 3 L. Ed. 597 (1814) Mr. Justice Story, speaking for the Supreme Court, said:

"But a claim is interposed by the United States, claiming a priority of right to the property in question. upon the ground of an antecedent forfeiture to the United States, by a violation of the Nonintercourse Act (of March 1, 1809, § 5, 2 U. S. Stat. 529), the goods having been put on board at a British port, with an intent to import the same into the United States. We are all of opinion, that this claim ought not to prevail. The municipal forfeiture under the Nonintercourse Act, was absorbed in the more general operation of the law of war. The property of an enemy seems hardly to be within the purview of mere municipal regulations, but is confiscable under the *jus gentium*."

## CHAPTER II

## EMBARGO

## SECTION 1.—NONHOSTILE

## THE WILLIAM KING.

(Supreme Court of the United States, 1817. 2 Wheat. 148, 4 L. Ed. 206.)

Appeal from the Circuit Court for the district of New York. A libel was filed against this vessel, in the District Court of New York, March, 1809, for a breach of the act of the 22d of December, 1807, laying an embargo, and the several acts supplementary thereto, alleging that she proceeded from Baltimore, without any clearance or permit, bound on a voyage to Exuma, one of the Bahama islands, where she took in a cargo of 6,000 bushels of salt, with which she returned to New York.

The claimants admitted the fact of going to Exuma, and bringing away the salt, but alleged that it was from necessity; that the brig was regularly bound to Boston, but, being captured soon after she left Hampton Roads, by a British privateer, was sent to Jamaica, where she sold the cargo of flour which she had on board, the government of that colony not allowing it to be brought off; that she then went to Exuma.

The testimony in the case exhibited the following summary: About the middle of October, 1808, the vessel arrived at Baltimore from Boston. At Baltimore, she took on board a cargo of upwards of 1,600 barrels of flour, and sailed again, ostensibly for Boston, about the first of November. On reaching Hampton Roads, she stopped a few days, being, as was asserted, wind-bound. While there, a British privateer, of ten guns and twelve men, called the *Ino*, arrived in the Roads. On the eighth of the month, the brig put to sea, the *Ino* following her. On the afternoon of the same day, the *Ino* captured her, within ten leagues of the shore, putting a prize-master and one man on board; the vessels then proceeded to the West Indies. During the voyage, no attempt was made by the crew either to retake the brig or to escape, though favorable opportunities were not wanting; her crew consisted of nine persons. After a short separation from the privateer, the brig arrived off St. Nicholas Mole; here the privateer joined her, and thence the two went to Kingston. No prize proceedings were instituted against the brig; but, on the contrary, the supposed captors

relinquished all claim to their prize, on reaching Kingston. From Kingston, she went to Exuma, as above stated. The District Court, on the hearing, pronounced a sentence of condemnation; a decree of affirmance, pro forma, was entered in the Circuit Court, from which the cause was brought, by appeal, to this court.

JOHNSON, Justice, delivered the opinion of the court.<sup>1</sup>

This case comes up on appeal from the Circuit Court of New York. The vessel is the same which makes her appearance in the case of *The Short Staple*, 9 Cranch, 55, 3 L. Ed. 655, decided in this court at February term, 1815; and it has been contended, that the acquittal in that case is conclusive upon this. But we think otherwise. It might with more propriety be contended, that had the hearing of this cause come on together with that of *The Short Staple*, the latter would have found much more difficulty in escaping. As it was, the division of the court, and the acknowledgment of the judge who delivered the opinion, show that the vessel in that case was "hardly saved." In the present cause, there is very material evidence, which did not appear in, and could not affect, the former. We shall, therefore, dispose of this case altogether upon the evidence that is peculiar to it.

It will be recollected, that this vessel, as well as the *Short Staple*, were libeled for a violation of the Embargo Act of the 22d of December, 1807, and the supplementary act of the 9th of January, 1808, the former of which enacts, "that an embargo shall be laid on all ships and vessels in the ports of the United States, bound on a foreign voyage," and the latter forfeits the vessel that shall proceed to any foreign port or place, "contrary to the provisions of this act, or of the act to which this is a supplement." As the majority of the court were of opinion that no offence was committed in the case of *The Short Staple*, it was unnecessary to express any opinion on the application of the law. They, therefore, waived it.

But, in this case, it becomes necessary to lay down the following principles: There can be no doubt, that if the *William King* was carried off to Jamaica, by actual force, it was an act which wanted the concurrence of the will, and therefore innocent. But whatever is done in fraud of a law, is done in violation of it;<sup>2</sup> and if a vessel, with an original intention to go to a foreign port, complied with the requisition necessary to obtain a clearance on a voyage coastwise, this is but the device by which she eludes the force that would otherwise have prevented her departure from the port.

Was, then, the sailing to a foreign port a prohibited act, under the embargo law, to a registered or sea-letter vessel? If so, the commission of such an act was a cause of forfeiture under the Act of January 9, 1808. And here, the only doubt is, whether the words, "an embargo shall be laid," operate any further than to impose a duty upon

<sup>1</sup> Parts of the opinion are omitted.

<sup>2</sup> *Lee v. Lee*, 8 Pet. 44, 8 L. Ed. 860 (1834).

the public officers, to prevent the departure of a registered or sea-letter vessel on a foreign voyage. The language of the act is certainly not very happily chosen; but when we look into the definition of the word embargo, we find it to mean "a prohibition to sail." Substituting this periphrasis for the word "embargo," it reads "a prohibition to sail shall be imposed," etc., or, in other words, "such vessels shall be prohibited to sail," which words, had they been used in the act, would have left no scope for doubt.

The only facts which it will be necessary to notice in this case, in order to show the grounds of our decision, are these: The *Ino*, the supposed capturing vessel, sailed from Guernsey, for Boston, in September, 1808. She bore an English commission, and is commonly called a British privateer. But as there exists no distinction, that we know of, between a privateer and letter of marque, but what results from their equipments and habits, and as, although she mounted ten guns, she had but twelve men, and confessedly came to Boston for a cargo, we are induced to think, that her habits were rather commercial than roving. These three vessels lay in Boston harbor, some time, together; the two brigs sailed, within a few days of each other, bound to Baltimore, for a cargo of flour, and the *Ino* sailed soon after. As the embargo prevented her taking in a cargo, as such, the master cleared out for the Cape of Good Hope, and was permitted to take in a large stock of provisions as for a long voyage; but the master admits, that he was, in fact, bound to Jamaica, and sailed for that port, and affected to be destined to the Cape, in order to get permission to take in a large stock of provisions, because he knew provisions in the West Indies to be dear. In the mean time, the two brigs had taken in a cargo at Baltimore, and cleared out for Boston; but, as they allege, on account of contrary winds, they put into Hampton Roads, where they remained from the 1st of November to the 8th of the same month. Whilst the two brigs lay in Hampton Roads, the *Ino* also put into the same port and the reason alleged for doing so is, that after leaving the port of Boston, she encountered high winds, which carried away her mainboom, and finding herself in the latitude of the Capes of Virginia, she put in, to obtain a spar for a boom. \* \* \*

Three days after the arrival of the *Ino*, the two brigs sailed; the *Ino* immediately pursued, overhauled them before night, put a prize-master and one man on board the *William King*, a prize-master and two men in the other, and ordered them for Jamaica, with instructions to rendezvous at St. Nicholas Mole, if separated. Being overhauled, on this voyage, by the *Garland* [a British] frigate, the *Ino* fled, and the brigs were examined. But being liberated, they proceeded to Cape Nicholas Mole, where the *Ino* joined them, and leaving the *Short Staple* there, the *Ino* and this vessel proceeded to Jamaica. Off that place, the *Ino* restored a man which she had taken from the *William King*, and putting also the owner, Southcote, into her, she bore away, whilst

the William King entered the harbor of Kingston. There she was given up to the master, who, as it is alleged, was refused permission by the government to sail with his cargo, was obliged to sell it, and obtained about \$20 clear per barrel, for what had cost five or six dollars at Baltimore.

So far the evidence stands unimpeached; it constituted, in fact, the defence of the claimant. But at the trial below, in this cause, a witness was produced in behalf of the prosecution, of the name of Gustaff Forsberg, who went out mate of the William King, and who, among a variety of facts, testifies to the following: That when the William King sailed from Boston, she carried off a Vineyard pilot, not having been able to land him; and that previous to her leaving Baltimore, this pilot was put on board the Federal George, Captain Field, then taking in a cargo of flour for Boston, with a request from the master of the William King, to return him to Boston, and the brig then sailed, without a Boston pilot. That, after putting into Hampton Roads, the masters of the two brigs went up to Norfolk, and did not return, until the evening before they sailed; that this was the true cause of their detention in that port, as vessels went to sea, whilst they lay there, and the winds would have admitted of their doing the same. That, after the capture by the Ino, this witness intimated his intention to do no more duty, as he was then a prisoner; and was prevailed upon by the master to return to duty, by having his wages raised from \$9 to \$20, which alteration was entered on the shipping articles. That the man put on board with the prize-master was called Colonel Kirkland, was not a seaman, and that Captain R. Daniel, of the William King, still navigated the vessel, the prize-master exercising no authority, and this witness keeping the log-book, under the directions of the master. That at sea, in calm weather, the master and owner of the Ino, and the masters of the two brigs, met and amused themselves, in each other's vessels; that on their sailing from Jamaica, they took on board a number of articles, some of which were marked Ino; that Southcote, the owner of the Ino, came out with them as passenger; that the day after they left Kingston, they fell in with the Ino, and put on board of her, her owner, and the articles taken on board at Kingston, with the exception of certain parcels of bagging, which they took out with them to Exuma, for the purpose of taking in salt. And lastly, that after their arrival in New York, the master decoyed him on board a packet, and hurried him off, without his clothes, to Boston, and particularly cautioned him to be on his guard to say nothing to any one, but what had been entered on the log-book, and informing him, that if he remained in New York, he would be put in jail.

It is evident, that these circumstances, taken together, afford very ample ground for condemnation. There could be no reason urged, for putting the Vineyard pilot on board another vessel, which was not yet ready for sea, if the master of this vessel had really intended to return

to Boston; and abandoning their vessels for five or six days in Hampton Roads, looks too much like waiting for the expected convoy; whilst leaving the navigation of this vessel, and the keeping of the log-book, to the original master and mate, presents a state of confidence inconsistent with all idea of hostility. And this confidence is further conspicuous in all the subsequent occurrences to which this witness testifies. Independently of his testimony, the case is loaded with suspicious circumstances, but his testimony leads to conviction.

Aware of this, the counsel for the claimants have contented themselves with attacking his credibility. But after duly weighing all the circumstances insisted on in the argument, we are of opinion, that as to several material facts, his testimony pointed out the means of detection, if it was not consistent with the truth. \* \* \*

Upon the whole, the court are of opinion, that the capture was fictitious, and that the decision below must be affirmed.

Decree affirmed.

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## SECTION 2.—HOSTILE

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### THE BOEDES LUST.

(High Court of Admiralty, 1804. 5 C. Rob. 233.)

This was the case of a Dutch ship on a voyage from Demerara to Batavia, embargoed at the Cape of Good Hope by an English squadron before the actual declaration of war against Holland in 1803, and afterwards condemned as enemy's property.

Sir WILLIAM SCOTT.\* \* \* \* This was the state of the first seizure. It was at first equivocal; and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo, so terminated. That would have been the retroactive effect of that course of circumstances. On the contrary, if the transactions end in hostility, the retroactive effect is directly the other way. It impresses the direct hostile character upon the original seizure. It is declared to be no embargo; it is no longer an equivocal act, subject to two interpretations; there is a declaration of the animus, by which it was done, that it was done *hostili animo*, and is to be considered as an hostile measure *ab initio*. The property taken is liable to be used as the property of persons, trespassers *ab initio*, and guilty of injuries, which they have refused to redeem by any amicable alteration of their measures. This is the necessary course, if no particular compact intervenes for the restitution of such property taken before a formal declaration of hostilities. No such convention is set

\* Parts of the opinion are omitted.

up on either side, and the state, by directing proceedings against this property for condemnation, has signified a contrary intention. Accordingly, the general mass of Dutch property has been condemned on this retroactive effect; and this property stands upon the same footing as to the seizure, for it was seized at the same time, and with the same intent. There is no ground of distinguishing the time of seizure, between these claims and former cases of a similar nature; it was a provisional seizure in all, declared to be hostile by subsequent events, acting in a reflex manner upon all the property then seized, and declaring it to be all enemy's property, unless some circumstances can be shown to take these particular claims out of the common operation. \* \* \*

<sup>4</sup> See the earlier decision of Sir William Scott in *The Gertruyda*, 2 C. Rob. 211 (1799).

"The object of a hostile embargo may be by way of reprisal to obtain satisfaction for an alleged injury; or, it may be, in the expectation of the outbreak of war, to get possession of property which will presumably be hostile, for the purpose of confiscating it later—after the actual outbreak of war. Although the government might restore such property at the breaking out of war, it has not been the practice to do so; and hence, as Dana says, embargo 'refers itself directly to the question of the right, on breaking out of war, to seize ships and cargoes found in port.' Dana's *Wheaton*, p. 372. note.

"In the case of *Lindo v. Rodney*, 2 Douglas, 615 (1782), Lord Mansfield said: 'Ships not knowing of hostilities come in by mistake. Upon the declaration of war, or hostilities, all the ships of the enemy are detained in our ports, to be confiscated as the property of the enemy, if no reciprocal agreement is made.'

"The earlier writers upon international law do not mention embargo, at least in the sense of hostile embargo. Until towards the end of the last century, there was really no distinction made between property found on land and that found afloat. In both cases it was liable to capture. At the time of Bynkershoek and of Vattel, private property of the enemy was confiscated, though some treaties had exempted it from seizure at the commencement of war. Bynkershoek, [quaestionum juris publici, lib.] I, c. II. Bynkershoek mentions many cases, too, where it was seized before the declaration of war. It was left to the English admiralty courts to formulate the practice into legal maxims by their decisions. As to the retroactive effect of a declaration of war as applied by the courts, it is apparently a necessary invention of Sir William Scott to legalize a practice already in vogue." Freeman Snow, *Cases and Opinions on International Law* 249, 250, note (1893).

SCOTT INT.LAW



### CHAPTER III

### RETALIATION

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#### THE NEREIDE.

(Supreme Court of the United States, 1815. 9 Cranch, 388, 3 L. Ed. 769.)

MARSHALL, C. J.,<sup>1</sup> delivered the opinion of the court as follows:

In support of the sentence of condemnation in this case, the captors contend: 1. \* \* \* 2. \* \* \* 3. That on the principles of reciprocity this property should be condemned. 4. \* \* \*

3. The third point made by the captors is, that whatever construction might be put on our treaty with Spain, considered as an independent measure, the ordinances of that government would subject American property, under similar circumstances, to confiscation, and therefore the property, claimed by Spanish subjects in this case, ought to be condemned as prize of war.

The ordinances themselves have not been produced, nor has the court received such information respecting them as would enable it to decide certainly either on their permanent existence, or on their application to the United States. But be this as it may, the court is decidedly of opinion that reciprocating to the subjects of a nation, or retaliating on them, its unjust proceedings toward our citizens, is a political not a legal measure. It is for the consideration of the government not of its courts. The degree and the kind of retaliation depend entirely on considerations foreign to this tribunal. It may be the policy of the nation to avenge its wrongs in a manner having no affinity to the injury sustained, or it may be its policy to recede from its full rights and not to avenge them at all. It is not for its courts to interfere with the proceedings of the nation and to thwart its views. It is not for us to depart from the beaten track prescribed for us, and to tread the devious and intricate path of politics. Even in the case of salvage, a case peculiarly within the discretion of courts, because no fixed rule is prescribed by the law of nations, congress has not left it to this department to say whether the rule of foreign nations shall be applied to them, but has by law applied that rule. If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. Till such an act be passed, the court is bound by the law of nations which is a part of the law of the land. \* \* \*

<sup>1</sup> For the facts of this case, and for the opinion of Chief Justice Marshall on other heads, see post, p. 1014.

<sup>2</sup> "So far as the claim is made that the relators should be held in a spirit of comity and reciprocity, we can only say that the comity and reciprocity to

### THE FRANCES AND ELIZA.

(Supreme Court of the United States, 1823. 8 Wheat. 398; 5 L. Ed. 645.)

Appeal from the District Court of Louisiana. This was an allegation of forfeiture, against the British ship *Frances and Eliza*, in the court below, for a breach of the act of Congress of the 18th of April, 1818, c. 65, the first section of which is in these words:

"That from and after the 30th day of September next, the ports of the United States shall be and remain closed against every vessel, owned, wholly or in part, by a subject or subjects of his Britannic Majesty, coming or arriving from any port or place in a colony or territory of his Britannic Majesty, that is or shall be, by the ordinary laws of navigation and trade, closed against vessels owned by citizens of the United States; and such vessel, that, in the course of the voyage, shall have touched at, or cleared out from, any port or place, in a colony or territory of Great Britain, which shall or may be, by the ordinary laws of navigation and trade aforesaid, open to vessels owned by citizens of the United States, shall, nevertheless, be deemed to have come from the port or place in the colony or territory of Great Britain, closed, as aforesaid, against vessels owned by citizens of the United States, from which such vessel cleared out and sailed, before touching at and clear-

be extended to representatives of foreign governments depends upon Congress, and is not lodged within the judiciary. See 2 Op. Atty. Gen. 378, citing *The Nereide*, 9 Cranch, 389, 3 L. Ed. 769 (1815)." Pardee, J., in *Re Aubrey* (C. C.) 26 Fed. 848, 851 (1885).

For what has been not inaptly called judicial reprisals, see *The Leonor*, 3 British and Colonial Prize Cases, 91, 111 (1916), in which Mr. Justice Martin said:

"And prize courts above all others should strive to be truly the 'mirror of justice,' and be particularly careful to see that justice in its highest form is administered, because they have to satisfy the sense of justice not only of their own citizens but of foreign nations, for they sit to administer not the municipal law of their own country, but the law of nations in times of war, when the minds of most of the citizens of the belligerent nations are inflamed or obsessed by passion and hatred, and few possess that robustness and breadth of mind which are essential to the attainment of justice in such a disturbed mental atmosphere. How conflicting these views and interests are may be gathered from the fact that even in the two cases now pending before me citizens of six different nations are concerned and eighteen different claimants, including the governor of a state of Mexico. I make these observations because, in recent decisions of the prize court in London, the learned President felt it to be his duty to take the extreme step between nations of denouncing the prize courts of the German Empire as tribunals wherein justice cannot be obtained—vide *The Kim*, [1915] 1 P. Cas. 405, at page 400; [1915] P. 215, and *The Pontoporus*, [1916] 2 P. Cas. 87, at 94-5; 85 L. J. P. 143; [1916] P. 100—in the former of which he charges the Hamburg prize court as being one which 'hacks its way through bona fide commercial transactions.' All impartial jurists will lament the fact that this great war of nations should have invaded their courts of law, and for that reason British prize courts should be careful to bear in mind their historic prestige, and give no excuse for judicial reprisals on the part of other prize courts."

ing out from an intermediate and open port or place as aforesaid; and every such vessel, so excluded from the ports of the United States, that shall enter, or attempt to enter the same, in violation of this act, shall, with her tackle, apparel and furniture, together with the cargo on board such vessel, be forfeited to the United States."

The libel set forth, in the words of the act, that the *Frances* and *Eliza* was owned, wholly or in part, by subjects of his Britannic Majesty, and had come from the port of Falmouth, in the Island of Jamaica, a colony of his Britannic Majesty, which port was closed against citizens of the United States, and that she attempted to enter the port of New Orleans, in the United States, contrary to the provisions of the act before recited. To this libel, William Coates, master of the vessel, put in an answer, denying the allegations in the libel, and claiming her as the property of Messrs. Herring & Richardson, of London. The material facts appearing on record, are these:

The *Frances* and *Eliza* sailed from London, in the month of February, 1819, for South America, having on board about 170 men for the service of the patriots. They arrived at Margaritta, in April, where the troops were disembarked. The vessel remained on the coast of Margaritta, until November, when Captain Coates, by order of Mr. Gold, agent of the owners, took command of her. \* \* \* Having a scanty supply of salt provisions, and being without fresh provisions, which were not to be had at Margaritta, he did not sail from that port until the 8th of November. Proceeding on the voyage, he met an American schooner, off the west end of St. Domingo, the master of which supplied him with a cask of beef. He had, at this time, 29 souls on board; and in the prosecution of the voyage, being off the coast of Falmouth, in the island of Jamaica, the *Frances* and *Eliza* hove to, within four or five miles of the shore, and the master went into Falmouth in his boat, for provisions, of which they were much in want, having only three days' supply on board, and to get his name indorsed on the ship's register; on the day following, he returned with a small supply, which being insufficient, he went again the next morning, to endeavor to increase his stock, and succeeded in getting enough to enable him to proceed to New Orleans. That he landed one passenger at Falmouth, and took two from thence to New Orleans; the passenger landed, was a physician, who had sailed from London with the troops, but left the service in distress, and took his passage in the *Frances* and *Eliza* to New Orleans. When at Falmouth, he found his professional prospects there favorable, and determined to remain; and George Glover, a mariner, had leave of the agent of the owners to work his passage from Margaritta to New Orleans. Upon leaving Margaritta, the master took with him a letter of recommendation from the agent of the owners, to R. D. Shepherd & Co., of New Orleans, which letter he presented on his arrival. When he had proceeded about half way up the Mississippi, the *Frances* and *Eliza* was hailed by an officer on board

the revenue cutter, the answer was, that she was from Jamaica; the captain being asked "what he was doing off Jamaica," answered, that he "went in to get his name indorsed on the register, and to obtain a freight for England"; to which the officer replied, that he was under the necessity of seizing his vessel for a breach of the Navigation Act; he then said he went in to get provisions.

Upon this testimony, the District Court condemned the vessel, as forfeited to the United States; and the claimant appealed to this court.

DUVALL, Justice, delivered the opinion of the court, and after stating the facts, proceeded as follows:

In the argument of this cause, it was contended by the Attorney General, that touching at Falmouth, with the intention to get freight there, and coming from that port to a port in the United States, brought the Frances and Eliza within the operation of the Navigation Act; it being the policy of the law to prevent all communication between vessels of the United States and British ports, which were closed against them. On behalf of the owners, it was contended, that if the Frances and Eliza was bound to Falmouth, it was a mere alternative destination, depending on her being able to get freight there; and that as she in fact embraced the other branch of the alternative, and went to New Orleans, this must be considered as her original destination.

If the destination of the Frances and Eliza, from Margaritta to New Orleans, was real, not colorable, and if the touching at Falmouth was for the purpose of procuring provisions, of which the ship's crew was really in want, there was not a violation of the navigation act. The evidence in the cause seems to justify the conclusion, that her real destination was to New Orleans. The order of Mr. Gold, agent of the owners, to the master, to take command of the vessel and proceed to New Orleans, and there to endeavor to procure a freight to England or the continent; the letter of recommendation from John Guya, merchant, to Messrs. R. D. Shepherd & Co., requesting their aid to the master to accomplish that purpose, taken in connection with the circumstance of Glover's taking his passage in the vessel, with the leave of the agent, from Margaritta to New Orleans, establish the fact in a satisfactory manner. It appears to have been understood, by all who had any concern with the vessel, that her destination was to New Orleans.

The Frances and Eliza did not enter the port of Falmouth, but stood off and on, four or five miles from the harbor, for a few days, during which time the master went on shore to get provisions, of which he was in want. Whether he endeavored to procure freight there, is a fact not ascertained by the testimony. It is certain, that he did not obtain it, because it is admitted, that the vessel sailed in ballast to New Orleans. His real object in going on shore at Falmouth, appears to have been to procure provisions, of which the ship's crew were much in want. And there is no evidence of any act done by him, which can

be construed into a breach of the act concerning navigation. The policy of that act, without doubt, was to counteract the British colonial system of navigation; to prevent British vessels from bringing British goods from the islands, in exclusion of vessels of the United States, and to place the vessels of the United States on a footing of reciprocity with British vessels. The system of equality was what was aimed at. The landing a passenger there, who casually got employment, and for that reason chose to remain on the island; and the taking in two passengers there, one of which was a boy and a relative, and the other taken, passage free, to New Orleans, are not deemed to be acts in contravention of the true construction of the Navigation Act.

The log-book was supposed to furnish some suspicious appearances, but, on examination, was found to contain no material fact which could govern in the decision. It is the unanimous opinion of the court, that the sentence of the district court ought to be reversed, and that the property be restored to the claimant.

Decree reversed.<sup>3</sup>

<sup>3</sup> In *The Pitt*, 8 Wheat. 371, 374, 375, 5 L. Ed. 639 (1823), counsel thus stated in argument the purpose of the act of Congress in question:

"The commercial convention concluded between the United States and Great Britain, on the 3d of July, 1815, did not extend to the British colonies in the West Indies; but as to them, the navigation laws and colonial system of Great Britain continued in force, which the United States were at liberty to counteract by any regulations in their power. It was for this purpose, the act of Congress was passed. It contemplated a partial, not a general, nonintercourse system. It did not, of course, exclude the entrance of an English vessel, whether documented at home or in a colony, coming with a cargo of British manufactures or colonial produce, from any other than a prohibited place, without having touched at, in the course of her voyage, any free port in the British colonies. Any article produced in the interdicted colony may be imported into the United States, in a lawful way, from permitted ports in England, or her colonies, and a fortiori, from the ports of any other foreign state."

For retaliation by a belligerent because of the alleged infraction of international law by its enemy at the expense of neutral nations, see *The Leonora*, [1919] A. C. 974, (1919), post, 804.

## CHAPTER IV

### DISPLAY OF FORCE

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#### PERRIN v. UNITED STATES.

(Court of Claims of the United States, 1868. 4 Ct. Cl. 543.)

Mr. Caleb Cushing and Mr. W. W. Boyce for the claimants:

The case comes up under a general demurrer to the plaintiff's petition.

The petition, in addition to the formal facts necessary, states:

1. That, on July 13, 1854, the petitioner, Marie Louise Perrin, was the wife of her co-petitioner, and now is.

2. That, on July 13, 1854, the petitioners were subjects of the emperor of the French, but that at the time of filing this petition they were naturalized citizens of the United States.

3. That neither of petitioners, at any time, were citizens of Greytown, or owed allegiance to, or claimed protection from, the government thereof.

4. That shortly before the 13th of July, 1854, Mrs. Perrin arrived at Greytown, with a valuable invoice of merchandise, to which town her husband had preceded her, with the intention of establishing a commercial house in some part of Central America, having previously shipped to that port, because it was free and on the transit to the interior of the five Central American states, a first large invoice of merchandise, which was landed May 1, 1854. That, on the arrival of Madam Perrin with the second invoice, about the middle of June, 1854, her husband left Greytown for the interior of Nicaragua, with samples of their goods, for the purpose of selecting in Nicaragua or Costa Rica a place at which to locate and establish a commercial house.

5. That, while Madam Perrin remained alone in Greytown hourly waiting the return of her husband to remove all the property to the interior, on the 13th day of July, 1854, the said town of San Juan (Greytown) was bombarded and burnt by the United States sloop of war Cyane, Commander Hollins, and all the merchandise, books, and papers, together with the personal effects of Madam Perrin, were wholly destroyed by said bombardment and burning.

6. That the merchandise burnt was worth \$13,900.

7. That the emperor of France declined to press the claims of French subjects for indemnity.

8. Application made by petitioners, February 10, 1868, to the Secretary of State of the United States for compensation.

I. Under this state of facts, as set forth in the petition, the ques-

tion arises whether there is any liability on the part of the United States to make compensation to Madam Perrin for her property destroyed at Greytown.

We submit that there is, and on the following grounds:

1. Because of the clause of the Constitution of the United States which provides that "private property shall not be taken for public use except on just compensation."

In the case of *Wiggins v. United States*, 3 Ct. Cl. 412, this court decided, under the above-cited clause of the Constitution, that the United States were liable for certain powder belonging to a citizen of the United States, and being stored across the bay from Greytown, at Punta Arenas, and being destroyed to prevent its being used by the inhabitants of Greytown to injure the warehouses of the Transit Company, in which it was stored.

a. That the powder was located at Punta Arenas it is submitted is immaterial. If the powder had been in Greytown and destroyed for the same motive, it would not have weakened Wiggins' claim for compensation.

b. The particular motive Commander Hollins had for destroying the powder was of no importance. The great question was, whether the powder was taken for public use.

c. The fact that Wiggins was a citizen of the United States does not place him in a better condition than the petitioner. The Constitution says not private property of citizens, but "private property" generally, shall not be taken.

2. Should we be in error in the grounds previously taken, then we submit that the United States are liable in another aspect of the case; that is to say, the bombardment and burning of Greytown were in violation of international law; and as by such violation damage resulted to the petitioners, an implied contract arises on the part of the United States to make compensation:

1. Because application should have been first made to Nicaragua for redress.

2. Violation of the neutrality of Nicaragua.

3. Bombardment and burning in violation of the laws of war.

Mr. Marcy objects to the claim of French subjects arising out of bombardment of Greytown principally on two grounds:

1. Because foreigners domiciled in a foreign country must look to that country for protection.

2. Foreigners domiciled in foreign countries must share with citizens of that country in fortunes of war.

In regard to the first point, a distinction is to be taken between foreigners domiciled and those present in a foreign country for a temporary purpose.

As to second point, the same distinction should be taken.

In both cases, Mr. Marcy assumes that war existed, which is not conceded.

In view of the facts and law of the case, we conclude that the United States are liable to the petitioners, and that the demurrer should be overruled.

The Assistant Attorney General, for the defendants.

CASEY, C. J. The petition in this case claims a sum exceeding twenty thousand dollars, for merchandise destroyed by the bombardment and burning of San Juan, or Greytown, by Commander Hollins, of the United States Navy, in command of the United States man-of-war Cyane, on the 13th of July, 1854.

The claimant and her husband, Mr. Trautman Perrin, were French subjects, temporarily domiciled at Greytown, having with them, contained in a store hired for the purpose, a valuable lot of merchandise. The inhabitants of Greytown prior to this time had been guilty of many outrages and depredations upon the persons and property of the citizens of the United States passing that way. They had also treated with great rudeness and indignity an accredited minister of the United States to one of the South American governments in his passage through Nicaragua. The passage across Central America had become a matter of great importance to the United States by the cession of California to her by Mexico, the discovery of large deposits of gold there, the consequent rush of emigration, and the necessity for the shortest and most rapid route of communication between the Atlantic seaboard and her Pacific possessions; and Greytown had become the resort of desperate and reckless adventurers, who took pleasure in despoiling the citizens of the United States and insulting her flag and authority. The United States applied to the Nicaragua authorities to restrain and suppress this lawless and obnoxious conduct. But the local government was either unable or unwilling to do so. The outrageous character of these acts, and the frequency of their occurrence, called for prompt and decided action on the part of the United States. Accordingly, by command of the President of the United States, Commander Hollins proceeded with the United States ship Cyane to that place. Arriving there, he communicated with Mr. Fabens, the commercial agent of the United States at Greytown. He also made repeated demands upon the authorities for reparation and indemnity for property belonging to citizens of the United States taken or destroyed by inhabitants of Greytown, and secretly connived at or openly sanctioned by the public authorities of the town. He also required suitable apologies to be made for the indignities offered to the United States in the person of her accredited minister; and gave full and distinct notice that unless such reparation was made, and such apologies offered as were satisfactory to the United States, within a given time, he would open fire upon the place. These demands remained unheeded, and on the 13th July, 1854, Commander Hol-



lins opened fire from his ship upon the town. A large portion of the place was battered down by guns of the ship, and then a party was sent on shore to apply the torch, and complete by burning what had escaped the bombardment. The town was totally destroyed. Commander Hollins made a detailed report of his operations to the Secretary of the Navy; and the President in his annual message for 1854 communicated all the facts in the case to Congress. Commander Hollins' conduct was approved, and he was commended for the prompt and efficient manner in which he had carried out the instructions of his government.

It is part of the case that the claimant has applied successively to the French government, to Congress, and the executive authorities of the United States for redress and indemnity for her losses without success.

The claimant's case must necessarily rest upon the assumption that the bombardment and destruction of Greytown was illegal and not justified by the law of nations. And hinging upon that, it will be readily seen that the questions raised are such as can only be determined between the United States and the governments whose citizens it is alleged have been injured by the injurious acts of this government. They are international political questions, which no court of this country in a case of this kind is authorized or empowered to decide. They grew out of and relate to peace and war, and to the relations and intercourse between this country and foreign nations. They are political in their nature and character, and under our system belong to the political departments of the government to define, arrange and determine. And when the questions arise incidentally in our courts the judiciary follow and adopt the action of the executive and legislative departments, whatever that may be. The case, we think, bears no resemblance to that of *Grant v. United States*, 1 Ct. Cl. 41, or *Wiggins v. The United States*, 3 Ct. Cl. 412. In both cases the claim was for property of citizens taken by the United States and destroyed to prevent it falling into the hands of the public enemy. It was not destroyed in hostile operations against the public enemy, but for the purpose of preventing the aid and succor it would have afforded him if it had been permitted to fall into his hands. No government, except as a special favor bestowed, has ever paid for the property of even its own citizens in its own country destroyed in attacking or defending against a common public enemy; much less is any government bound to pay for the property of neutrals, domiciled in the country of its enemy, which its forces may chance to destroy in its operations against such enemy. The doctrine is clearly and concisely stated in the letter of Hon. William H. Seward, Secretary of State, to Hon. Charles Sumner, chairman of the Committee on Foreign Relations of the United States Senate, dated February 26, 1868, and in reference to this case.

"Sir: I have examined the claim which you commended to the attention of this department, of Mr. Trautman Perrin, for damages sustained in the bombardment of Greytown in 1854, by Commander Hollins. It would be a sufficient answer that Mr. Perrin, at the time the injuries were sustained, was a French subject, and that his government has acquiesced in the refusal of the United States to grant any indemnity for the losses of French subjects on that occasion.

"The British government, upon the advice of the law officers of the crown, declared to Parliament its inability to prosecute similar claims. In 1857 Lord Palmerston applied the decision in the case of Greytown as a precedent for refusing compensation to British merchants whose property in a Prussian port had been destroyed by a British squadron during the Crimean war. (See note in Lawrence's Wheaton, p. 145.)

"The governments of Austria and Russia have applied the doctrine involved in the Greytown case to the claims of British subjects injured by belligerent operations in Italy in 1849 and 1850. (See note, p. 49, vol. 2, of Vattel, Guillaumin & Co.'s edition, 1863.) We have applied the same principle in declining to make reclamations for citizens of the United States whose property was destroyed in the bombardment of Valparaiso by a Spanish fleet, and in resisting the claims of subjects of neutral powers who sustained injury from our military operations in the Southern States during the recent rebellion. It will probably be found a sufficient answer to the reclamations of many of our citizens who have sustained losses from belligerent operations on both sides during the recent occupation of Mexico by French troops. The principle affirmed is, that one who takes up a residence in a foreign place and there suffers an injury to his property by reason of belligerent acts committed against that place by another foreign nation, must abide the chances of the country in which he chose to reside; and his only claim, if any, is a personal one against the government of that country in which his own sovereign will not interest himself.

"The only discrimination suggested in Mr. Perrin's case is on account of the very temporary nature of his sojourn at Greytown. I think this cannot affect the principle, which is too valuable in the present circumstances of this country, to allow us to waive or impair it.

"By no allowed construction of the laws could this claim be paid out of any fund under the control of the department, and the considerations I have stated forbid its recommendation to Congress.

"Your obedient servant,

William H. Seward."

Adopting these views as a correct exposition of the laws and usages of nations upon this subject, we are very clear that the claimants have presented no available claim against the United States which is cog-

nizable in this court. We therefore sustain the demurrer and dismiss the petition.<sup>1</sup>

<sup>1</sup> As regards private property destroyed by military operations, see *United States v. Pacific Railroad*, 120 U. S. 227, 234, 235, 7 Sup. Ct. 490, 30 L. Ed. 634 (1887), holding that the United States was not responsible for the injury or destruction of private property because of its military operations during the Civil War, and that private parties were not chargeable for works constructed on their property by the United States to facilitate such operations.

In delivering the unanimous opinion of the court, Mr. Justice Field stated that "these views are sustained in treatises of text-writers, by the action of Congress, and by the language of judicial tribunals." He thus continued:

"Vattel, in his *Law of Nations*, speaks of damages sustained by individuals in war as of two kinds—those done by the state and those done by the enemy. And after mentioning those done by the state deliberately and by way of precaution, as when a field, a house, or a garden, belonging to a private person, is taken for the purpose of erecting on the spot a town rampart or other piece of fortification; or when his standing corn or his storehouses are destroyed to prevent their being of use to the enemy; and stating that such damages are to be made good to the individual, who should bear only his quota of the loss, he says: 'But there are other damages, caused by inevitable necessity, as, for instance, the destruction caused by the artillery in retaking a town from the enemy. These are merely accidents; they are misfortunes which chance deals out to the proprietors on whom they happen to fall. The sovereign, indeed, ought to show an equitable regard for the sufferers, if the situation of his affairs will admit of it; but no action lies against the state for misfortunes of this nature—for losses which she has occasioned, not willfully, but through necessity and by mere accident, in the exertion of her rights. The same may be said of damages caused by the enemy. All the subjects are exposed to such damages; and woe to him on whom they fall! The members of a society may well encounter such risk of property, since they encounter a similar risk of life itself. Were the state strictly to indemnify all those whose property is injured in this manner, the public finances would soon be exhausted, and every individual in the state would be obliged to contribute his share in due proportion, a thing utterly impracticable.'" Vattel, *Droit des Gens*, liv. III, c. 15, § 232 (1758).

See, also, the *Giles Case*, 4 *Moore's International Arbitrations*, 3708 (1880), under the Convention between the United States and France, of January 15, 1880.

## CHAPTER V

### PACIFIC BLOCKADE<sup>1</sup>

#### GREAT BRITAIN, on Behalf of DON PACIFICO, v. GREECE.

(Mixed Commission of Inquiry, 1850, 1851. 40 British and Foreign State Papers, 635.)

On Easter Sunday, 1847, in Athens, a British subject of the Jewish faith, Don Pacifico by name, was roughly handled by a mob composed in part of soldiers, and his house was entered and sacked. Don Pacifico estimated his total losses at about £32,000, and his claim, presented to the British Ambassador, was espoused by the Foreign Office of Great Britain. It appears that it was then the custom at Athens to burn on Easter Sunday the image of Judas Iscariot. As, however, Lord Rothschild, a British subject of Jewish faith, was visiting Athens at this time, the Greek government forbade the custom. This was attributed by the populace, not to the presence of Lord Rothschild, but to the influence of Don Pacifico. Hence the outrages to his person and property.

The Greek government insisted that Don Pacifico should resort to the tribunals of Athens and that Great Britain should only espouse his claim, if there were a denial of justice, or if, after a judgment in his favor, it could not be collected from his assailants. Don Pacifico had, it appeared, been consul general of Portugal at Athens and insisted that in the destruction of his house, the documents necessary to establish a claim of some £26,000 against Portugal had been destroyed. There were other claims of Great Britain against Greece, not necessary to mention in this connection, although they were alleged to justify the aggressive action of Great Britain. The maltreatment of Don Pacifico and his alleged losses were the chief grievance. The other claims were incidental and merely swelled the bill, which, not paid by Greece, a so-called pacific blockade of the Greek coast was proclaimed January 24, 1850,<sup>2</sup> resulting in the seizure and sequestration of some fifty or sixty vessels.

<sup>1</sup> On the subject of pacific blockade and the various instances of its employment, see Albert E. Hogan's *Pacific Blockade* (1906).

<sup>2</sup> The British consul at Athens informed the Greek government on that date that the commander in chief of Her Majesty's naval forces "deems it necessary to extend to Greek merchant vessels the prohibition to put to sea, which, from an anxious desire not to injure Greek commerce, has up to this moment been limited to vessels belonging to the Greek government." Albert E. Hogan's *Pacific Blockade*, 167-168 (1906).

On the same date, the British consul notified third states of the blockade; the material portion of the notification being as follows:

"I have, therefore, to announce to you that henceforward the commander

France, deeply interested in the welfare of Greece, offered its good offices, as a result of which an agreement was reached on July 18, 1850, between representatives of the three governments. British claims other than those of Pacifico were declared satisfied,<sup>3</sup> and the claim of Pacifico for the loss of his documents establishing his rights against Portugal was submitted to an arbitral commission, consisting of three members, one appointed by Great Britain, one by Greece, the umpire by France. The mixed commission met at Lisbon in Portugal and rendered the following award on May 5, 1851:

By a Convention signed at Athens on the 18th of July, 1850, between her Britannic Majesty and His Hellenic Majesty, it was agreed and concluded that all the demands made on the government of Greece in a note of the 17th of January, 1850, having been satisfied, with the exception of the claim arising out of the loss by M. Pacifico of certain documents relating to money claims which he had to establish against the Portuguese government, His Hellenic Majesty engaged to make good to M. Pacifico any real injury (*préjudice réel*) which, upon a full and fair investigation, it should be proved that he had sustained by the destruction of those documents.

For the purpose of conducting the investigation it was further agreed, between the contracting parties, that two arbiters, with an umpire to decide between them in case of difference, should be appointed by the joint concurrence of the governments of France, of Great Britain, and of Greece, and that this Commission of Arbitration should report to the British and Greek governments whether any, and, if any, what amount of real injury had been sustained by M. Pacifico, by reason of the alleged loss of the documents mentioned, and the amount so reported should be the amount which M. Pacifico is to receive from the Greek government.

In chief of Her Britannic Majesty's naval forces will not permit any Greek vessel to quit a Greek port. Nevertheless any Greek vessel, having been chartered previous to the present communication to carry a cargo or part of a cargo belonging to foreign merchants will be allowed to put to sea; but this exception cannot be applied to any Greek vessel chartered by foreign merchants after the communication of this notice. The above measure in no way affects foreign vessels of any description, but it is exclusively confined to vessels under the Greek flag." Id. 168, 169.

Six days later, on January 30th, the British consul at Syra transmitted a further notice of blockade to third states, from which the following passage is taken:

"I have received orders \* \* \* to inform you that this measure does not in any way interfere with vessels of other powers, nor even with such Greek vessels as may have been already chartered by foreign merchants; but this exemption will not be granted to any Greek ships after the present communication. All Greek vessels having on board goods belonging partly or wholly to foreign merchants will be permitted to disembark them in Greek ports, the merchant being bound to produce proof of his property therein." Id. 169, 170.

<sup>3</sup> The Greek government admitted that Pacifico had sustained considerable damage at the hands of the mob, and paid in satisfaction of the claims other than the loss of his documents against Portugal some two-thirds of their original amount. See Hogan's *Pacific Blockade*, p. 113 (1908).

In accordance with the above-mentioned Convention, the government of France appointed M. Léon Béclard, Secretary of the Legation of France at the court of Lisbon, commissioner and umpire; Her Britannic Majesty's government nominated Mr. Patrick Francis Campbell Johnston, British commissioner; and His Hellenic Majesty's government named Mr. George Torlades O'Neill, consul-general for Greece at Lisbon, as their commissioner.

The Commission, consisting of these three members, assembled and met together at Lisbon in February, 1851, and proceeded to investigate a list of claims dated Athens, December 21, 1844, and which was inclosed in a letter addressed to Her Britannic Majesty's Principal Secretary of State for Foreign Affairs by M. Pacifico on the 26th September, 1850.

This list purported to be a statement of documents destroyed at Athens on the 4th April, 1847, relating to the claims of M. Pacifico on the Portuguese government; and a copy of it, authenticated by the signatures of the three commissioners, is appended to this report.

The commissioners, in order to facilitate the inquiry, have numbered the claims in that list, and divided them into two classes:

1st. Those which relate to losses sustained, and services rendered, by M. Pacifico during the civil war in Portugal;

2dly. Those which relate to claims for salary, expenses, voyage to Greece from Portugal, while holding the office of consul-general of Portugal in Greece.

The commissioners, in the prosecution of their duties, have endeavored to ascertain whether among those claims there were any which had not been defeated by the loss of documents carried away or destroyed during the sacking of M. Pacifico's house at Athens, and which can, therefore, still be as well established by means of official documents or records now existing in the public offices in Portugal.

The commissioners have now the honor to report that they have discovered in the archives of the Cortes at Lisbon a petition addressed by M. Pacifico to the Chamber of Deputies in 1839, and presented in the same year by one of its members, accompanied by a voluminous body of documents to prove his alleged losses, in which petition M. Pacifico prays for compensation for his sufferings.

The commissioners are satisfied, from inquiries which they established at great length and much difficulty, that the various certificates and papers attached to that petition are the originals or certified copies of the most important documents alleged to have been destroyed at Athens.

That petition has not yet been disposed of by the Chamber of Deputies, M. Pacifico appearing to have taken no steps since its presentation in 1839, either by himself or his agents, to cause it, together with the accompanying documents, to be taken into consideration and decided by that assembly.

With reference to M. Pacifico's claims in regard to the destruction of any documents connected with his salary and other expenses during the time he held the office of consul-general of Portugal in Greece, the commissioners are of opinion that they have not been prejudiced by any such loss, and that he is still able to establish his rights, if well founded, against the Portuguese government.

The commissioners, having now stated their unanimous opinion on the above-named points, beg to add that almost all the losses of property, represented by documents alleged to have been destroyed at Athens, took place between the years 1828 and 1834, and that M. Pacifico appears to have taken no steps, although constantly in Portugal between the years 1834 and 1839, to assert his rights and claims in a legal manner; nor does it appear that any application was ever made by him to the British Minister or consular authorities in Portugal, to support his rights or to redress his wrongs.

Under all the circumstances of this case, and taking into consideration the possibility that a few documents of no great importance may have been lost when M. Pacifico's house at Athens was pillaged, and the expenses he has incurred during this investigation, the commissioners think he is entitled to receive from the government of Greece the sum of £150. for the injury he has received.

The commissioners cannot conclude their report without taking this opportunity of stating that the utmost cordiality and unanimity of sentiment has accompanied every step they have collectively taken in this very important investigation, and they trust the result of this commission will prove an additional link in the friendly relations which subsist between Great Britain and France, and that the Portuguese and Greek governments will feel that England has had but one object in view in this inquiry, namely, a fair, impartial, and honest solution of a difficult question. \* \* \*

\* Mr. Hogan, who defends energetically the action of the British government in the principal case, says that "the Portuguese Minister, in a dispatch to Baron Gros, dated March 2, 1850, admitted the liability of the Portuguese government to the amount of £197. 4s., 3d." Loc. cit. 114. A rather paltry sum, it would seem, to justify the blockade of a weak and struggling country.

See, also, the case of *The Forte*, 5 Moore's International Arbitrations, 4925 (1863), under agreement between Great Britain and Brazil of January 5, 1863.

The distinction between a blockade in time of peace and in time of war is that, in the first case, the blockading nation proceeds against the property of the state blockaded, inasmuch as peace does not give rights against neutrals, whereas, in the second case, neutral property is, according to the laws of war, subject to belligerent rights. Therefore, blockade alleged to be pacific, but which subjects neutral commerce or trade to visit and search, is only pacific in name, but in fact an act of war. This was recognized by the nations which, peaceably blockading Venezuela in 1902-03, regarded their blockade as an act of war in order to have the rights accruing to belligerents.

## CHAPTER VI

## REPRISALS

## A DECLARATION BY THE LORDS JUSTICES

Appointing the Distribution of Prizes taken by Way of Reprisal before  
His Majesty's Declaration of War, 1739.

His Majesty having, on the tenth day of July, one thousand seven hundred and thirty-nine, taken into his serious consideration the many and repeated depredations which had been committed, and the many unjust seizures which had been made in the West Indies and elsewhere by Spanish Guarda Costas, and ships acting under the commissions of the king of Spain, or his governors, contrary to the law of nations, and in violation of the treaties subsisting between the crown of Great Britain and Spain, whereby His Majesty's trading subjects had sustained great losses; and His Majesty having determined to take such measures as were necessary for vindicating the honour of his crown, and for procuring reparation and satisfaction to his injured subjects, was pleased, by and with the advice of his Privy Council, upon the said tenth day of July, to order, that general reprisals should be granted against the ships, goods and subjects of the king of Spain, so that as well His Majesty's fleet and ships, as also all other ships and vessels that should be commissioned by letters of marque or general reprisals, or otherwise, by his Majesty's commissioners for executing the office of Lord High Admiral of Great Britain, should and might lawfully seize all ships, vessels and goods belonging to the king of Spain, or his subjects, or others inhabiting within any the territories of the king of Spain, and bring the same to judgment in any of the courts of admiralty within His Majesty's dominions.—The London Gazette, Numb. 8024, (1741).

## BLAAUWPOT v. DA COSTA.

(High Court of Chancery, 1758. 1 Eden, 130.)

The plaintiffs, as underwriters, by a policy of insurance made at Amsterdam, 1st February, 1729, to Elias and Solomon De Paz, had insured the ship *Friendship* for 18,000 guilders, or £1636. 7s. 3d. The ship was soon after seized by the Spaniards, before the declaration of war, and carried into Havannah and condemned. In the course of the following year the plaintiffs paid the sum of 18,000 guilders to Elias and Solomon De Paz. The ship had also been insured with

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the Royal Exchange Assurance Company for the sum of £1,500; but the company had afterwards compounded, and renounced salvage. His Majesty, by a proclamation issued 18th June, 1741, was pleased to order a distribution of all prizes taken before the declaration of war, in equal moieties between the sufferers and the captors. Accordingly, under a commission for the distribution of such prizes, the sum of £2050. 18s. 6d. was, on the 9th of November, 1746, paid to the executors of Elias De Paz, as a compensation for the loss of the ship *Friendship*. The bill was brought to recover the sum of £1,636. 7s. 3d.

The Solicitor-General, Mr. Wilbraham, and Mr. Pechell for the plaintiffs.

The plaintiffs ought to be repaid from the defendants in proportion to what they received from the crown. The defendants have had a double satisfaction. It is like the case of a supposed loss of a ship, money paid, and the ship afterwards discovered to be in safety.

The Attorney General for the Royal Exchange Assurance Office contended, that though the office compounded and renounced salvage, yet that such composition was only meant to extend to any part of the ship or goods that might be recovered, or to any satisfaction or restitution that might be made by the Spanish captors to the sufferers.

Sewell and Perrot for the executors of the De Pazes.

If this is in the nature of salvage, the underwriters must undoubtedly have the benefit of it. But it is not so; it is a grant of the king; a royal bounty to British sufferers, and not an act of justice. The commissioners for the distribution were only allowed to pay the difference to the sufferers. The plaintiffs as foreigners could not have claimed under the commission.

The LORD KEEPER [SIR ROBERT HENLEY]. I am of opinion that upon the policy, and the peril happening, and the payment of the money by the underwriters, the whole rights of the assured vested in them. The assured had this right of restitution vested in them against the Spanish captors, which was afterwards prosecuted by the crown by reprisals. Satisfaction having been made in consequence of that capture, I think the plaintiffs are entitled to that benefit; and that it was received by the executors of Elias De Paz in trust for them. The defence of the plaintiffs being foreigners, and as such not entitled to any benefit, is a fallacy; they stand in the place of British subjects, and have therefore in this court the same rights as British subjects. The capture is the origin of that right, which belongs to the plaintiffs by relation, as claiming under one of the sufferers.

As to the nature of the salvage, it was so much saved out of the hands of the Spaniards by means of the interposition of the crown; it was so understood by the crown. It was to be considered as a retribution to the underwriters as lessening the loss incurred by the capture. As to the Royal Exchange Assurance, they have no foundation whatever for their claim; they have settled their loss with the assured, and renounced all benefit of salvage.

Decreed the sum of £1636. 7s. 3d., with interest at 4 per cent. from the time of the payment of the £2050. 18s. 6d. and costs. Reg. Lib. A, 1757, fol. 424.<sup>1</sup>

<sup>1</sup> The principal case was quoted with approval in *Burnand v. Rodocanachi*, L. R. 1881-1882, 7 App. Cas. 333, 337, 339, 342 (1882).

"Letters of marque and reprisal may theoretically issue in time of peace (Articles of Confederation, signed 1773, art. 9), as they form a 'mode of redress for some specific injury which is considered to be compatible with a state of peace and permitted by the law of nations.' Kent, vol. I, p. 61. The commission authorizes 'the seizure of the property of the subjects as well as of the sovereign of the offending nation and to bring it in to be detained as a pledge, or disposed of under judicial sanction in like manner as if it were a process of distress under national authority for some debt or duty withheld.' Id. Speaking very technically, a letter of marque is merely a permission to pass the frontier, while a letter of reprisal authorizes a 'taking in return,' a taking by way of retaliation, a *captio rei unius in alterius satisfactionem*. The colloquial use together of the two names, letter of marque and letter of reprisals, leads sometimes to misunderstanding as to the differing effect of each, one being a simple authority to depart, the other an authority to seize property in compensation for an injury committed." Davis, J., in *Hooper, Administrator, v. United States*, 22 Ct. Cl. 408, 428-429 (1887).

"Acts of retorsion are not acts of war; they are pacific. When resorted to between independent states, they are intended to prevent the necessity of resorting to war. Nor can the passing of such an act be considered a granting of letters of marque and reprisal. Letters of marque and reprisal are a commission to attack the subjects of a foreign state on the high seas beyond the limits of the state, seize their property, and put it in sequestration. It is a hostile act of aggression. Martens, *Law of Nations*, 270; 1 Black. Com. 258. These terms were perfectly understood by the framers of our Constitution, and they are used in the sense in which they are ordinarily understood by enlightened jurists." Wood, *arguendo*, in *Gibbons v. Livingston*, 6 N. J. Law, 236, 255 (1822).

For the nature of reprisals and retorsion, see Henry Wheaton's *Elements of International Law*, Dana's Edition (1866), 370, note 151.

For instances in which the United States has acted by way of reprisal, see Wheaton's *Elements of International Law* (Lawrence's 2d Annotated Edition (1863), 507, note 168.

In considering the admissibility of reprisals, Attorney General Randolph said: "I appeal to the British reasoning on the Silesia loan [1752] as supporting this sentiment, in the following passages: 'The laws of nations, founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage, do not allow of reprisals, except in case of violent injuries directed and supported by the state, and justice absolutely denied, in re minime dubia, by all the tribunals, and afterward by the prince.' 'Where the judges are left free, and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful questions, different men think and judge differently; and all a friend can desire, is, that justice should be as impartially administered to him, as it is to the subjects of that prince in whose courts the matter is tried.' Under such circumstances, a citizen must acquiesce." Edmund Randolph to Secretary of State Thomas Jefferson, April 12, 1793. 1 Op. Atty. Gen. 30, 32.

For the facts of the Silesian Loan Case, the importance of which rests more upon the able exposition of the law of maritime capture than upon the question of reprisals, see the long account in 2 Martens, *Causes Célèbres* (2d Ed. 1858) 97, or the brief note in Hall, *Int. Law* (4th Ed. 1895) 454.

## GRAY v. UNITED STATES.

(Court of Claims of the United States, 1886. 21 Ct. Cl. 340.)

DAVIS, J., delivered the opinion of the court.<sup>2</sup> \* \* \* The defendants contend that the seizures were justified, as war existed between this country and France during the period in question; and, as we could have no claim against France for seizure of private property in time of war, the claimants could have no resulting claim against their own government; that is, the claims, being invalid, could not form a subject of set-off as it is urged these claims did in the second article of the treaty of 1800. It therefore becomes of great importance to determine whether there was a state of war between the two countries.

It is urged that the political and judicial departments of each government recognized the other as an enemy; that battles were fought and blood shed on the high seas; that property was captured by each from the other and condemned as prize; that diplomatic and consular intercourse was suspended, and that prisoners had been taken by each government from the other and "held for exchange, punishment, or retaliation, according to the laws and usages of war." While these statements may be in substance admitted and constitute very strong evidence of the existence of war, still they are not conclusive, and the facts, even if they existed to the extent claimed, may not be inconsistent with a state of reprisals straining the relations of the States to their utmost tension, daily threatening hostilities of a more serious nature, but still short of that war which abrogates treaties, and after the conclusion of which the parties must, as between themselves, begin international life anew. \* \* \*

The question has been carefully examined by authorized and competent officers of the political department of the government, and we may turn to their statements as expository of the views of that branch upon the subject.

In 1827 Senator Holmes reported that there had been "a partial war," but no "such actual open war as would absolve us from treaty stipulations. \* \* \* It was never understood here that this was such a war as would annul a treaty." 19th Cong., 2d Sess., Senate Rep., Feb. 8, 1827, p. 8. \* \* \*

Finally, Mr. Sumner considered the acts of Congress as "vigorous measures," putting the country "in an attitude of defense"; and that the "painful condition of things, though naturally causing great anxiety, did not constitute war." 38th Cong., 1st Sess., Rep. 41, 1864.

The judiciary also had occasion to consider the situation, \* \* \* in the case of *Bas v. Tingy*, 4 Dall. 37, 1 L. Ed. 731, wherein the facts were as follows: Tingy, commander of the public armed ship the

<sup>2</sup> Parts of the opinion are omitted.

Ganges, had libelled the American Ship, *Eliza*, Bas, master, setting forth that she had been taken on the high seas by a French privateer the 31st March, 1799 and retaken by him late in the following April, wherefore salvage was claimed and allowed below. Upon appeal the judgment was affirmed. \* \* \*

Justice Washington considers the very point now in dispute, saying (4 Dall. p. 40, 1 L. Ed. 731):

"The decision of this question must depend upon \* \* \* whether at the time of passing the act of Congress of the 2d of March, 1799, there subsisted a state of war between the two nations. It may, I believe, be safely laid down that every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form it is called solemn and is of the perfect kind, because one whole nation is at war with another whole nation, and all the members of the nation declaring war are authorized to commit hostilities against all the members of the other in every place and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition. But hostilities may subsist between two nations more confined in its nature and extent, being limited as to places, persons, and things, and this is more properly termed 'imperfect war,' because not solemn, and because those who are authorized to commit hostilities act under special authority and can go no further than to the extent of their commission. Still, however, it is public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, though all the members are not authorized to commit hostilities such as in a solemn war where the Government retains the general power."

Applying this rule he held that "an American and French armed vessel, combating on the high seas, were enemies," but added that France was not styled "an enemy" in the statutes, because "the degree of hostility meant to be carried on was sufficiently described without declaring war, or declaring that we were at war. Such a declaration by Congress might have constituted a perfect state of war which was not intended by the government." \* \* \*

The Supreme Court, therefore, held the state of affairs now under discussion to constitute partial warfare, limited by the acts of Congress.

The instructions to Ellsworth, Davie, and Murray, dated October 22, 1799, did not recognize a state of war as existing, or as having existed, for they said the conduct of France would have justified an immediate declaration of war, but the United States, desirous of maintaining peace, contented themselves "with preparations for defense and measures calculated to defend their commerce." Doc. 102, p. 561.

Yet all the measures relied upon as evidence of existing war had taken effect prior to the date of these instructions. \* \* \*

France did not consider that war existed, for her minister said that the suspensions of his functions was not to be regarded as a rupture between the countries, "but as a mark of just discontent" (15 Nov., 1796, *Foreign Relations*, vol. 1, p. 583), while J. Bonaparte and his colleagues termed it a "transient misunderstanding" (Doc. 102, p. 590), a state of "misunderstanding" which had existed "through the acts of some agents rather than by the will of the respective 'governments,'" and which had not been a state of war, at least on the side of France (Id. 616).

The opinion of Congress at the time is best gleaned from the laws which it passed. The important statute in this connection is that of May 28, 1798 (1 Stat. L. 561) entitled "An act more effectually to protect the commerce and coasts of the United States." Certainly there was nothing aggressive or warlike in this title.

The act recites that, whereas French armed vessels have committed depredations on American commerce in violation of the law of nations and treaties between the United States and France, the President is authorized—not to declare war, but to direct naval commanders to bring into our ports, to be proceeded against according to the law of nations, any such vessels "which shall have committed, or which shall be found hovering on the coasts of the United States for the purpose of committing, depredations on the vessels belonging to the citizens thereof; and also to retake any ship or vessel of any citizen or citizens of the United States which may have been captured by any such armed vessel."

This law contains no declaration or threat of war; it is distinctly an act to protect our coasts and commerce. It says that our vessels may arrest a vessel raiding or intending to raid upon that commerce, and that such vessel shall not be either held by executive authority or confiscated, but turned over to the admiralty courts—recognized international tribunals—for trial, not according to municipal statutes, as was being done in France, but according to the law of nations. Such a statute hardly seems necessary, for if it extended at all the police powers of naval commanders upon the high seas it was in the very slightest degree, and it is highly improbable that then or now, with or without specific statutory or other authority, an American naval commander would in fact allow a vessel rightfully flying the flag of the United States to be seized on the high seas or near our coasts by the cruiser of another government. But if the act did enlarge the power of such officers, and give to them authority not theretofore possessed, it tied them down to specified action in regard to specified vessels.

They might seize armed vessels only, and only those armed vessels which had already committed depredations, or those which were on our

coast for the purpose of committing depredations, and they might retake an American vessel captured by such an armed vessel. This statute is a fair illustration of the class of laws enacted at this time; they directed suspension of commercial relations until the end of the next session of Congress, not indefinitely (June 13, 1798, *Id.*, § 4, p. 566); they gave power to the President to apprehend the subjects of hostile nations whenever he should make "public proclamation" of war (July 6, 1798, *Id.* 577), and no such proclamation was made; they gave him authority to instruct our armed vessels to seize French "armed," not merchant, vessels (July 9, 1798, *Id.* 578), together with contingent authority to augment the army in case war should break out or in case of imminent danger of invasion. \* \* \*

This legislation shows that war was imminent; that protection of our commerce was ordered, but distinctly shows that, in the opinion of the legislature, war did not in fact exist.

Wheaton draws a distinction between two classes of war, saying: "A perfect war is where one whole nation is at war with another nation, and all the members of both nations are authorized to commit hostilities against all the members of the other, in every case, and under every circumstance permitted by the general laws of war. An imperfect war is limited as to places, persons, and things." To which the editor adds: "Such were the limited hostilities authorized by the United States against France in 1798." Lawrence's Wheaton, 518. \* \* \*

In cases like this "the judicial is bound to follow the action of the political department of the Government, and is concluded by it" (*Phillips v. Payne*, 92 U. S. 130, 23 L. Ed. 649); and we do not find an act of Congress or of the Executive between the years 1793 and 1801 which recognizes an existing state of solemn war, although we find statutory provisions authorizing a certain course "in the event of a declaration of war," or "whenever there shall be a declared war," or during the existing "differences." One act provides for an increase of the army "in case war shall break out," while another restrains this increase "unless war shall break out" (1 Stat. L. 558, 577, 725, 750). See also Acts of Feb. 10, 1800, and May 14, 1800. \* \* \*

We are, therefore, of opinion that no such war existed as operated to abrogate treaties, to suspend private rights, or to authorize indiscriminate seizures and condemnations; that, in short, there was no public general war, but limited war in its nature similar to a prolonged series of reprisals.<sup>3</sup>

<sup>3</sup> In *Cushing, Adm'r, v. United States*, 22 Ct. Cl. 1, 39 (1886), Judge Davis, after remarking that the acts of Congress were not intended to endanger French commerce, and that only armed vessels were to be seized and American vessels recaptured, leaving peaceable French merchantmen to pursue their voyages unmolested, said:

"A system of reprisals goes further than this, for it is based upon the principle of compensation, and is aggressive, not defensive, in spirit and intent. 'Reprisals [says Vattel, lib. 2, p. 842] are used between nation and

nation to do justice to themselves when they can not otherwise obtain it. If a nation has taken possession of what belongs to another; if it refuses to pay a debt, to repair an injury, to make a just satisfaction, the other may seize what belongs to it and apply it to its own advantage, till it has obtained what is due for interest and damage, or keep it as a pledge until full satisfaction has been made. In the last case it is rather a stoppage or a seizure than reprisals, but they are frequently confounded in common language.

"Dr. Woolsey says reprisals consist in recovering what is our own by force, then in seizing an equivalent. We do not attempt to lay down any general rule of law on this question of reprisals, but a study of the authorities leads to the conclusion that the action is affirmative and aggressive in character, having for its object compensation. The essence of reprisals has been said to be security—that is, the seizure of property for protection until just claims are settled, but we do not see that the principle of compensation is thereby changed, as the seizure of property for security must be directed by an effort to obtain security sufficient in amount to provide compensation should the demand for redress be unsuccessful."

Recurring to the same subject in *Hooper, Adm'r, v. United States*, 22 Ct. Cl. 408, 456 (1887), Judge Davis, who had delivered the opinion of the court in the principal case, said what may be considered as the final word on this subject, as far as the Court of Claims of the United States is concerned:

"Acts of retaliation are admitted to be justifiable under certain circumstances. They may exist when the two nations are otherwise at peace, but they are in their nature acts of warfare. They depart from the field of negotiation into that of force, and, as is war, are justified by a successful result. To term the decrees of France and the acts of their privateers under them 'acts of reprisal' does not alter the facts or the legal position. That position has been defined by the Supreme Court of the United States as limited partial war. We, following the path indicated by that tribunal, have defined it as 'limited war in its nature similar to a prolonged series of reprisals.'"

# PART III

## RIGHTS AND DUTIES OF NATIONS IN TIME OF WAR

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### CHAPTER I

#### COMMENCEMENT AND DEFINITION OF WAR

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##### THE NAYADE.

(High Court of Admiralty, 1802. 4 O. Rob. 251.)

This was a case of a quantity of cotton and sugar, taken in 1801, on a voyage from Lisbon to Bordeaux, and claimed on behalf of Mr. Beljeian, describing himself as a Prussian merchant, though resident in Lisbon. \* \* \*

Sir W. Scott.<sup>1</sup> This is the case of property claimed for a person who was first described in the claim "as a Lisbon merchant, and a subject of Her Majesty the queen of Portugal." Since the time of giving in the claim, it has been thought convenient to alter that description, and to represent him "as a subject of the king of Prussia, resident in Lisbon." It is admitted, however, that he is resident in Lisbon, and the question will be, whether that fact is not sufficient to preclude him from receiving the restitution of this property.

It may be necessary to consider, in the first place, the situation in which Portugal then stood. The relation which that country has borne towards France, at different periods, has been extremely ambiguous. At first there was a wish on the part of Portugal not to consider herself as being at war with France; and if a submissive conduct, and a disposition not to resent injuries, could have afforded protection against the violence of France, she might have escaped. But it is equally notorious, that all these concessions were made without success, and proved utterly inefficacious to prevent Portugal from being implicated in a war with France.

In cases of this kind, it is by no means necessary that both countries should declare war.<sup>2</sup> Whatever might be the prostration and

<sup>1</sup> Part of the opinion is omitted.

<sup>2</sup> There must be a declaration, or its equivalent. *The Brig Dart*, 1 Stew. 30 (1803).



submissive demeanor on one side, if France was unwilling to accept that submission, and persisted in attacking Portugal, it was sufficient; and it cannot be doubted by anybody who has attended to the common state of public affairs, that Portugal was considered as engaged in war with France. Without adverting to particular instances, it is notorious and evident from this very case, that there was a French commissary stationed at Lisbon for the regulation of French prisoners. At the time of this transaction, Portugal must, indubitably, be taken to have been at war with France. \* \* \*

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THE ELIZA ANN et al.

(High Court of Admiralty, 1813. 1 Dodson, 244.)

Sir W. SCOTT. \* \* \* This was the state of things originally; British ships were excluded from the ports of Sweden, and the island of Hanoe was occupied by British forces.

After this, a declaration of war was issued by the government of Sweden; but it is said, that the two countries were not, in reality, in a state of war, because the declaration was unilateral only. I am, however, perfectly clear that it was not the less a war on that account, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only is not, as has been represented, a mere challenge, to be accepted or refused at pleasure by the other. It proves the existence of actual hostilities on one side at least, and puts the other party also into a state of war, though he may, perhaps, think proper to act on the defensive only. It is the less necessary for me to insist on the truth of this position, since the language of the treaty places the matter beyond dispute. What appears to have been the motive which led to the appointment of the plenipotentiaries? Why, "a reciprocal desire to put an end to the war which had taken place;" and this they are authorized to carry into effect. Here, then, is a direct recognition of the existence of an antecedent state of war between the two countries. I cannot dive into the motives which led to the hostile declaration on the part of the Swedish government; I can only look to the broad fact, the existence of the war. It may be true that Sweden resorted to the measure with great reluctance. It is to be hoped that all countries are unwilling to enter upon hostilities, and that they have recourse to them only with a view of avoiding greater evils. It is said, that Sweden acted from fear of the resentment of France, and it may be that she did so; but, from whatever cause it

\* For the facts of the case, see ante, p. 438. Parts of the opinion are omitted.

proceeded, the fact is, that a war did take place, though it was carried on with inertness by Sweden, and with forbearance by Great Britain. \* \* \*

\* In *The Teutonia*, L. R. 1871-1873, 4 P. O. A. O. 171 (1872), arising out of the Franco-Prussian War, Lord Justice Mellish said:

"Their Lordships have great difficulty in agreeing with the learned Judge that the *Teutonia* could not have entered Dunkirk without being exposed to the penalties of trading with the enemy of its Country on the 16th of July. There does not appear to their Lordships to be any satisfactory evidence that a state of war existed between France and Prussia prior to the 19th of July. Their Lordships do not think that either the declaration made by the French Minister to the French Chambers on the 16th of July, or the telegram sent by Count Bismarck to the Prussian Ambassador in London, in which he states that that declaration appears to be equal to a declaration of war, amounts to an actual declaration of war. And though it is true, as stated by the learned judge, that a war may exist *de facto* without a declaration of war, yet it appears to their Lordships that this can only be effected by an actual commencement of hostilities, which, in this case, is not alleged."

For a case involving the exact date of the outbreak of the Spanish-American War of 1898, see *United States v. Pelly*, 4 Commercial Cases, 100 (1899).

In the case of *The Panama*, decided at the same time as *The Buena Ventura*, 87 Fed. 927, 933 (1898), Locke, J. said: "The *Panama* sailed from New York before the 21st of April, 1898, and was upon the high seas at that time and at the time of capture. The fact that there had been no formal proclamation or declaration of war before she had sailed or at the time she was captured, or that she had at a recent date, left a port of the United States, cannot be considered as exempting her from the liability of all enemy's property to capture, unless coming directly within the language of the President's proclamation. The practice of a formal proclamation before recognizing an existing war and capturing enemy's property has fallen into disuse in modern times, and actual hostilities may determine the date of the commencement of war, although no proclamation may have been issued, no declaration made or no action of the legislative department of the government had. This date has been declared by the act of Congress of April 25, 1898, and by the proclamation of the President of the next day to have been April 21, 1898, including that day, so that any Spanish property afloat, captured from that time, became liable to condemnation, unless exempt by the executive proclamation." Articles 4 and 5.

This case was affirmed on appeal. *The Panama*, 176 U. S. 535, 20 Sup. Ct. 480, 44 L. Ed. 577 (1900).

To obviate in the future the doubt and difficulty of the past in determining the date at which hostilities began, the Second Hague Peace Conference of 1907 adopted a Convention Relative to the Opening of Hostilities. See appendix, post, p. 1138.

It is believed that the various parties to the World War of 1914-1918 complied with the provisions of this convention.

## UNITED STATES v. THE ACTIVE.

(District Court of the United States for the Territory of Mississippi, 1814.  
Fed. Cas. No. 14,420.)

TOULMAN, J.<sup>5</sup> This is the case of a vessel and cargo belonging to the enemy taken in sight of the fort at Mobile Point, by the troops stationed at that place under the command of Major Wm. Lawrence. It appears from the testimony of two of the persons who boarded the vessel, that a boat with six men was sent out by the commanding officer to examine a vessel which, on approaching, they found to be British; that after being fired upon by the fort, she was boarded and taken without opposition, at the distance of about a mile, or perhaps more, as one of them says, or about two miles, as the other thinks; that she was under British colors; that the persons on board acknowledged themselves to be British subjects, and said they were detached from the Sea Horse to bring the schooner Active and cargo (consisting of flour captured at Alexandria) to Pensacola; and that the crew, consisting of six men, were armed with muskets, cutlasses and pistols. The log book shows her to be British. The libel prays the condemnation of the vessel and cargo as good and lawful prize to the United States. A plea, however, is filed by Lewis Judson (in the character of consignee and agent for the captors) to the jurisdiction of the court, on the ground that as this court has jurisdiction only in cases in which the United States are parties, it cannot legally entertain a suit in which the private captors (as it is alleged) are the only parties who have a right to claim the captured property. The said plea farther alleges that the "schooner Active and cargo were captured by Wm. Lawrence and others on the high seas, and not in the enemy's forts, camps, or barracks, and, therefore, by the usages of the laws of nations and the laws of war, as enemy's property, become forfeited to the said private captors." \* \* \*

1. What is war? "It is a contest," says Bynkershoek, "carried on between independent persons for the sake of asserting their rights." Where society does not exist—where there is no such institution as that which we call government—there individuals, being strictly independent persons, may carry on war against each other. But whenever men are formed into a social body, war cannot exist between individuals. The use of force among them is not war, but a trespass, cognizable by the municipal law. Bynk. War, p. 128. If war, then, be the act of the nation, whatever is done in the prosecution of it, must either expressly or implicitly be under the national authority. Whatever private benefits result from it must be from a national grant. "War," says Vattel (page 368), "is that state in which a nation prosecutes its right by force." The right of making war belongs alone to

<sup>5</sup> Parts of the opinion are omitted.

the sovereign power. Individuals cannot control operations of war, nor commit any hostility (except in self-defence), without the sovereign's order. The generals (adds that writer), the officers, the soldiers, the partisans, and those who fit out private ships of war, having all commissions from the sovereign, make war by virtue of a particular order. And the necessity of a particular order is so thoroughly established, that even after a declaration of war between two nations, if the peasants themselves commit any hostilities, the enemy, instead of sparing them, hangs them up as so many robbers or banditti. This is the case with private ships of war. It is only in virtue of a commission granted by the sovereign or his admiralty, that they are entitled to be treated like prisoners taken in a formal war. Vatt. Law Nat. pp. 365, 366. If, then, on the general principles of civil society, the whole operations of war depend upon the will and authority of the government, surely the appropriation and distribution of the property acquired in consequence of those operations must equally be subject to the control of the government, and depend on those regulations which it may establish.

2. What, indeed, is the object of war?

Is it to aggrandize individuals, or is it to maintain the rights of the nation? "The just and lawful scope of every war," observes Vattel (page 280), "is to revenge or prevent injury. If, to accomplish this object, it is expedient to encourage individual warfare, by granting all the profits arising from it to the parties engaged, the nation has a right to promise this encouragement; but until this encouragement be actually offered, it must follow that everything which is required by individuals, whether acting as private persons or as a part of the public force, must belong to the nation under whose authority they act."

3. What rights are acquired by a state of war? "A nation," says Bynkershoek (page 4), "who has injured another is considered, with everything that belongs to it, as being confiscated to the nation which receives the injury." The rights accruing, therefore, are national altogether. They are not individual rights. The case seems analogous to that of the internal administration of justice. A civil society—a nation—has the right of punishing those who are guilty of violating the public laws. Though the guilty be members of their own community, they may forfeit their property or their lives. But the right of the body politic does not attach itself to the individual members of it. The nation, indeed, might authorize individuals to take the lives or the property of known offenders; but, without an authority delegated by the nation, individuals have no such right. A right in private persons to avenge violations of the law does not follow as a natural consequence from the circumstance of their being members of the great political body. On the contrary, the very same act which would be retributive justice when emanating from the sovereign power would become murder or robbery in the individual. Why should it be otherwise,

as it regards our intercourse with other nations? Why should a nation be less jealous of its rights with regard to hostile nations than with regard to hostile individuals? Why less jealous when they are encroached upon on a larger scale than when they are encroached upon on a scale truly small and insignificant? And even admitting that in the one case the public authority permits an individual to execute the sentence of the law, and in the other to attack and vanquish the public enemy, it will not follow that in either case the property of the enemy is to become the property of the individual by whom the national will is carried into execution. This, it should seem, must depend on express stipulations made in behalf of the nation. Agreeably to these principles, the celebrated M. De Vattel, after observing that a nation has the right to deprive the enemy of his possessions and goods, of everything which may augment his forces and enable him to make war, goes on to remark, that booty, or the movable property of the enemy taken in war, belongs to the sovereign making war, no less than his towns and lands: for he alone (the sovereign authority) has such claims against the enemy as warrant him to seize on his goods, and appropriate them to himself. His soldiers (he adds) are only instruments in his hand, for asserting his right. He maintains and forms them. Whatever they do is in his name and for him. Vatt. Law Nat. 335. These principles are equally applicable to every form of government. It is perfectly immaterial with whom the sovereign authority resides. With whomsoever it resides, its power is erected on the doctrine of its being the legitimate representative of the nation; and the rights of the nation are not surely to be considered as being less, under a republican, than under a monarchical form of government.

The nation, however, as I have observed before, may give a bounty to individual captors—may relinquish a part of its rights to those who fight under its banners. Agreeably to this the same writer goes on to observe that “the sovereign may grant to the troops what share of the booty he pleases. At present most nations allow whatever they can make on certain occasions, when the general allows of plundering what they find on enemies fallen in battle; the pillage of a camp when it has been forced and sometimes that of a town taken by assault.” The cases here enumerated seem to be those where either the object was too trifling to become a matter of national attention, or where the services previously rendered by the troops call for a degree of vigor and exertion which would merit extraordinary encouragement. The whole, however, is made to depend on the will of the nation expressed through their commanding general. \* \* \*

I have been more particular in stating the principles laid down by writers on the law of nations (or the dictates of justice and common sense, as applied to national intercourse), because the attorney for the claimant, whilst acknowledging that the laws of the United States are silent on the present case, places a great reliance on the injunctions of

national law. It is contended that the law of nations gives the booty in this case to the captors. \* \* \*

What, indeed, is the law of nations? It is that rule of conduct which regulates the intercourse of nations with one another; or in the words of the author last cited, "the law of nations is the science of the law subsisting between nations or states, and of the obligations that flow from it." Vatt. Law Nat. 49. It is a law for the government of national communities as to their mutual relations, and not for the government of individuals of those communities in their relation towards one another—nor can it control the conduct of nations towards their own citizens, except in cases involving the rights of other nations. Property once transferred by capture must be subject to the laws of the nation by which the capture is made. The question whether it shall be public or private property must depend on the regulations adopted by the nation making the capture, and cannot naturally be regarded as subject to the control of a system of laws which has respect to the laws and duties of nations towards one another. What our author states as to the practice of nations towards their own citizens, is not, truly speaking, a delineation of the laws of nations. The conduct of nations towards their own citizens must depend on their own municipal regulations. It is by the laws of nations that we must determine the circumstances under which prizes may be taken, but what is to become of them when taken under the sanction of that law cannot depend upon the law of nations, but must depend upon the will of the nation by which the capture is made. Individuals of the capturing nation can have no right independent of the nation to which they belong. It is by a reliance on the authority of their nation, that they shelter themselves from the charge of robbery or piracy. The sovereign, however, may distribute the booty as he pleases. He may do it by a general law, or by special regulations, issued by his generals, subject to the emergency of the case; provided the form of government admits of such a delegation of authority. Even the property acquired by privateers depends on stipulations made with the supreme power of the country to which they belong. "Persons," says Vattel (page 367), "fitting out ships to cruise on the enemy, in recompense of their disbursements and risk they run, acquire the property of the capture; but they acquire it by grants of the sovereign who issues out commissions to them. The sovereign either gives up to them the whole capture or a part—this depends on the contract between them." Vatt. Law Nat. p. 367. As to those who without any authority from their sovereign, commit depredations by sea or land, they are regarded as pirates and plunderers, and things taken by them do not thereby undergo a change of property. Bynk. p. 127. \* \* \*

The English law on this subject seems to be pretty clearly laid down in the course of argument on the case of *Lord Camden v. Home*, and I do not observe anything in the decision of the court to impeach its

accuracy. "Whatever is taken by any of the king's subjects from an enemy in the course of naval operations appertains to the king, either as a *jure coronæ*, or as a droit of admiralty, according to the circumstances. If taken by a private ship, without any commission from the king, the prize belongs to him as a droit of admiralty. If such a ship had a commission, only one tenth of the prize belongs to the king, as a droit of admiralty, and the rest is the property of the owner of the privateer. But where the capture is made by the king's ships or forces, the property is vested in the king's *jure coronæ*; and in such cases it is adjudged by the admiralty lawful prize to the king. But that adjudication by no means imports the capture to have been made by the king's ships exclusively; for, if it were made by his forces, the adjudication would be the same. Now, there are three sorts of joint captures: One by the king's ship and privateer, with letters of marque, the distribution whereof is made, according to the number of persons on board the several ships; the king's share being adjudged to him in the *jure coronæ*. The second instance is of a capture by the king's ship and a non-commissioned privateer. There the king is entitled to the whole. To the privateer's part thereof, it is a droit of admiralty, and the other in *jure coronæ* according to the same mode of distribution. The third is the instance in question, of a capture by the king's army and navy conjointly; and there the whole vests in him *jure coronæ*." <sup>1</sup>

Agreeably to this statement, we find that Sir William Scott granted a monition against the master and owner of a privateer not commissioned against the Dutch, to bring in the proceeds of a Dutch prize. The party appearing acknowledged that he had no commission, but prayed to be admitted as a joint captor. The court did not even suffer the case to be argued, but observed: "The person admits that he had no commission. It is therefore impossible for him to contend for a legal interest in joint capture. If he thinks he has any equitable claims, arising from any services he has performed, they may be represented to the admiralty. The former proceedings (of condemnation at Jamaica) on the part of the non-commissioned captor are mere nullities; and the property must be proceeded against as droits of admiralty." 4 C. Rob. Adm. 72. The case of *The Rebeckah*, which was a question of interest in the capture of a vessel made by naval officers from the island of St. Marcou, a naval station, used for the temporary accommodation of the crews of ships of war, gave occasion to remarks from Sir William Scott, very applicable to the case now before me. "I accede," says he, "entirely to what has been laid down, that a capture at sea, made by a force upon land (which is a case certainly possible, though not frequent), is considered generally as a non-commissioned capture, and inures to the benefit of the lord high admiral. Thus, if a ship of the enemy was compelled

<sup>1</sup> 4 Term R. 387.

to strike by a firing from the castle of Dover, or other garrisoned fortress upon the land, that ship would be a droit of admiralty, and the garrison must be content to take a reward from the bounty of the admiralty, and not a prize interest, under the king's proclamation. All title to sea-prize must be derived from commissions under the admiralty, which is the great fountain of maritime authority; and a military force upon the land is not invested with any commission so derived, impressing upon them a maritime character, and authorizing them to take, upon that element, for their own benefit. I likewise think cases may occur in which naval persons, having a real authority to take upon the sea for their own advantage, might yet entitle the admiralty, and not themselves, by a capture made upon the sea, by the use of a force stationed upon the land. Suppose the crew, or part of the crew, of a man-of-war were landed, and descried a ship of the enemy at sea, and that they took possession of any battery or fort upon the shore, and by means thereof, compelled such ship to strike. I have no doubt that such a capture, though made by persons having naval commissions, yet being made by means of a force upon the land, which they employed accidentally, and without any right under their commission, would be a droit of admiralty, and nothing more." 1 C. Rob. Adm. 227. \* \* \*

The only question, then, which remains to be considered is, have the laws of the United States given to the military any share in prizes taken by troops so circumstanced? It may be desirable that they had done so. But this ground seems to be abandoned by the counsel for the army. \* \* \*

As to the laws of the United States respecting property captured by the public force, the most material is the act of the 23d April, 1800, for the better government of the navy. This act gives to the captors the proceeds of vessels and goods taken on board of them when adjudged good prize. But this act is a law expressly for the government of the navy of the United States; and, indeed, it does not appear to be contended that it can by any rule of construction be extended to the army. Private commissioned vessels, in like manner, deserve their right to appropriate to themselves the prizes they make, from the "act concerning letters of marque, prizes, and prize goods," passed on the 26th day of June, 1812. This act, after stating the conditions on which authority should be given to our vessels to capture the vessels and property of the enemy, proceeds to vest the same, when taken under such authority, in the owners, officers, and crews of the vessels by which prizes should be made. 11 Laws (Weightman's Ed.) p. 240 (2 Stat. 759). Had it been the intention of the government that non-commissioned vessels should be entitled to the proceeds of prizes made, or that any persons in the employ of the United States, and not belonging to the navy or marines, should be entitled to the benefit of all enemy's property taken by them, it would surely have been natural that such intention should have been expressed in these or some other leg-



islative acts. Moreover, indeed, it does not appear what occasion there could be to provide regulations and bonds for the government and good conduct of vessels applying for commissions to make prizes; if all vessels of any description were authorized to take and to appropriate to their own use the property of the enemy, merely because, as it hath been contended, the fortune of war had thrown it in their way. \* \* \*

In the whole view of the case, therefore, now before the court, it is adjudged and decreed, that the plea be overruled, and dismissed, with costs in court occasioned by the plea, and that the schooner *Active* and cargo be condemned as good and lawful prize to the United States.<sup>6</sup>

### THE PRIZE CASES.

(Supreme Court of the United States, 1862. 2 Black, 635, 17 L. Ed. 459.)

These were cases in which the vessels named, together with their cargoes, were severally captured and brought in as prizes by public ships of the United States. The libels were filed by the proper District Attorneys, on behalf of the United States and on behalf of the officers and crews of the ships, by which the captures were respectively made. In each case the District Court pronounced a decree of condemnation, from which the claimants took an appeal. \* \* \*

Mr. Justice GRIER. There are certain propositions of law which must necessarily affect the ultimate decision of these cases, and many

\* In the course of the principal case frequent reference is made to privateers and non-commissioned vessels. The following cases deal with these questions:

In *Hooper, Adm'r, v. United States*, 22 Ct. Cl. 408, 429 (1887), Judge Davis, speaking for the court, said:

"A privateer is an armed vessel belonging to one or more private individuals, licensed by government to take prizes from an enemy; its authority in this regard must depend altogether upon the extent of the commission issued to it, and is qualified and limited by the laws under which the commission is issued. *The Thomas Gibbons*, 8 Cranch, 421, 3 L. Ed. 610 (1814)."

In *The Curlew*, Stew. Adm. 312, 326, (1812) Dr. Croke said: "By the law of nations, as well as the municipal law of this country, no private vessel can cruise against the enemy, but under a lawful commission. The power of granting such commission is the right only of the sovereign, or of those to whom he has deputed it. The Lord High Admiral, when there is one, and the Lords Commissioners of the Admiralty, who, when there is no Lord Admiral, are invested with his general rights, are the only persons to whom it is usual for the king to give authority to grant such commissions, by themselves or by such persons as they shall appoint. \* \* \* By the law of nations: If any private subjects cruise against the enemy without such commission, they are liable to be treated as pirates."

Sailing and taking prize without letter of marque vests prize not in individual captor but in the king as droit of admiralty, *Nichol v. Goodall*, 10 Ves. Jr. 155, (1804), per Lord Eldon; master must be on board when capture made though lieutenant's presence was sufficient if captain were dead, *The Charlotte*, 5 C. Rob. 280 (1804). Commissions must likewise be on board although loss later does not matter; *The Estrella*, 4 Wheat. 298, 304, 4 L. Ed. 574 (1819).

These questions, at one time of practical importance, have only an historical interest at present, as privateering was abolished by the Declaration of Paris. See post, p. 1132.

others, which it will be proper to discuss and decide before we notice the special facts peculiar to each.

They are, 1st. Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the Government on the principles of international law, as known and acknowledged among civilized States?

2d. Was the property of persons domiciled or residing within those States a proper subject of capture on the sea as "enemies' property"?

I. Neutrals have a right to challenge the existence of a blockade *de facto*, and also the authority of the party exercising the right to institute it. They have a right to enter the ports of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion, for the purpose of subduing the enemy.

That a blockade *de facto* actually existed, and was formally declared and notified by the President on the 27th and 30th of April, 1861, is an admitted fact in these cases.

That the President, as the Executive Chief of the government and Commander-in-Chief of the Army and Navy, was the proper person to make such notification, has not been, and cannot be disputed.

The right of prize and capture has its origin in the "*jus belli*," and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto*, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other.

Let us enquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force.

War has been well defined to be, "That state in which a nation prosecutes its right by force."

The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign states. A war may exist where one of the belligerents, claims sovereign rights as against the other.

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. They claim to be in arms to estab-

lish their liberty and independence, in order to become a sovereign state, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

"A civil war," says Vattel, "breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms.

"This being the case, it is very evident that the common laws of war—those maxims of humanity, moderation, and honor—ought to be observed by both parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals, etc.; the war will become cruel, horrible, and every day more destructive to the nation."

As a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history which the court is bound to notice and to know.

The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, civil war exists and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land."

By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a state, or any number of states, by virtue of any clause in the Constitution. The Constitution confers on the President the whole executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several states when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic state. But by the Acts of Congress of February 28, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a state or of the United States.

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or states organized in rebellion, it is none the less a war, although the declaration of it be "unilateral." Lord Stowell (1 Dodson, 247) observes, "It is not the less a war on that account, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other."

The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the Act of Congress of May 13, 1846, which recognized "a state of war as existing by the act of the republic of Mexico." This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the act of the president in accepting the challenge without a previous formal declaration of war by Congress.

This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of a revolted province or state be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. In the case of the Santissima Trinidad, 7 Wheat. 337, 5 L. Ed. 454, this court say: "The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war." See also 3 Binn. 252.

As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding states, assuming to act as belligerents, could become known in Europe, to wit, on the 13th of May, 1861, the queen of England issued her proclamation of neutrality, "recognizing hostilities as existing between the government of the United States of America and certain states styling themselves the Confederate States of America." This was immediately followed by similar declarations or silent acquiescence by other nations.

After such an official recognition by the sovereign, a citizen of a foreign state is estopped to deny the existence of a war with all its consequences as regards neutrals. They cannot ask a court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the government and paralyze its power by subtle definitions and ingenious sophisms.

The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this court are now for the first time desired to pronounce, to wit: That insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not enemies because they are traitors; and a war levied on the government by traitors, in order to dismember and destroy it, is not a war because it is an "insurrecton."

Whether the President is fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this court must be governed by the decisions and acts of the political department of the government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

The correspondence of Lord Lyons with the Secretary of State admits the fact and concludes the question.

If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the government to prosecute the war with vigor and efficiency. And finally, in 1861, we find Congress "ex majore cautela" and in anticipation of such astute objections, passing an act "approving, legalizing, and making valid all the acts, proclamations, and orders of the President, etc., as if they had been issued and done under the previous express authority and direction of the Congress of the United States."

Without admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well known principle of law, "*omnis rati habitio retrotrahitur et mandato equiparatur*," this ratification has operated to perfectly cure the defect. In the case of *Brown v. United States*, 8 Cranch, 131, 132, 133, 3 L. Ed. 504, Mr. Justice Story treats of this subject, and cites numerous authorities to which we may refer to prove

this position, and concludes, "I am perfectly satisfied that no subject can commence hostilities or capture property of an enemy, when the sovereign has prohibited it. But suppose he did, I would ask if the sovereign may not ratify his proceedings, and thus by a retroactive operation give validity to them?"

Although Mr. Justice Story dissented from the majority of the court on the whole case, the doctrine stated by him on this point is correct and fully substantiated by authority.

The objection made to this act of ratification, that it is *ex post facto*, and therefore unconstitutional and void, might possibly have some weight on the trial of an indictment in a criminal court. But precedents from that source cannot be received as authoritative in a tribunal administering public and international law.

On this first question therefore we are of the opinion that the President had a right, *jure belli*, to institute a blockade of ports in possession of the states in rebellion, which neutrals are bound to regard. \* \* \*

<sup>7</sup> The statement of facts is abridged and the balance of the opinion of the court, dealing with the question of enemy property and the facts of the various cases on appeal, is omitted.

In the course of a dissenting opinion, in which Chief Justice Taney and Justices Catron and Clifford concurred, Mr. Justice Nelson said:

"Upon the whole, after the most careful consideration of this case which the pressure of other duties has admitted, I am compelled to the conclusion that no civil war existed between this government and the states in insurrection till recognized by the Act of Congress 13th of July, 1861; that the President does not possess the power under the Constitution to declare war or recognize its existence within the meaning of the law of nations, which carries with it belligerent rights, and thus change the country and all its citizens from a state of peace to a state of war; that this power belongs exclusively to the Congress of the United States, and, consequently, that the President had no power to set on foot a blockade under the law of nations, and that the capture of the vessel and cargo in this case, and in all cases before us in which the capture occurred before the 13th of July, 1861, for breach of blockade, or as enemies' property, are illegal and void, and that the decrees of condemnation should be reversed and the vessel and cargo restored." 2 Black, 698-699 (17 L. Ed. 459).

In *Stovall v. U. S.*, 26 Ct. Cl., 226, 240 (1891), Chief Justice (then Justice) Nott said: "It has been held in an unbroken series of decisions (from *The Prize Cases*, in 2 Black, 635, 17 L. Ed. 459 (1862) to *Young, Assignee of Collie v. United States*, in 97 U. S. 39, 24 L. Ed. 992 (1877), that the Civil War in all hostile operations must be regarded as international, and that 'all property within enemy's territory is in law enemy's property, just as all persons in the same territory are enemies.' Chief Justice Waite, 97 U. S. 60. When the United States accorded to the Confederate States the rights of a belligerent they became a hostile power and their inhabitants public enemies. The obligations of the Constitution do not extend across military lines nor into hostile territory. The law which governed the transactions of the civil war was not constitutional law, but international. It has been closely adhered to; so closely, that under the decisions of the court of last resort the loyal citizens of the North were practically excluded from the benefits of the Captured Property Act, and after nonintercourse began could do nothing to save their property in the South from Confederate confiscation; and though they acted in good faith, with no purpose to aid the rebellion, seeking simply to save their own property in the South by directing its investment there—sending nothing into the insurgent districts and bringing nothing out, but leaving the resources of the rebellion precisely as they found them—their acts were held to be intercourse between enemies, and the investments of their agents illegal and void.

## CHAPTER II

## PARTIES TO A WAR

## SECTION 1.—BELLIGERENTS; INSURGENTS

## GREAT BRITAIN, on Behalf of BARRETT, v. UNITED STATES.

(American and British Claims Commission under Treaty of May 8, 1871.  
3 Moore's International Arbitrations, 2900.)

In the case of *Edward Alfred Barrett v. United States*, No. 18, the claimant, a British subject, resident in England during the Civil War in the United States, alleged that in October, 1864, he purchased for a valuable consideration and was still the possessor and absolute owner of a certain "cotton-loan bond" of the Confederate States of America, by which the Confederate States bound themselves to pay to the bearer £200 sterling, with interest at 7 per cent. per annum, semiannually, on the 1st day of March and the 1st day of September in each year, until redemption of the principal at par; that the government of the United States, in 1865, "seized all the public assets of the said Confederate States, and especially a very large quantity of cotton, hypothecated by the said Confederate States government for payment of the said cotton loan, and thus prevented those states from paying their cotton-loan bondholders"; and that in consequence of such seizure by the government of the United States the principal of the bond remained unpaid, and no interest had been paid thereon from the 1st of March, 1865. The claimant demanded £200 and interest.

The agent of the United States, believing the claim to be outside of the scope of the submission under the treaty, sent a copy of the memorial to the Secretary of State, who protested against the presentation of the claim, and asked that it be withdrawn. This request not having been complied with, the agent of the United States, under specific instructions from the Secretary of State of December 9, 1871, filed a motion to dismiss for want of jurisdiction, on the ground that the memorial stated "no case for a claim against the United States within the intent" of the treaty.

*United States v. Grossmayer*, 9 Wall. 72, 19 L. Ed. 627 (1869); *Dillon v. United States*, 5 Ct. Cl. 586 (1869), affirmed without opinion; *Cutner, Use of Shipper v. United States*, 17 Wall. 517, 21 L. Ed. 656 (1873); *United States v. Lapene*, 17 Wall. 601, 21 L. Ed. 693 (1873); *Montgomery v. United States*, 15 Wall. 395, 21 L. Ed. 97 (1872); *Stoddart v. United States*, 6 Ct. Cl. 840."

See, also, *The Rapid*, 8 Cranch, 155, 3 L. Ed. 520 (1814), post, p. 631.

Arguments were submitted on this motion, and on December 14, 1871, the commission rendered the following unanimous decision:

"The commission is of opinion that the United States is not liable for the payment of debts contracted by the rebel authorities.

"The rebellion was a struggle against the United States for the establishment in a portion of the country belonging to the United States of a new state in the family of nations, and it failed. Persons contracting with the so-called Confederate States voluntarily assumed the risk of such failure, and accepted its obligations, subject to the paramount rights of the parent state by force to crush the rebel organization, and seize all its assets and property, whether hypothecated by it or not to its creditors.

"Such belligerent right of the United States, to seize and hold was not subordinate to the rights of creditors of the rebel organization, created by contract with the latter; and when such seizure was actually accomplished, it put an end to any claim of the property which the creditor otherwise might have had.

"We are therefore of opinion that after such seizure the claimant had no interest in the property, and the claim is dismissed."

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#### WILLIAMS v. BRUFFY.

(Supreme Court of the United States, 1877. 96 U. S. 176, 24 L. Ed. 716.)

See ante, p. 40, for a report of the case.

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#### MONTOYA v. UNITED STATES.

(Supreme Court of the United States, 1901. 180 U. S. 261, 21 Sup. Ct. 358, 45 L. Ed. 521.)

This was a petition by the surviving partner of the firm of E. Montoya & Sons, owners of a ranch in Nogal, New Mexico, against the United States, and the Mescalero Apache Indians, for the value of certain live stock stolen by certain of these Indians, known as Victoria's Band, in March, 1880.

From 1876 to 1879, the United States authorities were engaged in quelling insurrections of Apache Indians in Arizona, and in removing them to other reservations.

In 1879, Victoria, an Apache Indian, escaped from the reservation, and gathered together a band of Indians, and began marauding and destroying property, and killing citizens. During 1879 and 1880 they were constantly pursued by United States troops.

The Court of Claims found as an ultimate fact that the depredation complained of was committed by a band of Indians not in amity with



the United States at the date of depredation. Upon these findings of fact the court decided as a conclusion of law that the petition be dismissed. Claimants appealed to the Supreme Court of the United States.

Mr. Justice BROWN delivered the opinion of the court.

The first section of the Act of March 3, 1891, c. 538, 26 Stat. 851, vests the Court of Claims with jurisdiction to inquire into and finally adjudicate: "First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for."

To sustain a claim under this section, it is incumbent upon the claimant to prove that the Indians taking or destroying the property belonged to a band, tribe or nation in amity with the United States. The object of the act is evidently to compensate settlers for depredations committed by individual marauders belonging to a body which is then at peace with the Government. If the depredation be committed by an organized company of men constituting a band in itself, acting independently of any other band or tribe, and carrying on hostilities against the United States, such acts may amount to a war for the consequences of which the government is not responsible under this act, or upon general principles of law. *United States v. Pacific Railroad*, 120 U. S. 227, 234, 7 Sup. Ct. 490, 30 L. ed. 634.

The North American Indians do not and never have constituted "nations" as that word is used by writers upon international law, although in a great number of treaties they are designated as "nations" as well as tribes. Indeed, in negotiating with the Indians the terms "nation," "tribe" and "band" are used almost interchangeably. The word "nation" as ordinarily used presupposes or implies an independence of any other sovereign power more or less absolute, an organized government, recognized officials, a system of laws, definite boundaries and the power to enter into negotiations with other nations. These characteristics the Indians have possessed only in a limited degree, and when used in connection with the Indians, especially in their original state, we must apply to the word "nation" a definition which indicates little more than a large tribe or a group of affiliated tribes possessing a common government, language or racial origin, and acting for the time being, in concert. Owing to the natural infirmities of the Indian character, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits, and lack of mental training, they have as a rule shown a total want of that cohesive force necessary to the making up of a nation in the ordinary sense of the word. As they had no established laws, no recognized method of choosing their sovereigns by inheritance or election, no officers with defined powers, their governments in their original state were nothing more than a temporary submission to an intellectual or physical superior, who in

some cases ruled with absolute authority, and in others, was recognized only so long as he was able to dominate the tribe by the qualities which originally enabled him to secure their leadership. In short, the word "nation" as applied to the uncivilized Indians is so much of a misnomer as to be little more than a compliment.

We are more concerned in this case with the meaning of the words "tribe" and "band." By a "tribe" we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a "band," a company of Indians not necessarily, though often of the same race or tribe, but united under the same leadership in a common design. While a "band" does not imply the separate racial origin characteristic of a tribe, of which it is usually an offshoot, it does imply a leadership and a concert of action. How large the company must be to constitute a "band" within the meaning of the act it is unnecessary to decide. It may be doubtful whether it requires more than independence of action, continuity of existence, a common leadership and concert of action.

Whether a collection of marauders shall be treated as a "band" whose depredations are not covered by the act may depend not so much upon the numbers of those engaged in the raid as upon the fact whether their depredations are part of a hostile demonstration against the government or settlers in general, or are for the purpose of individual plunder. If their hostile acts are directed against the government or against all settlers with whom they come in contact, it is evidence of an act of war. Somewhat the same distinction is applicable here which is noticed by Hawkins in his *Pleas of the Crown*, and other ancient writers upon criminal law, as distinguishing a riot from a treasonable act of war. Thus it is said in *Wharton on Criminal Law*, section 1796, summing up the early authorities (though never accepted as a definition of treason in this country): "That constructive levying of war, by the old English common law, is where war is levied for the purpose of producing changes of a public and general nature by an armed force; as where the object is by force to obtain the repeal of a statute, to obtain the redress of any public grievance, real or pretended; to throw down all enclosures, pull down all bawdy houses, open all prisons, or attempt any general work of destruction; to expel all strangers, or to enhance the price of wages generally;" but if these acts were directed against a particular individual they would amount to nothing more than an assault or riot.

While as between the United States and other civilized nations, an act of Congress is necessary to a formal declaration of war, no such act is necessary to constitute a state of war with an Indian tribe. In his concurring opinion in *Bas v. Tingy*, 4 Dall. 37, 1 L. Ed. 731, recognizing France as a public enemy, Mr. Justice Washington recognized war as of two kinds: "If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with

another whole nation, and all the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place and under every circumstance. In such a war, all the members act under the general authority, and all the rights and consequences of war attach to their condition. But hostilities may subsist between two nations, more confined in its nature and extent, being limited as to places, persons and things; and this is more properly termed imperfect war, because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. Still, however, it is public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers." Indian wars are of the latter class. We recall no instance where Congress has made a formal declaration of war against an Indian nation or tribe; but the fact that Indians are engaged in acts of general hostility to settlers, especially if the government has deemed it necessary to dispatch a military force for their subjugation, is sufficient to constitute a state of war. *Marks v. United States*, 161 U. S. 297, 16 Sup. Ct. 476, 40 L. Ed. 706. \* \* \*

The judgment of the Court of Claims is affirmed.

<sup>1</sup> The statement of facts is rewritten and the balance of the opinion, dealing with the interpretation of the statute and compensation for damages caused by Indians, is omitted.

The principal case should be considered in connection with Part I, Chapter I, States, Section 1, Nature and Kinds, ante, p. 19.

From the Declaration of Independence of the United States on July 4, 1776, to March 3, 1871, the Indian tribes were treated as nations, in the sense that treaties were made with them by the President, and submitted to the Senate of the United States for its advice and consent to their ratification. The change which took place in that year is thus stated by Samuel B. Crandall, in his work entitled "Treaties, Their Making and Enforcement" (2d Ed.) 184 (1916):

"In the Indian Appropriations Act of March, 3, 1871, it was enacted that thereafter no Indian nation or tribe within the territory of the United States should be acknowledged or recognized as an independent nation, tribe, or power with which the United States might contract by treaty; but that the obligation of existing treaties was in no way to be impaired or invalidated by the act. No formal treaties with the Indian tribes have since been made, but agreements with them have been laid before Congress for its approval. 'Since the Act 3d March, 1871, the Indian tribes have ceased to be treaty-making powers and have become simply the wards of the nation. As such, Congress speaks for them and has become the legislative exponent of both guardian and ward.' Nott, C. J., *Jonathan Brown v. United States*, 32 Ct. Cl. 482, 489 (1897)."

See, also, *Cherokee Nation v. State of Georgia*, 5 Pet. 1, 8 L. Ed. 25 (1831); *Worcester v. Georgia*, 6 Pet. 515, 8 L. Ed. 483 (1832); *Elk v. Wilkins*, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643 (1884); and *United States v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1106, 30 L. Ed. 228 (1886).

On the present legal status of the Indians, see James Bradley Thayer's article entitled "A People Without Law" (1891), reprinted in his "Legal Essays," 91-140 (1908).

## SECTION 2.—RECOGNITION OF BELLIGERENCY; OF INSURGENCY<sup>2</sup>

### THE LILLA.

(District Court of the United States, D. Massachusetts, 1862. 2 Spr. 177, Fed. Cas. No. 8,348.)

SPRAGUE, District Judge.<sup>3</sup> This vessel and cargo were captured on the 3d day of July last, off Abaco, by the United States gunboat Quaker City, and sent into this district for adjudication. \* \* \*

This vessel was built in Wells, in the state of Maine, and was called the Betsy Ames, and was owned by the American claimants, Maxwell and others, inhabitants of that place. After the breaking out of the rebellion, she was captured by a Confederate privateer, under the command of Henry S. Libby, and carried into Charleston, S. C. There it is supposed certain proceedings were had in a tribunal, acting under the assumed authority of the Southern Confederacy, by which the vessel was condemned and sold; and her name was changed to the Mary Wright. The purchasers were John Fraser & Co., a commercial house doing business in Charleston. Afterwards, on the 2d of March last, she ran the blockade as before stated, and was commanded by the same Captain Libby.

She arrived at Liverpool on the 2d day of April, and on the 24th of the same month was registered as a British vessel, called the Lilla, and in the name of R. G. Bushby as sole owner. On the 15th of May she sailed from Liverpool for Nassau, N. P. Two objections are made to this claim: First, that Bushby is merely a nominal owner, that the beneficial interest is in Fraser & Co., and that, if he holds the legal title, it is only as trustee for enemies; second, that even if Bushby was an actual purchaser for value, and for his own use, still that the original title of Maxwell and others has never been divested, and that their claim must prevail. As to the first objection, there are certainly facts which seem to be irreconcilably opposed to the supposition that Bushby was a real purchaser for his own use; while every circumstance is consistent with his having lent his name to cover enemy's property, and taken the legal title in trust for that purpose. \* \* \*

The second objection to this claim is also fatal. There is no doubt that this vessel was the property of Maxwell and others, until her capture by a Confederate privateer. But it is contended that she has

<sup>2</sup> On the subject-matter of this section, see George Grafton Wilson's "Insurgency and International Maritime Law," in 1 American Journal of International Law, 46 (1907); also, his Lectures on Insurgency, delivered at the Naval War College, Newport, Rhode Island, August, 1900 (Washington, 1900).

<sup>3</sup> Parts of the opinion are omitted.

since been condemned and sold by a prize court in Charleston, S. C., and the purchasers conveyed her to the claimant Bushby. If this were so, of which there is no sufficient proof, still, such proceedings would not divest the title of the original owner. In the case of *The Amy Warwick*, 2 Sprague, 123, Fed. Cas. No. 341, this court held, that treating the Confederates in some respects as belligerents was not an abandonment of sovereign rights, and by no means precluded us from treating them in other respects as rebels. Most assuredly I shall not recognize the Southern Confederates as a nation or as having a government competent to establish prize courts. No proceedings of any such supposed tribunals can have any validity here, and a sale under them would convey no title to the purchaser, nor would it confer upon him any right to give a title to others. But it is argued, that, under the queen's proclamation, recognizing the Confederates as belligerents, a British court would hold a sale to be valid. What the decision of a British court might be upon that question, we do not know, it never having been there litigated. But such a decision, if made, would be no more binding upon our courts than the political views of the British government would be upon the President or the Congress.

If this second objection were the only matter before the court, it is questionable whether I ought to entertain or listen to it. If this vessel had been arrested on the ocean, without any reason for supposing she was enemy's property, or infringing belligerent rights of the United States, but merely to settle a contested title between a citizen of the United States and a neutral subject, this court would perhaps refuse to go into the question of title, and at once restore the vessel to the person from whose possession she had been thus wrongfully taken. A due regard to the peace of the world might require that, in questions of property between citizens of different nations, the court of one of such nations should not acquire jurisdiction by the wrongful exercise of force upon the ocean. But such is not the posture of this case. There has been no improper exercise of force. There was abundant reason for taking this vessel as enemy's property, and bringing her in for adjudication. She is rightfully within this jurisdiction, and if not condemned as prize, the court should deliver her to the person having the highest title. If, indeed, the question of ownership were wholly between foreigners, the court might refuse to decide it, as we are not bound to exercise jurisdiction merely to settle controversies between foreigners. But we cannot refuse to listen to the claims of our own citizens to property legitimately within our jurisdiction. \* \* \*

It remains only to determine upon what conditions the vessel shall be restored to Maxwell and others. By Act 1800, c. 14, § 1 (2 Stat. 16), it is provided that when a merchant vessel, belonging to any person under the protection of the United States, shall have been taken by a public enemy, and shall be recaptured by a public armed ship of the United States, such vessel not having been condemned by compe-

tent authority before the recapture, the same shall be restored to the former owners upon payment of one-eighth part of the true value, for and in lieu of salvage. The language of this statute is perhaps in strictness applicable only to captures in an international war. But the analogy is so close, that I think it most proper to adopt the rule therein prescribed in the present case. By the fourth section of the statute, the whole of such salvage is to go to the captors. I shall order restoration of the vessel to Maxwell and others upon payment, to the captors of one-eighth part of the value thereof, and of all costs and expenses which they have incurred on account of the vessel.<sup>4</sup>

### UNITED STATES v. THE AMBROSE LIGHT.

(District Court of the United States, S. D. New York, 1885. 25 Fed. 408.)

The libel in this case was filed to procure the condemnation of the brigantine *Ambrose Light*, which was brought into this port as prize on June 3, 1885, by Lieut. Wright and a prize crew, detached from the United States gunboat *Alliance*, under Commander Clarke, by whose orders the brigantine had been seized on the twenty-fourth of April. The seizure was made in the Caribbean Sea, about twenty miles to the westward of Cartagena. The commander was looking for the insurgent Preston, by whose order Colon had shortly before been fired, to the great loss and injury of our citizens. Observing the brigantine displaying a strange flag, viz., a red cross on a white ground, he bore down upon her, and brought her to by a couple of shots across her bows. Before coming to, she exhibited the Colombian flag. On examination, some sixty armed soldiers were found concealed below her decks, and one cannon was aboard, with a considerable quantity of shot, shell, and ammunition. Preston was not found. Her papers purported to commission her as a Colombian man-of-war, and read as follows (translation):

"I, Pedroa Lara, governor of the province of Barranquilla, in the state of Bolivar, in the United States of Colombia, with full powers conferred by the citizen president of the state, I give to whom it may concern this patente of the sailing vessel *Ambrose Light*, that she may navigate as a Colombian vessel of war in the waters touching the coast of this republic, in the Atlantic Ocean.

"Therefore, the general commandants and captains of the vessels-of-war of the friendly nations of Colombia are requested to give this vessel all the consideration that by right belongs to the vessels of the class of the *Ambrose Light* of all civilized nations. In the faith of which we have given these presents, and signed with rubric with the

<sup>4</sup> Affirmed on appeal to United States Circuit Court in *U. S. v. The Lilla et al.*, 2 Cliff. 169, Fed. Cas. No. 15,600 (1863).

secretary of my office, in the city of Barranquilla, on the eighteenth day of the month of April, 1885. [Signed] Pedroa Lara.

"The Secretary [Signed] R. A. Del Valle."

Indorsed: "Office of the Military,

"Barranquilla, April 18, 1885.

"Registered and noted in folio and book, respectively.

"The General in Chief, N. Juneno Collante.

"Adjutant and Secretary, A. Solano."

Believing this commission to be irregular, and to show no lawful authority to cruise as a man-of-war on the high seas, Commander Clarke reported her under seizure, in accordance with the naval regulations, to Admiral Jouett, commanding the North Atlantic squadron, then cruising in the Central American waters, and the admiral directed the vessel to be taken to New York for adjudication as prize. The vessel was at first supposed to belong to citizens of the United States. The proofs showed that she had been sold to, and legally belonged to, Colente, one of the chief military leaders of the insurgents at Barranquilla. None of her officers or crew were citizens of the United States. She was engaged upon a hostile expedition against Cartagena, and designed to assist in the blockade and siege of that port by the rebels against the established government of the United States of Colombia. She had left Sabanilla on April 20th, bound for Baru, near Cartagena, where she expected the soldiers aboard to disembark. She was under the orders of the colonel of the troops, whose instructions were to shoot the captain if disobedient to his orders. Further instructions were to fight any Colombian vessel not showing the white flag with a red cross.

Sabanilla, and a few other adjacent sea-ports, and the province of Barranquilla, including the city of Barranquilla, had been for some months previous, and still were, under the control of the insurgents. The proofs did not show that any other depredations or hostilities were intended by the vessel than such as might be incident to the struggle between the insurgents and the government of Colombia, and to the so-called blockade and siege of Cartagena.

As respects any recognition of the insurgents by foreign powers, it did not appear in evidence that up to the time of the seizure of the vessel, on April 24, 1885, a state of war had been recognized as existing, or that the insurgents had ever been recognized as a de facto government, or as having belligerent rights, either by the Colombian government, or by our own government, or by any other nation. The claimants introduced in evidence a diplomatic note from our Secretary of State to the Colombian minister, dated April 24, 1885, which, it was contended, amounted to a recognition by implication of a state of war. The government claimed the forfeiture of the ship as piratical, under the law of nations, because she was not sailing under the authority of any acknowledged power. The claimants contended that, being

actually belligerent, she was in no event piratical by the law of nations; but if so, that the subsequent recognition of belligerency by our government by implication entitles her to a release.

Elihu Root, U. S. Atty., and J. P. Clark, Asst. Atty., for the United States.

Frank F. Vanderveer, for claimants.

BROWN, J.<sup>5</sup> \* \* \* 6. That recognition by at least some established government of a "state of war," or of the belligerent rights of insurgents, is necessary to prevent their cruisers from being held legally piratical by the courts of other nations injuriously affected, is either directly affirmed, or necessarily implied from many adjudged cases; and I have found no adjudication in which a contrary view is even intimated. \* \* \*

This great weight of authority, drawn from every source that authoritatively makes up the law of nations, seems to me fully to warrant the conclusion that the public vessels of war of all nations, for the preservation of the peace and order of the seas, and the security of their own commerce, have the right to seize as piratical all vessels carrying on, or threatening to carry on, unlawful private warfare to their injury; and that privateers, or vessels of war, sent out to blockade ports, under the commissions of insurgents, unrecognized by the government of any sovereign power, are of that character, and derive no protection from such void commissions.

It thus appears that the rules laid down and implied in the decisions of our Supreme Court in the cases of *Rose v. Himely* [4 Cranch, 241, 2 L. Ed. 608], and *U. S. v. Palmer*, [3 Wheat. 610, 4 L. Ed. 471], nearly 70 years ago, have been since almost universally followed. The practical responsibility of determining whether insurgent vessels of war shall be treated as lawful belligerents, or as piratical, rests where the supreme court then in effect decided that it ought to rest, viz. with the political and executive departments of the government. These departments have it in their power, at any moment, through the granting or withholding of recognition of belligerency, and through the extent of such recognition as they may choose to accord, virtually to determine how such cruisers shall be treated by the courts. Even after judgment and sentence the prisoners may, like Smith and his associates, convicted before Mr. Justice Grier, be treated, and exchanged, as prisoners of war. And it is with those departments, exclusively, that the discretion ought to rest to determine when and how its technical rights against rebel cruisers shall be enforced. Its naval regulations will be framed accordingly; and any seizures made under such regulations may be enforced, or at any moment remitted, at the pleasure of those departments.

<sup>5</sup> Parts of the opinion are omitted.



Where insurgents conduct an armed strife for political ends, and avoid any infringement or menace of the rights of foreign nations on the high seas, the modern practice is, in the absence of treaty stipulations or other special ties, to take no notice of the contest. One of the earliest applications of this rule that I have met is in the answer of the states-general to Sir Joseph York's demand in 1779 for the surrender of Paul Jones' prizes as piratically captured, in which their Mightinesses say that "they had for a century past strictly observed the maxim that they will in no respect presume to judge of the legality or illegality of the actions of those who, upon the open sea, have taken any vessels that do not belong to this country." On this point Prof. Lawrence, in his recent *Hand-Book of Int. Law* (London, 1884), says:

"When a community, not being a state in the eye of international law, resorts to hostilities, it may, in respect of war, be endowed with the rights and subjected to the obligations of a state if other powers accord it what is called recognition of belligerency. Neutral powers should not do this. \* \* \* (4) unless it affect by the struggle the interests of the recognizing state. If the struggle is maritime, recognition is almost a necessity. The controversy of 1861 illustrates the whole question."

The practice is stated by Hall as follows: "When, however, piratical acts have a political object, and are directed solely against a particular state, it is not the practice for states other than that attacked to seize, and still less to punish, the persons committing them. It would be otherwise, so far as seizure is concerned, with respect to vessels manned by persons acting with a political object, if the crew, in the course of carrying out their object, committed acts of violence against ships of other states than that against which their political operation was aimed; and the mode in which the crew were dealt with would probably depend on the circumstances of the case." *Int. Law*, § 81, p. 223.

Whether a foreign nation shall exercise its rights only when its own interests are immediately threatened, or under special provocations only after injuries inflicted by the insurgents, as in this case, at Colon, is a question purely for the executive department. But when a seizure has been made by the navy department, under the regulations, and the case is prosecuted before the court by the government itself, claiming *summum jus*—its extreme rights—the court is bound to apply to the case the strict technical rules of international law. The right here asserted may be rarely enforced; the very knowledge that the right exists tends, effectually, in most cases, to prevent any violation of it, or at least any actual interference by insurgents with the rights of other nations. But if the right itself were denied, the commerce of all commercial nations would be at the mercy of every petty contest carried on by irresponsible insurgents and marauders under the name of war.

In the absence of any recognition of these insurgents as belligerents, I therefore hold the Ambrose Light to have been lawfully seized, as bound upon an expedition technically piratical. \* \* \*

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### THE THREE FRIENDS.<sup>7</sup>

(Supreme Court of the United States, 1897. 106 U. S. 1, 17 Sup. Ct. 495, 41 L. Ed. 897.)

See post, p. 830, for a report of the case.

\* Notwithstanding the opinion in the principal case, it is to-day recognized in practice as well as in theory, that a vessel belonging to insurgents who have not yet been recognized, will not be treated as a pirate engaged in a piratical enterprise, if it limits its actions to the parent state.

While it is unnecessary to cite authority for this statement, attention is invited to 2 Moore's Digest of International Law (1906) 1098 et seq., and L. Oppenheim, 1 International Law (2d Ed., 1912) 342.

<sup>7</sup> As this case deals with the question of neutrality, it is printed in Part III, chapter XV, Belligerent Use of Neutral Territory. The portion of the opinion to which reference is made for present purposes deals with the distinction between belligerency and insurgency, post, p. 834.

CHAPTER III  
ENEMY PROPERTY IN TERRITORY OF OTHER  
BELLIGERENT<sup>1</sup>

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Ex parte BOUSSMAKER.

(High Court of Chancery, 1806. 13 Ves. Jr. 71.)

The object of this petition was to be admitted to prove a debt under a commission of bankruptcy, which the commissioners refused to admit, upon the objection, that the creditors applying to prove were alien enemies.

Mr. Perceval, in support of the petition. This proof ought to be admitted at least. It will be another consideration, whether the petitioners shall receive dividends. But clearly the other creditors ought not to be permitted to take the dividends accruing upon this debt; for the crown will be entitled. There is no law, now subsisting, that a debtor to an alien enemy shall not pay the debt: the act of Parliament to prevent that in the last war having expired; and not being renewed. Upon the common law undoubtedly the objection might be made by the debtor by plea. The demand would survive at the end of the war; the suit only being suspended. The effect of that suspension will be obtained, admitting the proof, either by not permitting them to take a dividend, or by having it paid into Court. Here is no allegation, that these persons were alien enemies at the date of the contract.

The LORD CHANCELLOR [ERSKINE]. If this had been a debt, arising from a contract with an alien enemy, it could not possibly stand; for the contract would be void.<sup>2</sup> But, if the two nations were at peace at the date of the contract, from the time of war taking place the creditor could not sue; but, the contract being originally good, upon the

<sup>1</sup> For sequestration of property during the World War of 1914-1918, see James W. Garner's article entitled "Treatment of Enemy Allens," 12 American Journal of International Law (1918) 744, and his International Law and the World War, vol. 1, p. 86 et seq. (1920); "Germany's Treatment of American Property," Report of the Alien Property Custodian for 1919, p. 268; and "American Property in Germany," The Nation, February 16, 1921, p. 272.

See, also, Ernest J. Schuster, "The Peace Treaty [of Versailles] in Its Effects on Private Property," British Year Book of International Law, 1920-21, p. 167; J. W. Scobell Armstrong, War and Treaty Legislation Affecting British Property in Germany and Austria and Enemy Property in the United Kingdom (1921), and Paul F. Simonson, Private Property and Rights in Enemy Countries, under the Peace Treaties with Germany, Austria, Hungary, Bulgaria, and Turkey (1921).

<sup>2</sup> Evans v. Richardson, 3 Mer. 460 (1817); Ex parte Schmaling, Buck, 93 (1817); Potts v. Bell, 8 Term R. 548 (1800); Willison v. Patteson, 7 Taunt. 439 (1817), in which case this petition is supposed to have been heard by Lord Eldon.

return of peace the right would survive. It would be contrary to justice therefore to confiscate this dividend. Though the right to recover is suspended, that is no reason, why the fund should be divided among the other creditors. The point is of great moment, from the analogy to the case of an action; and it is true, a court of law would not take notice of the objection without a plea. It must appear upon the record. Has the case of a contract originally good, and the right suspended by war, never before occurred? Yet I do not know an instance of an application by an alien enemy to the court to keep the fund, until his right to sue should survive. The policy, avoiding contracts with an enemy, is sound and wise: but where the contract was originally good, and the remedy is only suspended, the proposition, that therefore the fund should be lost, is very different.

Let a claim be entered; and the dividend be reserved.<sup>3</sup>

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WOLFF et al. v. OXHOLM.

(Court of King's Bench, 1817. 6 Maule & S. 92.)

For the material portion of Wolff v. Oxholm, see *In re Ferdinand*, following.

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*In re FERDINAND*, Ex-Tsar of Bulgaria.

(Court of Chancery, 1920. [1921] L. R. 1 Ch. D. 107.)

LORD STERNDALE, M. R. In this case the ex-Tsar of Bulgaria, who has obtained special leave for the purpose, appeals against two orders made on July 30, 1919, and August 13, 1919, by Eve, J., and P. O. Lawrence, J., respectively. By each order certain stocks and securities which formerly belonged to the appellant were vested in the Solicitor to the Treasury as trustee for H. M. King George V. The appellant was by birth of German nationality, but according to his affidavit in 1887 he had become of Austro-Hungarian nationality by reason of holding a commission in the army of that country. In that year he was elected Prince of Bulgaria and in 1908 he assumed the title of Tsar. On being elected Prince of Bulgaria he became of Bulgarian nationality. War broke out between Bulgaria and this country in October, 1915, and the appellant thereupon became an enemy of His Majesty. At that time the stocks and securities in question were held by Messrs. Coutts & Co. on behalf of the appellant, some of them being registered in his own name and some in the names of partners

<sup>3</sup> See the distinction upon the case of an insurance of foreign property in England, followed by a war with the country of the assured; a loss, incurred by the hostile act of England, cannot be recovered even upon the return of peace. *Ex parte Lee*, 13 Ves. Jr., 64 (1806); *Brandon v. Curling*, 4 East, 410 (1803).

of Coutts & Co. who held them as trustees for the appellant. After the outbreak of war Messrs. Coutts & Co., acting in accordance with the provisions of the Trading with the Enemy Amendment Act of 1914, gave notice to the custodian appointed under that act that they so held the said stocks and securities and also some bearer securities not the subject of this appeal. They were required to deposit and did deposit them with the Bank of England to the order of the Solicitor to the Treasury, and the partners in whose names some of them were registered signed declarations that they held them also to the order of the Treasury. No further step was taken in the matter until after the conclusion of an armistice with Bulgaria and the abdication of the appellant, which took place on September 29, and October 3, 1918, respectively. After his abdication the appellant went to Germany and was resident there at the conclusion of the armistice with Germany on November 11, 1918.

On June 27, 1919, a commission was issued under the Great Seal by virtue of which on July 10, 1919, an inquisition was held by which it was found that the appellant was on the outbreak of war beneficially entitled to the stocks and securities and that the same became and remained forfeited to His Majesty. The orders in question were then made on the dates before mentioned. On November 19, 1919, an order was made by the Board of Trade under section 4 of the Trading with the Enemy Amendment Act, 1916, vesting the stocks and securities in the custodian, such order only to have effect in case of its being held that no forfeiture of them to His Majesty had taken place.

The points argued on the appeal were: (1) Was it ever the common law of England that the crown had the right to seize and claim as forfeited to it private property including choses in action found in this kingdom belonging to subjects of an enemy state? (2) If so, had that right ceased to exist before the passing of the Trading with the Enemy Acts? (3) If not, has it been abandoned or ceased to exist by reason of the legislation contained in the various acts relating to trading with the enemy, so far as such legislation deals with the disposition of enemy property during the war? (4) Had the crown lost the right to claim the forfeiture of such property, because no inquisition had been held before the conclusion of the armistice with Bulgaria? These stocks and securities were choses in action belonging to the appellant, and I do not think any distinction can be drawn between legal and equitable interests in such choses in action. The stocks and securities were the private property of the appellant and were in no way part of the national revenues or property of the state of Bulgaria. They would no doubt, if the appellant could have obtained possession of them, have been available for use by him in the promotion of the war against this country, but probably he had no intention of so using them, and I think that from the legal point of view they must be considered in the same light as the private property of any other na-

tional of the enemy state. The fact that they were the property of the enemy sovereign is only important from a moral or political point of view in influencing the crown to enforce the exercise of a right which it has not exercised for a long time, and probably would not have exercised against the property of a private person. I do not therefore think it necessary to discuss the question argued before us as to the position of the appellant as a sovereign under the constitution of Bulgaria, or the extent to which under that constitution he may be considered responsible for the war between this country and Bulgaria.

As to the first two questions I have no doubt that they should be answered against the appellant. I think the right to seize private enemy property existed and that nothing had occurred up to the beginning of the war with Bulgaria to deprive the crown of that right unless that were the effect of the Trading with the Enemy Acts. The right is stated by Hale, C. J., in his Pleas of the Crown to have existed originally, and although it was argued with some force that the cases in the Year Books to which reference is there made do not fully bear out the statement and have been questioned in Rolle's Abridgment, 195, it has been recognized and repeated as a correct statement of the law many times since. It is so stated also by the writers on international law, in Wheaton (8th Ed., by Dana) §§ 304-308, and notes 157 and 171; Phillimore, Part III, 132; Kent, Part I, 65; Wheaton (5th Ed., by Phillipson) p. 419; and Hall (7th Ed.) pp. 460-464, and the notes to those pages. In Westlake's International Law, Part II, 47, the author after adducing strong arguments to show that such a right should not continue says: "The time is now fully ripe when a British Court should not lag behind the position taken by Governments, but should boldly follow Lord Ellenborough." The allusion to Lord Ellenborough refers to the case of *Wolff v. Oxholm*, 6 M. & S. 92, with which I shall deal later. I have quoted Westlake's words, because they show that although the author strongly condemned the practice of seizing private property he did not consider that the law as then existing prohibited it, and earlier in the same passage he had referred to the decision of Dr. Lushington in *The Johanna Emilie*, Spinks' Prize Cas. 14, where the existence of the right was clearly stated. It was also so held in America in *Brown v. United States* (1814) 8 Cranch, 110, though in the circumstances of that case the court decided that there was no right to seize the goods in question. The only statement to the contrary in a modern writer that I have found is in Oppenheim, vol. II, § 102, where he says that the right to seize private property is obsolete, and that there is a customary international law prohibiting the confiscation of private property and the annulment of enemy debts on the territory of a belligerent. If this only refers, as I think it does, to a general confiscation and annulment and not to a right in the Crown to seize in particular instances it is not, whether correct or not, opposed to what I think is the law. If it be intended to ex-

tend to the right to seize I think it is opposed to other authorities and incorrect.

Great reliance was however placed by the counsel for the appellant on the case of *Wolff v. Oxholm*, 6 M. & S. 92, to which reference has already been made. In that case a Danish subject ordinarily resident in Denmark was sued for a debt due to the plaintiffs who were carrying on business in England. His defence was that he had during the war between England and Denmark paid the debt to commissioners appointed by the Danish government, by whose order all debts due to English subjects by Danes were sequestrated and made payable to the commissioners. Lord Ellenborough, delivering the judgment of the Court of King's Bench in 1817, held the defence bad and the ordinance to be contrary to the law of nations. The actual decision related to a general confiscation of mercantile debts, and Lord Ellenborough referred in his judgment to the protection given to merchants by Magna Charta, but he did use expressions which show that he considered that there was no right to seize any property of an incorporeal nature. This judgment has been the subject of criticism in *Wheaton* (8th Ed., by Dana) § 308, and is in my opinion, if it go to the length contended by the appellant's counsel, opposed to the decision I have already mentioned in *The Johanna Emilie*, *Spinks' Prize Cas.* 14, and also to *Land v. Lord North*, 4 Doug. 266-274, where Lord Mansfield speaks of that summum jus which undoubtedly gives all enemies' property coming into this country to the king. In *Furtado v. Rogers*, 3 Bos. & P. 191, also the right to seize property and debts seems to have been recognized by Lord Alvanley, though he does not expressly decide the question. It seems also clear that Lord Ellenborough was in error as to some of the historical facts upon which he relies in his judgment. It is pointed out in *Hall's International Law*, p. 462, note 1, that he was incorrect in stating that the ordinance in question "stood single and alone unsupported by any precedent and that no instance of such confiscation except the ordinance in question is to be found for more than a century," and instances are given in that note to the contrary. There were also produced before us in the argument instances of Exchequer special commissions in 1693, 1705, 1797, 1806, 1807 and 1812 under which inquisitions were found forfeiting to the crown private enemy property including choses in action, and in one case at least government securities which would not now be seized. In one case, namely, that of the inquisition held in 1697, the matter came before the court in *Attorney General v. Weeden, Parker*, 267, where it was held that the inquisition was invalid because it was not held until after the conclusion of peace, but this decision was given: "upon long debate it was resolved first that choses in action which belonged to an alien enemy were forfeited to the crown." Lord Ellenborough seems to have been unaware of these inquisitions. I ought perhaps to mention that other inquisitions forfeiting property in 1854 were produced, but I attach no importance to them, because

they related to certain steam vessels under construction for the Emperor of all the Russians during the Crimean War. These steam vessels may well have been considered enemy government property which might be used in the war. Taking these matters into consideration I do not think *Wolff v. Oxholm*, 6 M. & S. 92, displaces the other authorities to which I have referred. \* \* \*

The third question raises very different considerations. I doubt whether such a right as in my opinion existed could be lost by mere disuse unless such disuse took place in circumstances which would raise the inference of an international compact, but I think it is quite clear that the crown can abandon and give up a right if it choose to do so. The question here is whether by the various Acts called Trading with the Enemy Acts it has so abandoned the right. \* \* \* It is fairly clear, I think, that the powers conferred by these acts are in important respects inconsistent with the exercise of the common law right of forfeiture. If an order had been previously made by the Board of Trade vesting the property in the custodian I do not see how the right of forfeiture could be exercised or an inquisition held which could find that the property was enemy property forfeited to the crown when it was already vested in the custodian to be disposed of according to Order in Council. The powers conferred by the act no doubt afforded a readier and more convenient method of dealing with enemy property than the somewhat cumbrous method of procedure by inquisition, and were therefore useful to the crown, but I do not think that is the only effect of the act. It seems to me that a power to vest property in a custodian to be dealt with at the end of the war as His Majesty should by Order in Council direct is inconsistent with an intention of preserving a power to insist on an absolute forfeiture at common law. The one contemplates a discretion as to the disposal of the property which would no doubt be affected by the provisions of the treaty of peace, while the other works an absolute forfeiture following the exercise of a right still in existence but unexercised in late years. The right to forfeiture and the Trading with the Enemy legislation are concerned with all enemy property, and it must be remembered that the right to forfeit, although its existence is recognized, has been criticised and its exercise deprecated by practically all writers on international law in modern times. In these circumstances I think that if the crown in taking powers in many respects inconsistent with that right meant also to preserve it the intention to do so should be clearly shown, and in my opinion that is not the case. \* \* \*

I think, therefore, that on this ground the appeal should be allowed, and the orders appealed from discharged. \* \* \*

\* The statement of facts, parts of the opinion of Lord Sterndale, and the concurring opinions of Lords Justices Warrington and Younger are omitted.



## BROWN v. UNITED STATES.

(Supreme Court of the United States, 1814. 8 Cranch, 110,  
3 L. Ed. 504.)

**THIS** was an appeal from the sentence of the Circuit Court of Massachusetts, which condemned 550 tons of pine timber, claimed by Armitz Brown, the appellant. \* \* \*

MARSHALL, C. J., delivered the opinion of the court, as follows:

The material facts in this case are these:

The *Emulous* owned by John Delano and others, citizens of the United States, was chartered to a company carrying on trade in Great Britain, one of whom was an American citizen, for the purpose of carrying a cargo from Savannah to Plymouth. After the cargo was put on board, the vessel was stopped in port by the embargo of the 4th of April, 1812. On the 25th of the same month, it was agreed between the master of the ship and the agent of the shippers, that she should proceed with her cargo to New Bedford, where her owners resided, and remain there without prejudice to the charter party. In pursuance of this agreement, the *Emulous* proceeded to New Bedford, where she continued until after the declaration of war. In October or November, the ship was unloaded and the cargo, except the pine timber, was landed. The pine timber was floated up a salt water creek, where, at low tide, the ends of the timber rested on the mud, where it was secured from floating out with the tide, by impediments fastened in the entrance of the creek. On the 7th of November, 1812, the cargo was sold by the agent of the owners, who is an American citizen, to the claimant, who is also an American citizen. On the 19th of April, a libel was filed by the attorney for the United States, in the district Court of Massachusetts, against the said cargo, as well on behalf of the United States of America as for and in behalf of John Delano and of all other persons concerned. It does not appear that this seizure was made under any instructions from the president of the United States; nor is there any evidence of its having his sanction, unless the libels being filed and prosecuted by the law officer who represents the government must imply that sanction.

On the contrary, it is admitted that the seizure was made by an individual, and the libel filed at his instance, by the district attorney who acted from his own impressions of what appertained to his duty. The property was claimed by Armitz Brown under the purchase made in the preceding November.

The District Court dismissed the libel. The Circuit Court reversed this sentence, and condemned the pine timber as enemy property forfeited to the United States. From the sentence of the Circuit Court, the claimant appealed to this court.

The material question made at bar is this. Can the pine timber, even admitting the property not to be changed by the sale in November, be condemned as prize of war?

The cargo of the *Emulous* having been legally acquired and put on board the vessel, having been detained by an embargo not intended to act on foreign property, the vessel having sailed before the war, from Savannah, under a stipulation to re-land the cargo in some port of the United States, the re-landing having been made with respect to the residue of the cargo, and the pine timber having been floated into shallow water, where it was secured and in the custody of the owner of the ship, an American citizen, the court cannot perceive any solid distinction, so far as respects confiscation, between this property and other British property found on land at the commencement of hostilities. It will therefore be considered as a question relating to such property generally, and to be governed by the same rule.

Respecting the power of government no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court.

The questions to be decided by the court are:

1st. May enemy's property, found on land at the commencement of hostilities, be seized and condemned as a necessary consequence of the declaration of war?

2d. Is there any legislative act which authorizes such seizure and condemnation?

Since, in this country, from the structure of our government, proceedings to condemn the property of an enemy found within our territory at the declaration of war, can be sustained only upon the principle that they are instituted in execution of some existing law, we are led to ask—

Is the declaration of war such a law? Does that declaration, by its own operation, so vest the property of the enemy in the government, as to support proceedings for its seizure and confiscation, or does it vest only a right, the assertion of which depends on the will of the sovereign power?

The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received, that the right to them revives on the restoration of peace, would seem to prove that war is not

an absolute confiscation of this property, but simply confers the right of confiscation.

Between debts contracted under the faith of laws, and property acquired in the course of trade, on the faith of the same laws, reason draws no distinction; and, although, in practice, vessels with their cargoes, found in port at the declaration of war, may have been seized, it is not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace in the course of trade. Such a proceeding is rare, and would be deemed a harsh exercise of the rights of war. But although the practice in this respect may not be uniform, that circumstance does not essentially affect the question. The enquiry is, whether such property vests in the sovereign by the mere declaration of war, or remains subject to a right of confiscation, the exercise of which depends on the national will: and the rule which applies to one case, so far as respects the operation of a declaration of war on the thing itself, must apply to all others over which war gives an equal right. The right of the sovereign to confiscate debts being precisely the same with the right to confiscate other property found in the country, the operation of a declaration of war on debts and on other property found within the country must be the same. What then is this operation?

Even Bynkershoek, who maintains the broad principle, that in war every thing done against an enemy is lawful; that he may be destroyed, though unarmed and defenceless; that fraud, or even poison, may be employed against him; that a most unlimited right is acquired to his person and property; admits that war does not transfer to the sovereign a debt due to his enemy; and, therefore, if payment of such debt be not exacted, peace revives the former right of the creditor; "because," he says, "the occupation which is had by war consists more in fact than in law." He adds to his observations on this subject, "let it not, however, be supposed that it is only true of actions, that they are not condemned ipso jure, for other things also belonging to the enemy may be concealed and escape condemnation."

Vattel says, that "the sovereign can neither detain the persons nor the property of those subjects of the enemy who are within his dominions at the time of the declaration."

It is true that this rule is, in terms, applied by Vattel to the property of those only who are personally within the territory at the commencement of hostilities; but it applies equally to things in action and to things in possession; and if war did, of itself, without any further exercise of the sovereign will, vest the property of the enemy in the sovereign, his presence could not exempt it from this operation of war. Nor can a reason be perceived for maintaining that the public faith is more entirely pledged for the security of property trusted in the territory of the nation in time of peace, if it be accompanied by its owner, than if it be confided to the care of others.

Chitty, after stating the general right of seizure, says, "But, in strict justice, that right can take effect only on those possessions of a belligerent which have come to the hands of his adversary after the declaration of hostilities."

The modern rule then would seem to be, that tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty an article is inserted stipulating for the right to withdraw such property.

This rule appears to be totally incompatible with the idea that war does of itself vest the property in the belligerent government. It may be considered as the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not itself confiscate the property of the enemy; and their rules go to the exercise of this right.

The Constitution of the United States was framed at a time when this rule, introduced by commerce in favor of moderation and humanity, was received throughout the civilized world. In expounding that Constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy property which may enable the government to apply to the enemy the rule that he applies to us.

If we look to the Constitution itself, we find this general reasoning much strengthened by the words of that instrument.

That the declaration of war has only the effect of placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results, such as a transfer of property, which are usually produced by ulterior measures of government, is fairly deducible from the enumeration of powers which accompanies that of declaring war. "Congress shall have power \* \* \* to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

It would be restraining this clause within narrower limits than the words themselves import, to say that the power to make rules concerning captures on land and water, is to be confined to captures which are extraterritorial. If it extends to rules respecting enemy property found within the territory, then we perceive an express grant to Congress of the power in question as an independent substantive power, not included in that of declaring war.

The acts of Congress furnish many instances of an opinion that the declaration of war does not, of itself, authorize proceedings against the persons or property of the enemy found, at the time, within the territory.

War gives an equal right over persons and property: and if its declaration is not considered as prescribing a law respecting the person

of an enemy found in our country, neither does it prescribe a law for his property. The act concerning alien enemies, which confers on the president very great discretionary powers respecting their persons, affords a strong implication that he did not possess those powers by virtue of the declaration of war.

The "act for the safe keeping and accommodation of prisoners of war" is of the same character.

The act prohibiting trade with the enemy contains this clause:

"And be it further enacted, That the President of the United States be, and he is hereby authorized to give, at any time within six months after the passage of this act, passports for the safe transportation of any ship or other property belonging to British subjects, and which is now within the limits of the United States."

The phraseology of this law shows that the property of a British subject was not considered by the legislature as being vested in the United States by the declaration of war; and the authority which the act confers on the President, is manifestly considered as one which he did not previously possess.

The proposition that a declaration of war does not, in itself, enact a confiscation of the property of the enemy within the territory of the belligerent, is believed to be entirely free from doubt. Is there in the act of Congress, by which war is declared against Great Britain, any expression which would indicate such an intention?

That act, after placing the two nations in a state of war, authorizes the President of the United States to use the whole land and naval force of the United States to carry the war into effect, and "to issue to private armed vessels of the United States, commissions or letters of marque and general reprisal against the vessels, goods and effects of the government of the United Kingdom of Great Britain and Ireland, and the subjects thereof."

That reprisals may be made on enemy property found within the United States at the declaration of war, if such be the will of the nation, has been admitted; but it is not admitted that, in the declaration of war, the nation has expressed its will to that effect.

It cannot be necessary to employ argument in showing that when the attorney for the United States institutes proceedings at law for the confiscation of enemy property found on land, or floating in one of our creeks, in the care and custody of one of our citizens, he is not acting under the authority of letters of marque and reprisal, still less under the authority of such letters issued to a private armed vessel.

The "act concerning letters of marque, prizes and prize goods," certainly contains nothing to authorize this seizure.

There being no other act of Congress which bears upon the subject, it is considered as proved that the legislature has not confiscated enemy property which was within the United States at the declaration of war, and that this sentence of condemnation cannot be sustained.

One view, however, has been taken of this subject which deserves to be further considered.

It is urged that, in executing the laws of war, the executive may seize and the courts condemn all property which, according to the modern law of nations, is subject to confiscation, although it might require an act of the legislature to justify the condemnation of that property which, according to modern usage, ought not to be confiscated.

This argument must assume for its basis the position that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. This position is not allowed. This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

The rule is, in its nature, flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary.

Commercial nations, in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy property in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary.

It appears to the court, that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war. The court is therefore of opinion that there is error in the sentence of condemnation pronounced in the Circuit Court in this case, and doth direct that the same be reversed and annulled, and that the sentence of the District Court be affirmed.\*

\* The dissenting opinion of Mr. Justice Story, in which one of the justices concurred, is omitted. It is the opinion which the learned justice had delivered in the Circuit Court below, from which an appeal was taken, to the effect that the right to confiscate existed and could be exercised by the executive without an act of Congress. It is unfortunately too long to print.

See *Ware v. Hylton*, 3 Dall. 199, 231, 1 L. Ed. 568 (1796). Especial reference is made to the opinion of Mr. Justice Chase, who examined the question before the court upon the basis of principle and precedent, and concluded that "Virginia had a right [after the Declaration of Independence of the United States], as a sovereign and independent nation, to confiscate any British property within its territory."

In *Folliott v. Ogden*, 1 H. Black. 123 (1789), it was held *inter alia* that

## THE FORTUNA.

(High Prize Court of the Republic of China, 1918. Judgments of the High Prize Court, 1919, 68.)

First appellant, Theodor Hannig, a German subject domiciled in Germany.

First appellant's representative, Paul Hense, master of the ship Fortuna, a German subject residing at No. 11 Yates Road, Shanghai.

Second appellant, Tung Hansen, a Chinese subject, residing at No. 379 Burkill Road, Shanghai.

Representatives of second appellant, Tsai Yu Pai, lawyer residing in Park Road, Shanghai, and Chan Yun Long, lawyer, residing in Yan Jar Lung, Shanghai.

Whereas, the said appellants have appealed against a judgment of the District Prize Court of Shanghai dated the 11th day of July in the seventh year of the Chinese Republic, which held that the steamer Fortuna owned by the said German merchant and captured by the Chinese warship Hai Yung was a lawful prize; and whereas, Mark Ting Wa, procurator of the High Prize Court, has appeared before this court and submitted his opinion relative thereto: This court after full consideration of the case orders and directs as follows: Judgment: The appeal is hereby dismissed.

Reasons: \* \* \* This court finds that, according to the first ground of appeal of the appellant Paul Hense, it is contended that there was no plot to blow up the ship Fortuna, and that it is contrary to international law that the ship should have been taken into custody by the Chinese government before rupture of diplomatic relations with Germany. But according to the evidence of Fu-Shi-Kwai, commander of the warship Hai Yung, the ship after the commencement of the European War ceased to be engaged in any trade and stopped in the port of Shanghai, and he, on receiving a report from the customs au-

the state of New York, during the American Revolution possessed the right inherent in a sovereign nation to confiscate the debts and private property belonging to the enemy (loyalists). But see same case on error in K. B., 3 Term B. 725 (1790) where it was distinctly held by Lord Kenyon, C. J., that acts of confiscation passed in the several states of North America after the Declaration of Independence, 1776, and before the treaty of peace, 1783, by which Great Britain acknowledged their independence, are considered as a nullity in British courts of justice. See, however, the comment on this case by Loughborough (as Lord Chancellor) in *Barclay v. Russell*, 3 Ves. Jr. 424, 429 (1797). This latter case, dealing with the claim of Maryland to succeed to assets of the proprietary government, should be considered in connection with the effect of change of sovereignty.

For a collection and analysis of the authorities in behalf of the right of seizure and confiscation, see Francis Wharton's *Commentaries on Law*, § 216, pp. 307-309 (1884).

thorities, before China broke off diplomatic relations with Germany, saying that the German ships lying in the port of Shanghai were going to be blown up when diplomatic relations broke off, took custody of the ship on the 14th day of March, in the sixth year of the Republic, as a precautionary measure; for Shanghai is an international commercial center and immense damage would be done to its trade if its port were obstructed by the blowing up of the ships. What the said commander did is perfectly lawful in international law as a measure of self-defence. The appellant's contention in this respect therefore fails. \* \* \*

According to the latter part of the fifth and the sixth grounds, it is contended by the appellant that both the Prize Court Rules and the Regulations Governing Capture at Sea were promulgated on the 30th day of October, 1917, whereas the ship *Fortuna* was taken into custody on the 14th day of March and captured on the 14th day of August of the same year, so that China, against the fundamental principles of law, applied rules and regulations that were not yet in existence, and that as many provisions of the said rules and regulations were disregarded by the Chinese Navy and the District Prize Court, China violated the law of her own making; and it is inconceivable how the condemnation of the ship could be based on such law. But according to international law the right to capture enemy ships is inherent in a belligerent; rules relating to capture are merely rules laid down for his own guidance and not the source of such right; so that it cannot be said that such right did not exist before the promulgation of such rules. The capture of the ship *Fortuna* on the 14th day of June in the sixth year of the Republic was therefore an exercise of an inherent right, and the capture was lawful, notwithstanding that neither the Regulations Governing Capture at Sea nor the Prize Court Rules were yet promulgated. The procedure of capture followed by the commander of the warship *Hai Yung* varies with that provided in the said Regulations, merely because the said Regulations were promulgated after the capture had been effected and therefore inapplicable. \* \* \*

According to the first part of the seventh ground of appeal it is contended that the ship was a merchant ship lawfully engaged in trade along the China coast, and that, as it was peacefully lying in harbor, it ought to be privileged under articles 1 and 2 of the Sixth Hague Convention of 1907. But the object of said Convention is, as set out in the preamble, to ensure the security of international commerce against the surprises of war and, in accordance with modern practice, to protect as far as possible operations undertaken in good faith and in process of being carried out.<sup>7</sup> ("Désireux de garantir la sécurité du commerce international contre les surprises de la guerre et voulant,

<sup>7</sup> Read: "Out before the outbreak of hostilities."



conformément à la pratique moderne, protéger autant que possible les opérations engagées de bonne foi et en cours d'exécution avant le début des hostilités.")

It is obvious that the said Convention is applicable only to merchant ships, bona fide engaged in trade. A merchant ship that has ceased to be engaged in trade and takes refuge in a port to avoid capture by belligerent countries cannot claim to be privileged under it. The ship *Fortuna*, since it was chartered to the said Tung Hansen between September and October, 1915, sailed twice to Pukow and then remained in Yung Shu Poo of Shanghai for over a year. Although the Appellants allege interference on the part of the customs officials, the ship having long ceased to be engaged in trade is not within the meaning of the said Convention, and was lawfully condemned according to the Regulations Governing Capture at Sea. If it is argued that the ship ought to be exempted from capture as being a ship engaged in local trade within subclause (a) of clause 1 of Article 25 of the Regulations Governing Capture at Sea, the answer is that the provisions of the said subclause are based on article 3 of the Second Hague Convention relating to the restrictions on capture in maritime warfare and the said article, according to the minutes then taken, was confined to enemy ships engaged in coasting or local trade in enemy country. An enemy ship found in a belligerent country, even if it were engaged in such trade, would not be protected; for the belligerent country itself can supply its own people without the help of its enemy. Therefore no matter whether or not the ship *Fortuna* was, as alleged by the appellant in the District Prize Court, engaged in trade between Foochow and Tsingtau and therefore in local trade, the fact that it was found within Chinese territorial waters justified its capture. The appellant's contention in this respect therefore fails.

According to the latter part of the seventh ground of appeal it is contended that the ship *Fortuna* was bona fide sold by the appellant to the said Tung Hansen on the 12th day of March, 1917; that the Shanghai customs authorities have been officially notified, by the German consulate general in Shanghai, of the change of the ship's flag—a fact that may still be verified—that the District Prize Court was wrong in refusing to recognise the sale; that the provision in the contract of sale that the ship shall remain the property of the original owner until the purchase price is wholly paid is only a usual clause, which cannot be regarded as invalidating the sale; that the bona fide of the transaction can be proved by the fact that negotiation for the sale of the ship was commenced before the rupture of diplomatic relations between China and Germany; that the District Prize Court was wrong for not being impartial. According to clause 4 of article 3 of the Regulations Governing Capture at Sea, an enemy ship transferred to persons domiciled in the Republic or in a neutral state before the war but in anticipation of its outbreak, or during the war, unless

the transfer has been completed and is shown to have been made in good faith, is an enemy ship. A transfer is completed by carrying out the intention of the parties to the sale in compliance with all legal formalities required for the transfer of ownership. By bona fide is meant that the contract is not made in contemplation of war. Transfer of ownership of ships, according to law now in force in this country, does not depend on registration. Registration of ships, as required by the regulations made by the Ministry of Communication, is merely the result of an administrative rule, not an essential condition for the transfer of ownership in law.

According to the rule of law that everything is governed by statutes, failing that, by customs, and failing that, by general principles, the transfer of ships, as there is no statute or custom on the matter, should be governed by general principles, according to which a ship is only movable property and, therefore, delivery of possession is essential to the transfer of its ownership. Assuming that the contract of sale is binding, it only means that between the parties the contract gives rise to an enforceable obligation. The question whether the alleged transfer of the ship *Fortuna* is complete or not should therefore be governed by the principle referred to. Now the appellant and the said Tung Hansen have between themselves made two contracts both of which, as nothing is said of the one cancelling the other, are binding. According to the first one dated the ninth day of March in the sixth year of the Republic, it is expressly stipulated that, as long as the purchase price has not been wholly paid, the ship remains the property of the original owner, and according to the other, dated the 13th day of March, the validity of the sale depends on the change of the flag. The point that only ten thousand dollars of the purchase price has been paid is not contested by the appellant, nor is the point that, according to the evidence of the said Tung Hansen, taken before the District Prize Court on the 15th day of June, this year, "a change of the ship's nationality could not be effected until the ship's repair was completed and a new license obtained, and that for this reason it was not flying the Chinese flag when the officer of the Chinese Navy came on board, although it had been sold to him, because the new license had then not yet been issued." Thus it is obvious that the sale cannot be said to have been completed.

Moreover, delivery of possession has never been proved by the appellant. Even according to his own evidence taken on the same day as that of the said Tung Hansen to the effect that, since the purchase price had not been wholly paid, appellant retained ownership of the ship notwithstanding delivery, there was at least no delivery of possession with intention to transfer ownership, and, irrespective of the question of bona fide of the transaction, the ship has not lost its enemy character. It has been contended that, if the ship had not been taken into custody by the Chinese government, the sale of the ship would have been completed. But the taking of the ship into custody was

the exercise of a right of self-protection well recognised in international law and, as it was apprehended that the ship would endanger the security of the port, it was properly taken into custody; therefore assuming that the completion of the sale of the ship has been prevented by its being taken into custody as alleged, the fault only lies with the appellant. In conclusion, as the sale of the ship had not been completed, it was lawfully captured, and the appellant's contention is untenable.

As to the grounds of appeal maintained by the appellant Tung Hansen, except those which are a mere repetition of those maintained by the said Paul Hense, the most important point is that since the ship had been sold to him (Tung Hansen) it ought not to have been condemned. But, as pointed out in the earlier part of this judgment, the ownership of the ship has not been completely transferred to him; therefore this contention of his is groundless. The rest does not merit an answer at all.

Wherefore the finding of this court is that there is no ground for appeal and the appeal is hereby dismissed. In accordance with article 30 of the Prize Court Rules, this court pronounces judgment as above after review of the records.<sup>8</sup>

<sup>8</sup> In *The Germania*, [1916] P. D. 5 (1915), Sir Samuel Evans held that a yacht is not a navire de commerce, and therefore is not entitled to the protection of days of grace according to article 1 of the Sixth Hague Convention of 1907. To the same effect is the decision of the German Prize Court in the *Primavera*, *Entscheidungen des Oberprisengerichts in Berlin*, 1918, 194 (1916).

Enemy tugs and lighters employed in ports of the other belligerents are not exempt from capture. See *The Atlas*, 2 British and Colonial Prize Cases, 470 (1916); *Procurator in Egypt v. Deutsches Kohlen Depot Gesellschaft* [1919] A. C. 291 (1918).

To be exempt from confiscation the enemy merchantmen must be actually within port, as distinguished from the roadstead and from the port for customs and fiscal purposes. *The Möwe*, [1915] P. D. 1 (1914); *The Belgia*, [1916] 2 A. C. 183 (1916); 1 British and Colonial Prize Cases, 308 (1915); 2 *Id.*, 32, (1916); *The Erymonthos*, 1 British and Colonial Prize Cases, 339 (1914). In accord with these views is the decision of the German Prize Court in *The Fenix*, *Entscheidungen des Oberprisengerichts in Berlin*, 1918, 1 (1914).

In *The Achala*, [1916] 2 A. C. 198 (1916), Lord Parker of Waddington held, on behalf of the Privy Council, that the *Achala*, a German vessel, was given sufficient time to leave the port of Alexandria, Egypt, saying:

"She was offered a pass to a neutral port, and there is no reason to suppose that such pass was insufficient, or would not have been recognized as valid by any belligerent power. The fact that the vessel did not leave Alexandria under this pass was not due to force majeure, but to her own deliberate election not to do so. She cannot, therefore, rely on the provisions of article 2 of the Convention. Even if Alexandria could be regarded as a neutral port, the fact would be immaterial. The seizure of an enemy vessel in a neutral port, though a breach of neutrality, would not in a court of prize afford any ground for its release."

But failure to leave within days of grace, caused by force majeure, does not entail confiscation. *The Turul*, [1919] A. C. 515 (1919).

In *The Marie Leonhardt*, [1921] P. D. 1 (1920), Sir Henry Duke, President of the Probate, Divorce and Admiralty Division, took occasion to consider the legal status of belligerent vessels found in a British port upon the outbreak of war with Germany, and concluded as follows:

"Giving all the weight I can give to the concessions made by belligerent

## CHAPTER IV

## ALIEN ENEMIES BEFORE COURTS OF JUSTICE

WELLS v. WILLIAMS.<sup>1</sup>

(Court of King's Bench, 1697. 1 L. Raym. 282.)

Debt upon bond. The defendant pleads, that the plaintiff was an alien enemy born in France of French parents who were alien enemies, and that he came into England sine salvo conductu, and concludes in bar. The plaintiff replies, that at the time of making of the bond he was, and yet is, here per licentiam et sub protectione domini regis. The defendant demurs. And Wright, Serjeant, objected, that it ap-

powers from 1854 to 1914, and the concurrence of numerous states in a desire to secure as a right under international law days of grace for enemy ships found in the ports of a belligerent at the outbreak of war, I find myself brought definitely to the conclusion that the law on this subject remained in 1914, and is now, as it was in the time of Lord Mansfield. Ships of the enemy in our ports at the declaration of war, or the outbreak of hostilities, are 'detained in our ports to be confiscated if no reciprocal agreement is made.'" *Lindo v. Rodney*, 2 Doug. 613, 615, note (1781).

In the case of *The Blonde and Other Vessels* (Privy Council, 1922; 38 Times L. R., 328), it was held that as Great Britain had continued throughout the war to treat the Sixth Hague Convention of 1907 as binding, the German owners would be entitled under Article 2 to release of their vessels seized in British ports, and that the one surviving ship and the appraised values of the lost ships should be treated as German property under the provisions of the Treaty of Versailles.

It has been usual for nations—especially since the good example set by Turkey in its declaration of war against Russia, October 4, 1853—to allow a certain number of days for vessels to leave port, and to exempt from capture upon the high seas, merchant vessels of the enemy which had left their home ports before the beginning of war.

In the absence of an agreement to this effect, and, it would appear, also in the absence of reciprocity, merchant vessels of the enemy are still liable to capture, although they may have left their home ports before and without knowledge of the outbreak of war.

Of the many cases on this subject, see *The Porto*, French Prize Court, *Journal Officiel*, March 30, 1915, p. 1732 (1914), captured at sea by the French mine layer *Pluton*, August 5, 1914.

On the whole subject, see Convention VI, Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, signed at The Hague, October 18, 1907, Appendix, post, p. 1149.

<sup>1</sup> The principal case is reported more briefly in 1 Salk. 46 (1697), as follows: "If an alien enemy comes hither subsalvo conductu, he may maintain an action; if an alien amy comes hither in time of peace, per licentiam domini regis, as the French Protestants did, and lives here sub protectione, and a war afterwards begins between the two nations, he may maintain an action; for suing is but a consequential right of protection, and therefore an alien enemy, that is here in peace under protection, may sue a bond; aliter of one commorant in his own country."

pears that the plaintiff is an alien enemy, and came here sine salvo conductu. He admitted, that an alien enemy, who comes here with safe conduct, may maintain an action. But unless there is a safe conduct, though it be per licentiam et protectionem, he cannot maintain an action. For by the same reason a captive or prisoner of war may maintain an action. But to that it was answered and resolved, that the necessity of trade has mollified the too rigorous rules of the old law in their restraint and discouragement of aliens. A Jew may sue at this day, but heretofore he could not, for then they were looked upon as enemies. But now commerce has taught the world more humanity. And as to the case in question, admit that the plaintiff came here before the war was proclaimed (for so it may be intended), then this action is maintainable: 1. Because there was no need of a safe conduct in time of peace. 2. Though the plaintiff came here since the war, yet if he has continued here by the king's leave and protection ever since, without molesting the government or being molested by it, he may be allowed to sue, for that is consequent to his being in protection.

And TREBY, Chief Justice said, that wars at this day are not so implacable as heretofore, and therefore an alien enemy, who is here in protection, may sue his bond or contract, but an alien enemy abiding in his own country cannot sue here. And Dier, 2 b. pl. 8, and the other books ought to be understood so.

Note, that TREBY, Chief Justice, said in this case last Trinity term, that the king may declare war against one part of the subjects of a prince, and may except the other part. And so he has done in this war with France, for he has excepted in his declaration of war with France all the French Protestants. And of such proclamations all ought to take notice, because the war begins only by the king's proclamation.\*

\* In *Sparenburgh v. Bannatyne*, 1 Bos. & P. 163, 170 (1797), it appeared that the plaintiff, a German, was captured on board a Dutch ship during war between Holland and England; that the ship was, at the time, committing an act of hostility against Great Britain; that the plaintiff was taken as prisoner of war to St. Helena, where, with the consent and permission of the commanding officer of the English troops, he made a contract to serve as a seaman upon the defendant's vessel, the *Caledonia*.

On suit brought by the plaintiff for his wages under the contract, the defendant contended that the plaintiff was an alien enemy when captured; that he remained so during the time when he was a prisoner of war, and that therefore, he could not sue in an English court.

On this state of affairs, the court held that the plaintiff was an alien enemy only during the time of his temporary allegiance to the enemy, and that when his temporary allegiance was severed, he became a neutral, and therefore entitled to sue.

In the course of his opinion Chief Justice Eyre said:

"This is certainly one of the hardest cases I ever knew, and I think we ought to lean against it. And if a distinction is to be found between the permanent character of alien enemy, to which the courts of justice cannot give protection, and the temporary character, we shall readily adopt it. As to the ground of policy which has been taken in argument for the defendant, namely, that a benefit would result to the enemy from the plaintiff's recover-

## THE CHARLOTTE.

(High Court of Admiralty, 1813. 1 Dodson, 212.)

This vessel, under American colors, took on board, at Providence, in Rhode Island, a cargo of provisions and other goods, with which she sailed, bound to Grenada, and arrived at the port of St. George, in that island, on the 16th of April, 1809. On the 19th of the same month the vessel was seized by Lieutenant Middleton, representing himself to be the commander of His Majesty's prison ship *Antigua*, and was by him proceeded against for a breach of the revenue laws. On the 24th of April a claim was given by the master for the ship and cargo, as the property of an American merchant; and on the same day the vessel and cargo were again seized by Thomas Martin, a searcher in the customs for the port of St. George, in the island of Grenada, on whose behalf an information was afterwards filed. On the 12th of May the cause came on for hearing in the Vice-Admiralty Court, when the judge pronounced the ship and cargo to be forfeited, but reserved the question respecting the rights of the informants. On the 27th of May the reserve question came on, when the judge dismissed the information filed on behalf of Lieutenant Middleton, for want of legal authority to make the seizure on which it was founded, and adjudged the brig and cargo to be forfeited under the information filed by Thomas Martin, and the net proceeds to be divided, one third to the collector for the use of His Majesty, one third to the commander-in-chief of the island, and one third to the informant. From this sentence an appeal was prosecuted by the claimant, and an intervention given on behalf of Lieutenant Middleton. In consequence of the war which has since taken place between this country and America, the appellant has become an alien enemy; and the question which stood first for the decision of the court was, whether he could, under such circumstances, be allowed to prosecute his appeal. A second question arose between the two seizers, and, as it was admitted that the seizure by Lieutenant Middleton was first in point of time, the case depended

ing; it is a policy, perhaps doubtful, certainly remote, and which I do not hold to be satisfactory. I take the true ground upon which the plea of alien enemy has been allowed is, that a man, professing himself hostile to this country, and in a state of war with it, cannot be heard if he sue for the benefit and protection of our laws in the courts of this country. We do not allow even our own subjects to demand the benefit of the law in our courts, if they refuse to submit to the law and the jurisdiction of our courts. Such is the case of an outlaw. Modern civilization has introduced great qualifications to soften the rigours of war, and allows a degree of intercourse with enemies, and particularly with prisoners of war, which can hardly be carried on without the assistance of our courts of justice. It is not therefore good policy to encourage these strict notions, which are insisted on contrary to morality and public convenience. As the real justice of the case is with the verdict, and a legal distinction to exclude this unworthy defence can fairly be maintained, I think no new trial should be granted."

on his competency to make the seizure. It appeared that he had, in the year 1805, been appointed to the command of His Majesty's ship *Antigua*, then used as a prison ship, and that his appointment had not been revoked at the time of this seizure. The prisoners, however, had been removed to the non-commissioned vessel, *The Arethusa*, which had been hired for their reception in consequence of *The Arethusa* [Antigua] having become unfit for the purpose.

Sir W. SCOTT. This was a suit originally instituted against this ship and cargo for a breach of the revenue laws, in the Vice-Admiralty Court of Grenada, where the property was condemned to the crown and the seizers, in the usual proportions. It was not a personal action, but a proceeding in rem; and the sentence of the court, as usual in cases of this kind, condemned the thing itself. A person representing the owner appeared, claiming the restitution of the goods; and, I think, he has been justly described to have come before the court in the character of plaintiff, since the policy of the law throws on him the duty of a plaintiff—the onus of making out his case. How far he discharged that duty in the court below, it is impossible for me to say, since the proceedings are not before me. It appears, however, that this claim was rejected. He then comes before this court as appellant, which character he had a perfect right to sustain; but, unfortunately for him, the war with America takes place, and imposes on him a disability in law to carry on an action in any of the courts of this country. The sentence of the court below must be taken as right, unless it has been reversed by the judgment of a superior court. Has the party, who, by the intervention of hostilities, is become an alien enemy, a right to come forward in the Court of Appeal, and ask for a reversal of the sentence? I am clearly of opinion that he has not. It is an universal disability under which he labors, and which all courts are bound to notice. Whatever rights he might have possessed pass to the crown. The officers of the crown might, if they had thought proper, have defended the claim; and, if they had succeeded in obtaining a reversal of the sentence, the king would have been entitled to the whole, instead of a proportion, of the property. But, to the party himself, the court can assign nothing, nor has it the power of attending to his claims in any manner. It is under an obligation of shutting its ears against his complaints. The cases which have been cited from *Dallas*\* by Dr. Stoddart, appear to be of a different kind. I have not had an opportunity of looking into them, but they appear to have been personal actions. It has not been much the practice, in modern times, to proceed against the property of enemies found in the country, but it is nowhere laid down as law, that an inquest of office might not now be had, and the property confiscated. I remember a proceeding to that effect in the American war; and there can be no doubt that the law remains

\* *State of Georgia v. Brailsford, etc.*, 3 Dall. 1, 1 L. Ed. 483 (1794).

precisely the same as it was at that time. It is said, that I may suspend the present proceedings, and give the party an opportunity of renewing his claim on the return of peace. But this is a greater privilege than an alien friend, or any other person, could demand from the court. Such a suspension would be an act of injustice to the party in possession of the sentence; and, therefore, I think it incumbent on me to reject the application.

PORTER v. FREUDENBERG.

KREGLINGER v. S. SAMUEL & ROSENFELD.

In re MERTEN'S PATENTS.

(Court of Appeals, 1915. [1915] 1 K. B. 857.)

Porter v. Freudenberg.

Appeal of the plaintiff from an order made at chambers by Scrutton, J., giving leave to issue a concurrent writ against the defendant, an alien enemy, and to serve notice of it upon the defendant at Berlin.

The action was brought to recover a quarter's rent due on September 29, 1914, under a lease made in 1903, at a rental of £625., of certain premises in Princes street, Hanover Square. The defendant resided and carried on business as a mantle manufacturer at Berlin, in the Empire of Germany, and had for some time before the outbreak of the war carried on a branch establishment at the above premises by means of an agent named Arthur Barnes. According to the plaintiff's affidavit, a quantity of stock was usually kept on the premises, but immediately before September 29, 1914, the whole of the stock, fixtures, and fittings was removed from the premises. On September 28 the keys of the premises were sent to the plaintiff by Barnes, and the plaintiff intimated that they would be held at the disposal of Barnes as the agent of the defendant. \* \* \*

LORD READING, C. J.<sup>4</sup> \* \* \* The main questions to be considered are, first, the capacity of alien enemies to sue in the king's courts; secondly, their liability to be sued; thirdly, their capacity to appeal to the appellate courts, and, generally, their right to appear and be heard in the king's courts. \* \* \*

In ascertaining the rights of aliens the first point for consideration is whether they are alien friends or alien enemies. Alien friends have long since been, and are at the present day, treated in reference to civil rights as if they were British subjects, and are entitled to the enjoyment of all personal rights of a citizen, including the right to sue in

<sup>4</sup> The statement of facts is abridged and parts of the opinion are omitted.



the King's Courts. Alien enemies have no civil rights or privileges unless they are here under the protection and by permission of the crown. Blackstone (21st Ed.) vol. 1, c. 10, p. 372. \* \* \*

In Walford's treatise on the Law respecting Parties to Actions, published 1842, there is a chapter in vol. 1, p. 647, dealing with disabilities of civil origin which well repays close and diligent study. When treating of alien enemies the learned author at page 650 thus states the law: "Alien enemies are distinguishable according as they are under the king's special protection or not. If an alien enemy came here under a safe conduct or is commorant here by the king's license and under his protection he seems to stand in the same position as to the right of maintaining actions in our courts as an alien friend, a right of suing being an incidental right to protection"—that is, he is no longer under the disability attaching to an alien enemy.

Whenever the capacity of an alien enemy to sue or proceed in our Courts has come up for consideration, the authorities agree that he cannot enforce his civil rights and cannot sue or proceed in the civil courts of the realm. \* \* \*

Having stated the common law of England in regard to the question of the alien enemy's right to sue in our Courts of law, we have now to consider whether the Hague Convention of 1907 upon the Laws and Customs of War on Land, article 23 (h) of chapter 1 of section 2 of the Annex entitled "Regulations respecting the Laws and Customs of War on Land," has any bearing upon the questions we have to determine. The heading of that section is "Of Hostilities." Section 3 is headed "Military Authority over the Territory of a Hostile State."

Chapter 1 of section 2 is entitled "The Means of Injuring the Enemy; Sieges and Bombardments." The articles in it are numbered from 22 to 28. \* \* \*

The important paragraph is 23 (h):—"To declare abolished, suspended or inadmissible the right of subjects of the hostile party to institute legal proceedings." \* \* \*

Extending our view from the paragraph itself to the immediate context, we find that it is included in a group of paragraphs forming article 23, every other of which relates solely to the conduct of a military force and its commanders in a campaign and not at all to the administration of the law respecting alien enemies at home; that the chapter of which the article forms part is entitled "Means of Injuring the Enemy; Sieges and Bombardments," and that the section of the Annex to which the chapter belongs bears the general heading "Of Hostilities." Extending our view still further to the Convention itself, we find the declaration which governs the whole Annex and controls its application in article 1: "The contracting powers will issue to their armed land forces instructions which shall be in conformity with the 'regulations respecting the laws and customs of war on land' annexed to the present Convention."

It is impossible to suppose that this means—as it must do if the effect of the paragraph (h) is to abrogate the law existing hitherto in England and to give an alien enemy the position of a *persona standi in judicio* in English courts of law—that the War Office of Great Britain shall in the present war for this purpose issue instructions to Sir John French, commanding our land forces in the field, forbidding him to “declare” that the rights of alien enemies—Germans, Austrians, or Turks—to institute legal proceedings in the High Court of Justice in London are suspended or inadmissible. And yet this absurdity seems necessarily to follow from the scheme of the Convention as applied to paragraph (h) if the interpretation of this paragraph is that which is contended for by those who find in it an abrogation of our law, which hitherto has not given to an alien enemy the position of a *persona standi in judicio*.

Our view is that article 23 (h), read with the governing article 1 of the Convention, has a very different and very important effect, and that the paragraph, if so understood, is quite properly placed as it is placed in a group of prohibitions relating to the conduct of an army and its commander in the field. \* \* \*

Having now explained the meaning of “alien enemy” for civil purposes, and having decided that such alien enemy’s right to sue or proceed either by himself or by any person on his behalf in the king’s courts is suspended during the progress of hostilities and until after peace is restored (see also *Flindt v. Waters*, [1812] 15 East, 260), the next point to consider is whether he is liable to be sued in the king’s courts during the war. To allow an alien enemy to sue or proceed during war in the civil courts of the king would be, as we have seen, to give to the enemy the advantage of enforcing his rights by the assistance of the king with whom he is at war. But to allow the alien enemy to be sued or proceeded against during war is to permit subjects of the king or alien friends to enforce their rights with the assistance of the king against the enemy. *Prima facie* there seems no possible reason why our law should decree an immunity during hostilities to the alien enemy against the payment of just debts or demands due to British or neutral subjects. The rule of law suspending the alien enemy’s right of action is based upon public policy, but no considerations of public policy are apparent which would justify preventing the enforcement by a British or neutral subject of a right against the enemy. As was said by Bailhache, J., in *Robinson & Co. v. Continental Insurance Co. of Mannheim*, [1915] 1 K. B. 155, at page 159: “To hold that a subject’s right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy and to defeat the object and reason of the suspensory rule.” In our judgment the effect would be to convert that which during war is a disability, imposed upon the alien enemy because of his hostile char-

acter, into a relief to him during war from the discharge of his liabilities to British subjects. It is very noteworthy that when dealing with the rights of alien enemies there is no shadow of doubt suggested in the books as to the right to sue alien enemies. More often there is no mention of it, but sometimes it is the subject of express reference and then always to the same effect, that the alien enemy can be sued during the progress of hostilities. Bacon's Abridgment (7th Ed.) vol. 1, p. 183, asserts this liability of the alien enemy without doubt or hesitation. "The plea of 'alien enemy' is a bar to a bill for relief in equity as well as to an action at law, but it would seem not sustainable to a mere bill for discovery for as an alien enemy may be sued at law and may have process to compel the appearance of his witnesses so he may have the benefit of a discovery." This is an important passage in other respects also, and in our judgment it is a correct statement of the law. \* \* \*

The Supreme Court of the United States had to consider the position of an alien enemy defendant in *McVeigh v. United States*, 11 Wall. 259, 20 L. Ed. 80. The United States under a statute then in force filed a libel of information in the District Court of Virginia for the forfeiture of certain real and personal property of McVeigh on the ground that he was "a resident of the city of Richmond within the Confederate lines and a rebel." McVeigh appeared by counsel and filed a claim to the property and an answer. The attorney of the United States moved that the claim and answer and appearance be stricken from the files, and the court granted the motion and the decree was made for forfeiture of the property. The case eventually was brought to the Supreme Court on writ of error. Swayne, J., in delivering the judgment of the court, said: "The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy and hence could have no locus standi in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. \* \* \* Whether the legal status of the plaintiff in error was or was not that of an alien enemy is a point not necessary to consider; because, apart from the views we have expressed, conceding the fact to be so, the consequences assumed would by no means follow. Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defence." The learned judge relied upon the above-mentioned passage in Bacon's Abridgment as an authority for this proposition, and the Supreme Court acted upon it by reversing the judgment of the District Court and of the Circuit Court.

Although there is no case in English law which has directly decided that an alien enemy can be sued in our courts until the recent decision of *Bailhache, J.*, it is instructive to glance at cases dealing with for-

feiture of civil rights resulting from some act of misconduct. The traitor, the felon, the outlaw, and the excommunicated person were under civil disabilities. They were held by their misconduct to have wiped out and obliterated the original traces of their character as citizens (see Walford, p. 647). Such misconduct generally speaking carried the same denial of the rights to sue in the courts as attached to an alien enemy. In Noy's Reports (Noy was Attorney General to Charles I) this judicial observation occurs in *Hastings v. Blake*, Noy, 1: "Men attaint or outlawed shall be put to answer in any action against them because it is to their prejudice: but in an action brought by them they shall not be answered because it is to their benefit." In *Ramsden v. Macdonald*, 1 Wils. 217, Lee, C. J., said: "There is no doubt but a person attainted may be sued." These are not direct authorities to support the proposition now under discussion with reference to alien enemies, but they are instances to show that there is no reason in principle why a person attainted or outlawed should not be sued. \* \* \*

Once the conclusion is reached that the alien enemy can be sued, it follows that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a court of justice he must have the right of submitting his answer to the court. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the king's courts in the administration of justice.

Equally it seems to result that, when sued, if judgment proceed against him, the appellate courts are as much open to him as to any other defendant. It is true that he is the person who may be said in one sense to initiate the proceedings in the appellate court by giving the notice of appeal, which is the first necessary step to bring the case before that court; but he is entitled to have his case decided according to law, and if the judge in one of the king's courts has erroneously adjudicated upon it he is entitled to have recourse to another and an appellate court to have the error rectified. Once he is cited to appear he is entitled to the same opportunities of challenging the correctness of the decision of the judge of first instance or other tribunal as any other defendant. The decision in *McVeigh v. United States*, 11 Wall. 259, 20 L. Ed. 80, in the Supreme Court of the United States is to the same effect. In that case the defendant, who was appellant in the circumstances already stated, brought writ of error in respect of the judgment of the District and Circuit Courts and succeeded in reversing the judgments of those courts.

We must now consider whether the same conclusion is reached in reference to appeals by an alien enemy plaintiff, that is, a person who before the outbreak of war was a plaintiff in a suit and then by virtue

of his residence or place of business became an alien enemy. As we have seen, he could not proceed with his action during the war. If judgment had been pronounced against him before the war in an action in which he was plaintiff, can he present an appeal to the appellate courts of the King? We cannot see any distinction in principle between the case of an alien enemy seeking the assistance of the king to enforce a civil right in a court of first instance and an alien enemy seeking to enforce such right by recourse to the appellate courts. He is in either case seeking to enforce his right by invoking the assistance of the king in his courts. He is the "actor" throughout. He is not brought to the courts at the suit of another; it is he who invokes their assistance; and it matters not for this purpose that a judgment has been pronounced against him before the war. When once hostilities have commenced he cannot, so long as they continue, be heard in any suit or proceeding in which he is the person first setting the courts in motion. If he had given notice of appeal before the war, the hearing of his appeal must be suspended until after the restoration of peace.

Having now dealt with general principles, we proceed to consider their application to the three appeals before us. The plaintiff in the first appeal issued a writ against one Philip Freudenberg. \* \* \* The plaintiff having issued his writ applied to Scrutton, J., for directions as to the manner of serving it upon the defendant in Berlin. The learned judge gave liberty to the plaintiff to issue a concurrent writ against the defendant and to serve notice of the writ in Berlin. In view of the difficulty of serving the notice of writ on the defendant, Mr. Fitch, on behalf of the plaintiff, asked this court to make an order for substituted service of the notice of writ by allowing service of it upon Barnes or otherwise as the court might direct. \* \* \*

Unless an order for substituted service in this country of a notice of writ for service out of the jurisdiction can be made in a proper case, great hardship may be inflicted upon persons who are subjects of and resident in this country who have given credit or entered into contractual relations with or have claims against persons who are now alien enemies, to the manifest advantage of the alien enemies and disadvantage of British subjects and subjects of other States who wish to sue in this country. This court whilst bearing this consideration in mind must also take into account the position of the defendant the alien enemy, who is, according to the fundamental principles of English law, entitled to effective notice of the proceedings against him. It is obvious that in all cases against the alien enemy the plaintiff will seek, if possible, an order to make substituted service in this country. \* \* \*

Upon the materials now before us we think service of the notice should be effected in the one case by substituted service upon Barnes and in the other upon Bonome, and such further terms should be im-

posed in chambers upon the plaintiff as to advertisement or other means of communication and as to the period to be given to the defendant for appearance as may seem proper. \* \* \*

This is the judgment of the court.

Order varied in *Porter v. Freudenberg*. \* \* \*

### McVEIGH v. UNITED STATES.

(Supreme Court of the United States, 1870. 11 Wall. 259, 20 L. Ed. 80.)

Error to the Circuit Court for the District of Virginia.

On the 17th of July, 1862, Congress passed an act, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." This act provided for the seizure and confiscation of the property of persons holding certain offices or agencies under "the Confederate States," and of persons engaged in the rebellion then existing, or aiding or abet-

\* In *Johnstone v. Pedlar*, [1921] 2 A. C. 262, 283-284 (1921), Lord Atkinson thus contrasted the status of the alien enemy and of the alien friend:

"By the common law of this country an alien enemy has no rights. He could be seized or imprisoned and could have no advantage from the laws of this country. He could not obtain redress for any wrong done to him in this country. *Sylvester's Case*, 7 Mod. 150 (1702). The crown may no doubt grant a licence to an alien enemy to reside in this country, which imports a licence to trade here, but in the absence of such a licence the property of an alien enemy may be seized for the use of the Crown. *The Johanna Emille*, 2 Eng. P. C. 252 (1854). But while in this country with a licence any alien enemy may bring an action. *Wells v. Williams*, 1 Ld. Raym. 282 (1697); *Janson v. Driefontein Mines*, [1902] A. C. 484, 506. A mere non-interference with an alien enemy does not imply a licence to reside and trade. It is necessary for him to show that he resides in this country with the full knowledge and sanction of the government. *Boulton v. Dobree*, 2 Camp. 163 (1806). Aliens, whether friendly or enemy, can be lawfully prevented from entering this country and can be expelled from it. 1 *Blackstone*, 259; *Attorney General for Canada v. Cain*, [1906] A. C. 542. And at any time the Crown may revoke its licence expressed or implied to an alien to reside. *The Hoop*, 1 C. Rob. 196, 199 (1799). In *Vattel*, book 2, § 108, it is stated that a friendly alien can at any time leave the country, the government have no right to detain him, except for a time and for very particular reasons, as, for instance, the apprehension in war, lest such foreigners acquainted with the state of the country and of the fortified places should communicate knowledge to the enemy.

"A friendly alien resident in this country can undoubtedly be prosecuted for high treason (*De Jager v. Attorney General of Natal*, [1907] A. C. 320), because it can then be averred that he acted *contra ligentiae suae debitum* (*Calvin's Case*, 7 Rep. 6b [1608]).

"For the same reason an alien enemy can be prosecuted, for high treason if he has accepted the protection of the sovereign, but not otherwise. *Foster*, 185.

"I cannot find any authority for the proposition that if the property of a friendly alien resident in this country under the protection of the crown and not violating in any way the allegiance he owes to the crown which protects him be seized and detained by an act of state of the sovereign authority the alien cannot sue the officer of the crown by whose act he is aggrieved in one of the municipal courts of the country."

ting such rebellion, who should not cease to aid, countenance, and abet such rebellion within sixty days after public warning and proclamation by the President, and return to their allegiance to the United States. The act contains numerous sections. They are set forth with fullness in a case which was decided soon after this one, and which is reported next to it, *Miller v. United States* [(1870) 11 Wall. 268, 20 L. Ed. 135], the leading case on the Confiscation Acts, and in which, rather than in this one, where the main subjects were hardly reached, the provisions of the statute are inserted. \* \* \*

With this statute in force the United States filed a libel of information in the District Court for the District of Virginia, for the forfeiture of certain real and personal property of one William McVeigh, situated in Virginia. The information was in form against "all the right, title, and estate of William McVeigh in and to all that certain piece, parcel, or lot of land," etc., describing it particularly.

The libel alleged that subsequent to July 17, 1862, the said McVeigh held and exercised an office and agency of honor, aid trust, and profit, under the government of the Confederate States, and under one of the states of said Confederacy and that he accepted the appointment, and was elected to the office and agency after the date of the ordinance of secession of said state; and that he took an oath of allegiance to and to support the constitution of the Confederate States; and that since July, 1862, he had assisted and given aid and comfort to the rebellion, and to those engaged in the rebellion, by acting on the 18th of July, 1862, and at various times subsequently as a soldier, and as an officer, and as a non-commissioned officer in the army and navy of the Confederate States; and by contributing money and property to the aid and encouragement of those engaged in the rebellion. The libel was afterwards amended so as to charge, in addition to the above offences, that McVeigh, on the 18th of July, 1862, was engaged in armed rebellion against the government of the United States, and notwithstanding the President, on the 25th of July, 1862, issued his proclamation warning all persons thus engaged to cease participating in aiding, countenancing, and abetting such rebellion, the said McVeigh did not within sixty days thereafter cease to aid, countenance, and abet such rebellion, and return to his allegiance to the United States.

McVeigh appeared by counsel, made a claim to the property, and filed an answer. This answer was not contained in the record, and nothing of its contents appeared except what was stated in the order of the court made on the motion of the attorney of the United States.

The attorney of the United States, however, moved that the claim, answer, and appearance be stricken from the files, as it appeared from the answer filed; that at the time of filing it the party was "a resident of the city of Richmond, within the Confederate lines, and a rebel." The court granted the motion. Subsequently the default of all persons

was taken, and a decree was rendered for the condemnation and sale of the property. The case was carried to the Circuit Court, and there the decree was affirmed. It was now brought here on writ of error.<sup>6</sup>

Mr. Justice SWAYNE delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Virginia.

The defendants in error filed in the District Court of the United States for that district a libel of information, under the act of July 17, 1862, to reach, for the purposes of forfeiture and sale, certain real and personal property of McVeigh, a description of which is fully set forth. The original libel was the same, *mutatis mutandis*, as that in the case of Garnett, claimant of certain real estate, against the United States.<sup>7</sup> An amendment was subsequently made, whereby a farther charge was alleged of the offence defined in the sixth section of the act. The plaintiff in error appeared by counsel, interposed a claim to the property, and filed an answer. The attorney of the United States submitted a motion, that the appearance, answer, and claim should be stricken from the files, for the reasons that the respondent was "a resident of the city of Richmond, within the Confederate lines, and a rebel." An order was made according to the motion. Subsequently a decree *pro confesso* was taken. The property was condemned as forfeited, and ordered to be sold. The Circuit Court upon error affirmed the decree, and the case is now before us for review.

It is objected that McVeigh was incompetent to sue out this writ of error. His alleged criminality lies at the foundation of the proceeding. It was averred in the libel that he was the owner of the property described, and that he was guilty of the offences charged, which rendered it liable to forfeiture. The questions of his guilt and ownership were therefore fundamental in the case. The notice by publication was given to bring him constructively before the court. It was in the nature of the substituted service of process. If he failed to appear, his absence and silence could not affect the validity of the proceedings. After the decree, *pro confesso*, he occupied the same relation to the record as a defendant against whom a judgment by default has been taken. The case is wholly unlike a proceeding purely in rem, where no claimant is named, and none appears until after the final decree or judgment is entered, and the case has terminated. We entertain no doubt that the plaintiff in error had the right to sue out the writ, and that the record is properly before us for examination.

In our judgment the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will

<sup>6</sup> The statement of facts is abridged.

<sup>7</sup> See *Garnett v. United States*, 11 Wall. 258, 20 L. Ed. 79 (1870).



be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no locus standi in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice.<sup>8</sup>

Whether the legal status of the plaintiff in error was, or was not, that of an alien enemy, is a point not necessary to be considered; because, apart from the views we have expressed, conceding the fact to be so, the consequences assumed would by no means follow. Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country,<sup>9</sup> it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defence. In Bacon's Abridgment,<sup>10</sup> it is said: "For as an alien may be sued at law, and may have process to compel the appearance of his witnesses, so he may have the benefit of a discovery."

The judgment of the District Court is reversed, and the cause will be remanded to the Circuit Court with directions to proceed in it in conformity to law.<sup>11</sup>

<sup>8</sup> *Calder v. Bull*, 3 Dall. 388, 1 L. Ed. 648 (1798); *Bonaker v. Evans*, 16 Adol. & E. (N. S.) 170 (1850); *Capel v. Child*, 2 Cromp. & J. 574 (1832);

<sup>9</sup> *Clarke v. Morey*, 10 Johns. (N. Y.) 69 (1813); *Russel v. Skipwith*, 6 Bin. (Pa.) 241 (1814);

<sup>10</sup> *Title Alien, D.* See also *Story's Equity Pleadings*, section 53; *Albrecht v. Susmann*, 2 Ves. & B. 323 (1813); *Dorsey v. Kyle et al.*, 30 Md. 512, 522, 96 Am. Dec. 617 (1869).

<sup>11</sup> See *Washington University v. Finch*, 18 Wall. 108, 21 L. Ed. 818 (1873), citing with approval the principal case, and *De Jarnette v. De Giverville*, 53 Mo. 440 (1874).

See, also, *Clarke v. Morey*, 10 Johns. (N. Y.) 69, 70, 74, 75 (1813), in which Kent, C. J., reviewed the English authorities, and held, according to the head-note, that:

"Aliens, resident in the United States at the time of war breaking out between their own country and the United States, or who come to reside in the United States after the breaking out of such war, under an express or implied permission, may sue and be sued, as in time of peace; and it is not necessary, for that purpose, that such aliens should have letters of safe conduct, or actual license to remain in the United States, but a license and protection will be implied, from their being suffered to remain, without being ordered out of the United States by the executive."

Chief Justice Kent concluded his opinion as follows:

"The case before us does not raise the question, nor do we give any opinion in favor of the right of action by aliens who resided in the enemy's country when war was declared, and when the action was commenced. The cases appear to be against such right. But as to aliens who were residents with us when the war broke out, or who have since come to reside here, by a presumed permission, the authorities seem to be decisive. And whether we consider this case in reference to the decisions of the English courts, to the act of Congress, or to the sense of European nations, declared in their treaties, and by their writers on public law, the plea must be overruled; and the plaintiff is entitled to judgment, upon his demurrer."

## UNITED STATES v. GROSSMAYER.

(Supreme Court of the United States, 1869. 9 Wall. 72, 19 L. Ed. 627.)

Elias Einstein, a resident of Macon, Georgia, was indebted, when the late rebellion broke out, to Grossmayer, a resident of New York, for goods sold and money lent, and while the war was in progress a correspondence on the subject was maintained through the medium of a third person, who passed back and forth several times between Macon and New York. The communication between the parties resulted in Grossmayer requesting Einstein to remit the amount due him in money or sterling exchange, or, if that were not possible, to invest the sum in cotton and hold it for him until the close of the war.

In pursuance of this direction—and, as it is supposed, because money or sterling exchange could not be transmitted—Einstein purchased cotton for Grossmayer, and informed him of it; Grossmayer expressing himself satisfied with the arrangement. The cotton was afterwards shipped as Grossmayer's to one Abraham Einstein, at Savannah, who stored it there in his own name, in order to prevent its seizure by the rebel authorities. It remained in store in this manner until the capture of Savannah, in December, 1864, by the armies of the United States, when it was reported to our military forces as Grossmayer's cotton, and taken by them and sent to New York and sold.

Grossmayer now preferred a claim in the Court of Claims for the residue of the proceeds, asserting that he was within the protection of the Captured and Abandoned Property Act.

That court considering that the purchase by Elias Einstein for Grossmayer was not a violation of the war intercourse acts set forth in the preceding case, decided that he was so, and gave judgment in his favor. The United States appealed.

Mr. George Taylor, for Grossmayer, and in support of the judgment below:

The cotton, the proceeds of which are in question, was purchased during the rebellion, by an agent of the claimants, residing within the Confederacy, and therefore was not a violation of the Nonintercourse Act; it being a settled principle of public law that a citizen of a country at war with another may have an agent in the enemy's country, and may enforce the contracts or accept the beneficial acts of his agent after peace; and, in this respect, he may do by an agent what he could not do himself.\*

Even if the messages from Grossmayer to his agent were illegal, and no authority were given to the agent, yet the agent had a right, voluntarily on his own motion, to purchase and appropriate this prop-

\* *Potts v. Bell*, 8 Term, 548 (1800); *Denniston v. Imbrie*, 3 Wash. C. C. 396, Fed. Cas. No. 3802 (1818); *Paul v. Christie*, 4 Har. & McH. (Md.) 161 (1798); *Buchanan v. Curry*, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200 (1821); *Ward v. Smith*, 7 Wall. 452, 19 L. Ed. 207 (1868).

erty to his creditor, and by the appropriation of it, and the shipment of it to Savannah for storage for him, the title passed, subject only to the ratification of Grossmayer.<sup>4</sup>

The case shows that the purchase was ratified by Grossmayer. Claiming the cotton, and instituting suit for it, is itself a ratification. This ratification reverts back, and is equivalent to a previous permission or command.

Mr. Hoar, Attorney General, and Mr. R. S. Hale, special counsel for the United States, contra.

Mr. Justice DAVIS delivered the opinion of the court.

Grossmayer insists that he is within the protection of the Captured and Abandoned Property Act, but it is hard to see on what ground he can base this claim for protection. It was natural that Grossmayer should desire to be paid, and creditable to Einstein to wish to discharge his obligation to him, but the same thing can be said of very many persons who were similarly situated during the war, and if all persons in this condition had been allowed to do what was done in this case, it is easy to see that it would have produced great embarrassment and obstructed very materially the operations of the army. It has been found necessary, as soon as war is commenced, that business intercourse should cease between the citizens of the respective parties engaged in it, and this necessity is so great that all writers on public law agree that it is unlawful, without any express declaration of the sovereign on the subject.

But Congress did not wish to leave any one in ignorance of the effect of war in this regard, for as early as the 13th of June, 1861, it passed a Nonintercourse Act, which prohibited all commercial intercourse between the states in insurrection and the rest of the United States. It is true the President could allow a restricted trade, if he thought proper; but in so far as he did allow it, it had to be conducted according to regulations prescribed by the Secretary of the Treasury.

There is no pretence, however, that this particular transaction was authorized by any one connected with the Treasury Department, and it was, therefore, not only inconsistent with the duties growing out of a state of war, but in open violation of a statute on the subject. A prohibition of all intercourse with an enemy during the war affects debtors and creditors on either side, equally with those who do not bear that relation to each other. We are not disposed to deny the doctrine that a resident in the territory of one of the belligerents may have, in time of war, an agent residing in the territory of the other, to whom his debtor could pay his debt in money, or deliver to him property in discharge of it, but in such a case the agency must have been created before the war began, for there is no power to appoint an agent

<sup>4</sup> *Ogle v. Atkinson*, 5 Taunt. 759 (1814); *Mitchel v. Ede*, 11 Adol. & El. 883 (1840); *Fowler v. Down*, 1 Bos. & P. 47 (1797); *Wilkes v. Ferris*, 5 Johns. (N. Y.) 335, 4 Am. Dec. 864 (1810); *Colt v. Houston*, 8 Johns. Cas. (N. Y.) 243 (1802) and remarks upon it in *Hawley v. Foote*, 19 Wend. (N. Y.) 517 (1838).

for any purpose after hostilities have actually commenced, and to this effect are all the authorities. The reason why this cannot be done is obvious, for while the war lasts nothing which depends on commercial intercourse is permitted. In this case, if Einstein is to be considered as the agent of Grossmayer to buy the cotton, the act appointing him was illegal, because it was done by means of a direct communication through a messenger who was in some manner not stated in the record able to pass, during the war, between Macon and New York. It was not necessary to make the act unlawful that Grossmayer should have communicated personally with Einstein. The business intercourse through a middle man, which resulted in establishing the agency, is equally within the condemnation of the law.

Besides, if, as is conceded, Grossmayer was prohibited from trading directly with the enemy, how can the purchase in question be treated as lawful when it was made for him by an agent appointed after his own disability to deal at all with the insurgents was created?

It is argued that the purchase by Einstein was ratified by Grossmayer, and that being so the case is relieved of difficulty; but this is a mistaken view of the principle of ratification, for a transaction originally unlawful cannot be made any better by being ratified.

In any aspect of this case, whether the relation of debtor and creditor continued, or was changed to that of principal and agent, the claimant cannot recover.

As he was prohibited during the war from having any dealings with Einstein, it follows that nothing which both or either of them did in this case could have the effect to vest in him the title to the cotton in question.

Not being the owner of the property he has no claim against the United States.

The judgment of the Court of Claims is reversed, and the cause is remanded to that court with directions to enter an order dismissing the petition.<sup>5</sup>

<sup>5</sup> See also *Small's Adm'r v. Lumpkin's Ex'r*, 28 Grat. 832, 835, decided by the Court of Appeals of Virginia in 1877.

After stating the effect of war upon intercourse, Burks, J., said:

"Limited agencies in the enemy's country may lawfully continue, provided they can be and are exercised without intercourse or communication between the citizens or subjects of the contending powers—such as agencies to collect and preserve, but not to transmit money or property. *Buchanan v. Curry*, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200 [1821]; *Ward v. Smith*, 7 Wall. 447, 19 L. Ed. 207 [1869]; *Manhattan Life Ins. Co. v. Warwick*, 20 Grat. 614, 3 Am. Rep. 218, [1871]; *Hale v. Wall*, 22 Grat. 424 [1872]; *Mutual Benefit Life Ins. Co. v. Atwood's Adm'r*, 24 Grat. 497, 18 Am. Rep. 652 [1874]; *N. Y. Life Ins. Co. v. Hendren*, 24 Grat. (Va.) 536 [1874].

"Such agencies, however, to be lawful, must, it seems, be created before the war begins, for there is no power it is said to appoint any agent for any purpose after hostilities have actually commenced, and that to this effect are all the authorities. *United States v. Grossmayer*, 9 Wall. 72, 19 L. Ed. 627 [1869]; *United States v. Lapéne*, 17 Wall. 601, 21 L. Ed. 693 [1873]."

## CHAPTER VI

### PRIVATE RIGHTS AND CONTRACTS<sup>1</sup>

#### FURTADO v. ROGERS.

(Court of Common Pleas, 1802. 3 Bos. & P. 191.)

This was the case of the ship *Petronelli*, which sailed from Bayonne in France, October, 1792, for Martinique insured in an English company, the policy dating 19th October, 1792. The next year, while the ship was still at Martinique the war between France and England broke out; and the island of Martinique with all the shipping in the harbors was captured by the English. After the peace of Amiens in 1802, the owner of the ship brought suit in Common Pleas in England, to recover the insurance on the ship.<sup>2</sup>

The opinion of the court was now delivered by LORD ALVANLEY, C. J.:

As it is of infinite importance to the parties that this case should be decided as speedily as possible, and as we entertain no doubts upon the subject, we think it right to deliver the judgment of the court without any further delay; at the same time considering the magnitude of the question, we shall allow the parties to convert this case into a special verdict, in order that the opinion of the highest court in this kingdom may be taken, if it should be thought necessary. There are two questions for our consideration: 1st, whether it be lawful for a British subject to insure an enemy from the effect of capture made by his own government? 2dly, whether, if that be illegal, the insurance in this case having been made previous to the commencement of hostilities will make any difference? As to the first point, it has been understood for some years past to have been the opinion of all Westminster Hall, and I believe of the nation at large, that such insurances are not strictly legal or capable of being enforced in a court of justice.

The cases upon the subject are all brought into a small compass in the two valuable books of Mr. Park and my Brother Marshall. Mr. Park seems to consider the cases of *Brandon v. Nesbitt* and *Bristow v. Towers* as having decided the point;<sup>3</sup> but after looking very accurately into all the cases, I am ready to admit that there is no direct determination. The above two cases proceeded on the short ground of alienage, which was sufficient to support the decision of the court without entering into the other question; and I do not think the lat-

<sup>1</sup> On the subject-matter of the present chapter, see Coleman Phillipson's "Effect of War on Contracts" (1909).

<sup>2</sup> A shortened statement has been substituted for that of the original report.

<sup>3</sup> See Park on Insurance pp. 14, 240.

ter words of Lord Kenyon in *Brandon v. Nesbitt*, applied as they are to the case of *Ricord v. Bettenham*, support the inference which has been drawn by my Brother Marshall, in his book, the *Law of Insurance*, pp. 37, 600, viz. that his Lordship thought that a policy effected previous to the war might be sued upon in the event of peace, even though the loss sustained by the assured arose from British capture. It is well known that for a considerable time, not only some politicians entertained an opinion that insurances on enemy's property were beneficial, but that a great Judge went so far as to try causes in which this point directly appeared, and permitted foreigners in their own names, and for their own benefit during the war, to recover on policies of insurance on foreign goods against British capture. The opinion of that learned judge, as to the policy of such insurances, is well known, and it was supposed he would not have sanctioned them unless his opinion in point of law had been equally favorable. But we have now the best evidence<sup>4</sup> that his sentiments in that respect were different from what they were supposed to be. Though he did try causes upon such insurances, he always entertained doubts upon the law, and endeavored to keep out of sight a question which might oblige him to decide against what he thought for the benefit of the country. This takes off materially from the effect of those cases which have been cited, to induce a supposition that the law of England had tolerated such insurances. How far it is consistent with good faith, after so long an acquiescence, to set up a defence which the foreigner may say he had no reason to expect, is a question for the decision of Defendant and not that of the court. We can only say, that although many persons have recovered in such actions it is equally true that doubts have been entertained by many persons as to their right to recover, and that most of those who were informed upon the subject were firmly persuaded that the objection might have been made with success. This affords a sufficient vindication to the courts of this country in now deciding this point against a foreigner.

In the year 1748 an act, 21 Geo. II, c. 4, passed prohibiting the insurance of French ships and goods during the war; this was at least a legislative declaration of the impolicy of such insurances at that time. From the expiration of that act to the passing of the 33 Geo. III, c. 27, § 4, no legislative interference upon the subject ever took place, and previous to the last mentioned act the policy in question was effected. By the terms of the policy the underwriters certainly undertake to indemnify the plaintiff against all captures and detentions of princes, without any exception in respect of the acts of the government of their own nation. The question then is, whether the law does not make that exception, and whether it be competent to an English underwriter to indemnify persons who may be engaged in war with his own sovereign against the consequences of that war? We

<sup>4</sup> See what is said by Buller, J., 1 *Boa. & P.* 354.

are all of opinion that on the principles of the English law it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his own country; and that such a contract is as much prohibited as if it had been expressly forbidden by act of Parliament. It is admitted that if a man contract to do a thing which is afterwards prohibited by act of parliament, he is not bound by his contract. This was expressly laid down in *Brewster v. Kitchell*, 1 Salk. 198. And on the same principle, where hostilities commence between the country of the underwriter and the assured, the former is forbidden to fulfil his contract. With respect to the expediency of these insurances, it seems only necessary to cite a single line from *Bynkershoek* (*Quaest. Juris. Pub. lib. 1, c. 21*; *Marshall*, p. 31), and part of a passage in *Valin* (*Marshall*, p. 32). The former says, "*Hostium pericula in se suscipere quid est aliud quam eorum commercia maritima promovere*," and the latter, speaking of the conduct of the English during the war of 1756, who permitted these insurances, says, "The consequence was, that one part of that nation restored to us by the effect of insurance, what the other took from us by the rights of war." Lord Hardwicke indeed, in *Henckle v. The Royal Exchange Assurance Company*, 1 Ves. 320, uses these words: "No determination has been that insurance on enemies' ships during the war is unlawful; it might be going too far to say all trading with enemies is unlawful, for that general doctrine would go a great way, even where only English goods are exported, and none of the enemies' imported, which may be very beneficial. I do not go on a foundation of that kind, and there have been several insurances of this sort during the war which a determination upon that point might hurt." This however is but a doubtful opinion as to the legality of such insurances, and not very favorable to them. In *Planche v. Fletcher*, Lord Mansfield is certainly reported to have said, "It is indifferent whether the goods were English or French, the risk insured extends to all captures," which seems at first to go a great way towards giving effect to insurances against British capture. But we must suppose this to have been said because the defendant did not press the objection; and if the party acquiesced, the expression gives no more weight to the case than belongs to any of the other cases which have been cited, such as *Bermon v. Woodbridge*, *Eden v. Parkinson*, and *Tyson v. Gurney*, in which the question was not raised at all. On the other hand, the cases of *Brandon v. Nesbitt* and *Bristow v. Towers* certainly proceeded on the ground of alienage. There is no express declaration therefore of the Court of King's Bench, either for or against the legality of such insurances, and the question comes now to be decided for the first time. We are all of opinion that to insure enemies' property was at common law illegal, for the reasons given by the two foreign jurists [*Bynkershoek* and *Valin*] to whom I have referred. If this be so, a contract of this kind entered into previous to the commencement of hos-

ilities must be equally unavailable in a court of law, since it is equally injurious to the interests of the country; for if such a contract could be supported, a foreigner might insure previous to the war against all the evils incident to war. But it is said that the action is suspended, and that the indemnity comes so late that it does not strengthen the resources of the enemy during the war. The enemy however is very little injured by captures for which he is sure at some period or other to be repaid by the underwriter. Since the case of *Bell v. Potts*, it has been universally understood that all commercial intercourse with the enemy is to be considered as illegal at common law (though previous to that case a very learned judge, Mr. Justice Buller, in *Bell v. Gilson*, 1 Bos. & Pull. 345, appears to have entertained doubts on that subject) and that consequently all insurances founded on such intercourse are also illegal. Why are they illegal? Because they are in contravention of his Majesty's object in making war, which is by the capture of the enemies' property, and by the prohibition of any beneficial intercourse between them and his own subjects to cripple their commerce. The same reasoning which influenced the Court of King's Bench in their decision in *Bell v. Potts*, seems decisive in the present case. For it being determined that during war all commercial intercourse with the enemy is illegal at common law, it follows that whatever contract tends to protect the enemy's property from the calamities of war, though effected antecedent to the war, is nevertheless illegal. It has been supposed that the doctrine which has prevailed respecting ransom bills tends to favor these insurances; but no action was ever maintained upon a ransom bill in a court of common law until the case of *Ricord v. Bettenham*, 3 Bur. 1734, 1 Bl. 563, and I have the authority of Sir William Scott for saying, that in the Admiralty Court the suit was always instituted by the hostage. The case of *Ricord v. Bettenham*, however, certainly tended to show that such an action might be maintained in the courts of common law at the suit of an alien enemy. In consequence of this a similar action was brought in *Cornu v. Blackburn*, Doug. 641, and after argument the Court of King's Bench held that it might be sustained. But in *Anthon v. Fisher*, Doug. 649, 650, in *notis*, the contrary was expressly determined upon a writ of error in the Exchequer Chamber. I forbear to enter into the argument suggested at the bar in favor of the defendant, that the law will not enforce a contract founded on a transaction detrimental to the public policy of the state. The ground upon which we decide this case is, that when a British subject insures against captures, the law infers that the contract contains an exception of captures made by the government of his own country; and that if he had expressly insured against British capture, such a contract would be abrogated by the law of England. With respect to the argument insisted upon by way of answer to the public inconvenience likely to arise from permitting such contracts to be enforced, viz. that all contracts made with an enemy



enure to the benefit of the King during the war, and that he may enforce payment of any debt due to an alien enemy from any of his subjects, we think it is not entitled to much weight. Such a course of proceeding never has been adopted; nor is it very probable that it ever will be adopted, as well from the difficulties attending it, as the disinclination to put in force such a prerogative. The plaintiff, I am sorry to say, is not entitled to a return of premium, because the contract was legal at the time the risk commenced, and was a good insurance against all other losses but that arising from capture by the forces of Great Britain.

Judgment for the defendant.<sup>5</sup>

### JANSON v. DRIEFONTEIN CONSOLIDATED MINES, Ltd.

(House of Lords, 1902. L. R. [1902] App. Cas. 484.)

The respondents, a company registered under the law of the South African Republic, in August, 1899, insured, with the appellant and other underwriters, gold against (*inter alia*) "arrests, restraints, and detainments of all kings, princes, and people," during its transit from the gold mines near Johannesburg in the Transvaal to the United Kingdom. On October 2, 1899, the gold was during its transit seized on the frontier by order of the government of the South African Republic. On October 11, at 5 p. m., a state of war began between the British government and the government of the Republic. At the time of the seizure war was admitted to be imminent.

The respondent company had a London office, but its head office was at Johannesburg. Most of its shareholders were resident outside the Republic and were not subjects thereof.

The respondent company having brought an action against the appellant upon the policy, it was agreed between the parties that the action should be treated as if brought at the conclusion of the war, and that the Blue Book might be referred to for evidence as to the facts. The action was tried without a jury before Mathew, J., who held that

<sup>5</sup> See, further, the excellent case of *Brandon v. Curling*, 4 East, 410, (1803) in which Ellenborough, C. J., held that an insurance on goods from London to Bayonne in France, shipped on board a neutral ship on account and at the risk of Frenchmen before the declaration of hostilities between Great Britain and France, but exported afterwards, cannot be enforced against the underwriter even after the restoration of peace, to recover a loss by capture of a co-belligerent (though not stated to be an ally) during the war; that every insurance on alien property by a British subject must be understood with this implied exception that it shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and assurer. Of this case, Mr. Duer says (1 *The Law and Practice of Marine Insurance*, 473 [1845]): "Thus, it was finally determined, that a supervening war between the countries of the assurers and the assured, from the time that it occurs, renders a prior insurance illegal and void, precisely for the same reasons that render the contract illegal in its origin, when made during a war."

the appellant was liable. [1900] 2 Q. B. 339. This decision was affirmed by the Court of Appeal (A. L. Smith, M. R., and Romer, L. J., Vaughan Williams, L. J., dissenting) [1901] 2 K. B. 419. \* \* \*

LORD BRAMPTON (read by Lord Lindley). My Lords, I am of opinion that the respondent is entitled to your Lordships' judgment. At first sight the case may appear to be fraught with difficulty; but when the material facts, which are few and simple, are ascertained and understood, the difficulty will, as I think, be found to be more apparent than real.

The plaintiff is a company incorporated under the laws of the South African Republic for the purpose of working gold mines therein. The majority of its shareholders are subjects of the United Kingdom. The company has an office and a committee of management in England, and it was a custom of the company to transmit to this country gold bullion for sale and distribution of the profits amongst its shareholders. The company clearly must be treated as a subject of the Republic, notwithstanding the nationality of its shareholders.

In the early autumn of 1899 the company was, in the ordinary course of business, about to send to the United Kingdom a large amount of such bullion, and on August 1 it effected a policy of insurance on its transit from the mines to England with underwriters at Lloyd's, the defendant, a British subject, being one. On October 2 the bullion was placed in the mail train at Johannesburg for conveyance to Cape Town en route for its destination. It reached Vereeniging, the frontier station of the Republic, in safety; but on its arrival there it was seized and appropriated by the then government of the Republic, and became totally lost to the plaintiff. When the bullion was so seized there can be no doubt that the friendly relations between this country and the South African Republic were much strained; but both countries were negotiating for a settlement of their differences, and it was not until the afternoon of October 11 that war was declared between them, from which date they continued in open hostility until the end of May, 1902. The action was commenced on January 30, 1900, the crucial issue between the parties being whether war had been commenced, or a state of hostility equivalent to a state of war, so far as the insurance was affected, was in existence between the two countries when the seizure was made on October 2, 1899. If the answer was in the affirmative, the plaintiff, as a subject of the Republic, could not recover upon his policy against the defendant, an English subject and an alien enemy of the plaintiffs' country; for, although covered by the words of the policy, it would have been a loss happening during the existence of hostilities, and within the proviso which, according to the language of Lord Ellenborough in *Brandon v. Curling* (1803) 4 East, 417; 7 R. R. 592, is in all cases considered as engrafted in every insurance, namely, "that this insurance shall not extend to cover

\* The opinion of Halsbury, L. C., is omitted, as is a part of that by Lord Lindley.

any loss happening during the existence of hostilities between the respective countries of the assured and the assurer." The reason he assigns for this is, "because, during the existence of such hostilities, the subjects of the one country cannot allowably lend their assistance to protect by insurance the property and commerce of the subjects of the other." The law is in other words also explained by Willes, J., in delivering the judgment of the Exchequer Chamber in *Esposito v. Bowden*, 7 E. & B. 779: "It is now fully established that the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the license of the Crown, is illegal." If, however, the answer to the issue between the parties ought to be, as I think it was, rightly found by Mathew, L. J., in the negative, the plaintiff company was clearly entitled (subject to a point which was waived) to recover its loss from the defendant, for both the making of the contract of indemnity and insurance and the loss by seizure—which was simply an outrage by the Republic upon its own subject—occurred before the declaration of war.

By way of defence it was urged that the seizure of the bullion by the government of the Republic was incidental to actual or expected hostilities against Her Majesty Queen Victoria, and for the purpose of supplying the Republic with funds to levy war upon Her Majesty, and that, coupled with the actual declaration of war which followed, created a state of hostility against Her Majesty, and rendered the plaintiff's claim for indemnity contrary to public policy and irrecoverable.

This contention, though very ingenious and exceedingly well argued by the learned counsel, affords, in my opinion, no bar to this action. It was an endeavour to extend the well-established principle described by Lord Ellenborough so as to meet the circumstances of this case, in which undoubtedly hostile intentions were made manifest by word and by action during the time negotiations for peace were being carried on, though no declaration or act of war was made or done until after the British government had signified by silence, on October 11, the non-acceptance of the ultimatum of the Republic received on the previous day. No decided authority supporting this contention was cited to your Lordships, while, in my opinion, reason and good sense are against it.

Every prudent government naturally endeavours and takes steps to place itself in a condition to uphold its own country in the possible event of a state of hostility arising with any other power, and it would indeed be strange that a declaration of war should be held to have relation back to an indefinite period of time during which both the hostile countries believed themselves to be and conducted themselves towards each other as in a condition of amity, and were negotiating with a view to avoid any rupture of a then existing state of peace. I do not think it necessary to say more.

In my opinion the judgments of Mathew, L. J., and of the majority of the Court of Appeal ought to be upheld, and this appeal dismissed with costs. \* \* \*

LORD LINDLEY. \* \* \* My Lords, one ground, and one ground only, is invoked to shew that it is, and that ground is the ground of public policy. A contract or other transaction which is against public policy, i. e., the general interest of this country, is illegal (4 H. L. C. 161, 195, 196); but public policy is a very unstable and dangerous foundation on which to build until made safe by decision. On this point I venture to remind your Lordships of the weighty observations of Alderson, B., and Parke, B., in *Egerton v. Brownlow*, 4 H. L. C. 106, 123.

The seizure of the gold in the present case was a distinct gain to the captors. To indemnify the owner of the gold against the loss of such gold is clearly a benefit to the owner, and such an indemnity is a benefit to a person who is regarded as an enemy as soon as war breaks out. But he was not an enemy when the policy was effected nor when the gold was seized, and how it can be against the policy of this country to keep faith with him when the war is over I fail to see. He cannot, of course, sue in this country during the war if the defendants raise that objection; but they do not. The contention is that if the war were over this action could not be maintained.

Reference was made in the argument to such cases as *The Jan Frederick*, 5 C. Rob. 129, and *The Boedes Lust* (1804) 5 C. Rob. 233, to shew that contracts made before war breaks out, but in contemplation of it, for the protection of enemy's property against British capture, will not be recognized in this country. This is intelligible enough; for to recognize such contracts would be to defeat the object of this country in effecting the capture. It would be to undo by means of British tribunals the work done for the British nation by its naval or military forces. Anything which would produce, or be calculated to produce, such an effect as that would be clearly against public policy, and be judicially dealt with accordingly. I am unable myself to bring the present case within this principle. The view that public policy requires an extension of rules already recognized so as to meet the present case has been very clearly presented by Vaughan Williams, L. J., in his judgment. I am unable, however, to arrive at the same conclusion. His view appears to me to be based on the doctrine which identifies every subject of a State with its own Government. \* \* \*

War produces a state of things giving rise to well-known special rules. It prohibits all trading with the enemy except with the Royal licence, and dissolves all contracts which involve such trading. See *Esposito v. Bowden*, 7 E. & B. 781 et seq. But threatened war or anticipated war or imminent war is peace, which may not after all result in war; and to apply the rules of war to insurances against loss before war breaks out would paralyze commerce, and often without any

real necessity. Is it for the interest of this country to dislocate trade because international relations are strained and war appears probable to the public, who do not know and cannot know the real views and resolutions of the Governments concerned? It must be remembered that contracts of insurance are not by any means the only contracts which have to be considered in this connection; what affects them affects contracts of sale and contracts of carriage both by land and sea, and in fact affects the whole external commerce of the country. Romer, L. J., saw this, as is apparent from his judgment.

My Lords, where a policy of insurance is not void *ab initio*, and a loss from one of the perils insured against happens before war is declared or breaks out, what defence can be offered to an action upon it? I know of none except where the loss is occasioned by British capture followed by war. Of course, if war breaks out before the action is brought or before it is over, the war suspends its prosecution, for an alien enemy cannot sue in this country. *Le Bret v. Papillon* (1804) 4 East, 502, 7 R. R. 618. Your Lordships are asked to invent a new defence unheard of before, and to say that every policy on a foreigner's property abroad is subject to the implied condition that it shall not be seized by his own government in order to be used against this country if war breaks out. Such a doctrine, I venture to think, would paralyze legitimate trade and be entirely against the interests of this country.

In my opinion the order and judgment appealed from should be affirmed and the appeal be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.<sup>7</sup>

<sup>7</sup> In 15 Harv. Law Rev. 237 (1901) the following criticism appears of the principal case: "Acts done in contemplation of war are, if war ensues, regarded as if done in time of war. The *Jan Frederick*, 5 Rob. 128 [1804]; The *Boedes Lust*, 5 Rob. 233 [1804]. The question, then, is whether it is against public policy for an insurance company to insure an alien enemy against seizure of his property by his own government. No decided case covers this. It has been held that insurance of an enemy's subject against capture of his goods by ships of the insurer's government is void. *Furtado v. Rogers*, 3 Bos. & P. 191 [1802]; *Gamba v. Le Mesurier*, 4 East, 407 [1808]. The ground of the decisions was that a state could not put the same pressure on its enemy if the enemy knew it would be recouped at the end of the war by subjects of that state. This principle applies with equal if not greater force to insurance on goods seized by the government of the assured. Payment of such insurance would be relieving the enemy's subject from the pressure put upon him by his own government to carry on the war, and would in effect be paying the enemy's expenses. On principle and authority the case is wrong, though it has the practical advantage of affording relief to commerce."

HUGH STEVENSON & SONS, Limited, v. AKTIENGESELL-  
SCHAFT FÜR CARTONNAGEN-INDUSTRIE.

(House of Lords, 1918. L. R. [1918] App. Cas. 239.)

LORD FINLAY, L. C.\* My Lords, the appellants are a limited company incorporated under English law, and the respondents are a German trading corporation. The two companies traded in England in partnership and carried on a business described as a clamp factory. It consisted in the manufacture and sale of metal edges for securing cardboard boxes. The partnership business was carried on under an agreement in writing dated November 22, 1906. Clause 2 provided for its remaining in force for five years from January 1, 1907, and thereafter till the expiration of six months' notice by either party. Clauses 3, 4, 5, 6, and 7 related to an agency business quite distinct from the partnership business with which alone the present case is concerned. The partnership business was regulated by clauses 8 to 15. Nothing turns on the details of these arrangements, and it is only necessary to observe that clause 12, as to the sale of the machinery on dissolution, has no application in the present case, as the operation of that clause is confined to dissolution by effluxion of time or notice under clause 2. The remaining provisions of the agreement are for the present purpose immaterial.

On August 4, 1914, war broke out between this country and Germany, and it is admitted that the effect of the war was to dissolve the partnership at once.

The dispute in the present case turns on the question what is to be done in respect of the respondents' share in the machinery belonging to the partnership and used in carrying it on.

The appellants continued to carry on the business which had been that of the partnership and used the machinery for the manufacture of the clamps. On June 21, 1915, the appellants commenced an action under the Legal Proceedings against Enemies Act, 1915 (5 Geo. V, c. 36), asking for a declaration that the plaintiffs should account for the machinery at the price at which it stood in the books of the partnership on August 4, 1914, or, alternatively, at its value on that date.

The case was tried by Atkin, J., on February 8, 1916. He gave judgment, making the following declaration with regard to the partnership: "That the partnership constituted by the said contract was dissolved on the said August 4, 1914; that the defendants are entitled to the value of their share in the said partnership including the good will, if any, as of the date of August 4, 1914; that clause 12 of the said contract is not applicable; and that the defendants are not entitled to any of the profits of or interest in the capital of the partnership since August 4, 1914."

\* The statement of facts and part of the opinion are omitted.

The effect of Atkin, J.'s judgment was that he held that the respondents were entitled to the value of their share in the property of the partnership as on August 4, 1914, but were not entitled to any of the profits of or interest in the capital of the partnership since August 4, 1914. In other words, he held that the English company were entitled to use the machinery for the purposes of the business without making any allowance to the German partner for the use of his interest therein.

The German partner is, of course, not entitled to any payment so long as the war lasts, but the declaration of Atkin, J., if it stands, would prevent his getting on the conclusion of peace, anything beyond the capital value of his interest in the machinery at the date of dissolution.

The Court of Appeal were divided in opinion. A. T. Lawrence, J., agreed with Atkin, J., while Swinfen Eady, L. J., and Bankes, L. J., held that the right to some allowance in respect of the use by the plaintiffs of the German company's interest in the machinery should not be excluded altogether. The Court of Appeal accordingly reversed Atkin, J.'s judgment and substituted for the declaration made by him, and above quoted by me, the following: "Declaration 3. That the partnership constituted by the said contract was dissolved on the said August 4, 1914, that the defendants are entitled to their share in the said partnership, including the good will (if any), and that clause 12 of the said contract is not applicable."

From that decision the present appeal has been brought.

In my opinion the decision of the majority of the Court of Appeal is right. It is not the law of this country that the property of enemy subjects is confiscated. Until the restoration of peace the enemy can, of course, make no claim to have it delivered up to him, but when peace is restored he is considered as entitled to his property with any fruits which it may have borne in the meantime. The question to be determined in the present case does not depend upon any contract, but on the rights of property which both partners have in the assets of the firm. The enemy partner was entitled to the value of his share in the machinery. If that amount had been ascertained on August 4, 1914, it would have been retained in custody, and if it had been invested, as in ordinary course it would have been, the enemy partner would on the conclusion of peace have been entitled to the principal with any interest or dividends which had accrued in the meantime.

What took place here was that the English partner continued the business, using the machinery to earn profits. The German partner is, of course, not entitled to any share of the profits attributable to the skill or industry of the English partner, but some portion of the profits may be attributable to the machinery used, and the enemy partner would be entitled to some allowance in respect of his interest therein. Or to put the matter in another way, some allowance may be made in lieu of interest on its value in respect of the use by the English partner of the German share in the machinery.

This appears to me to follow from the principle that the property of an enemy is not confiscated, though his right to have it back is suspended during war. It was strenuously contended that in the case of a debt to a foreigner bearing interest no interest could accrue during the existence of hostilities between the countries of the debtor and creditor, and in support of this proposition two American cases were cited, *Hoare v. Allen*, 2 Dall. 102, 1 L. Ed. 307, and *Brown v. Hiatts*, 15 Wall. 177, 21 L. Ed. 128, the latter a decision of the Supreme Court of the United States.

These decisions seem to me not to be in conformity with English law. The rule of international law on this point, in the view of the courts of this country, does not appear to have formed the subject of any express decision in England. The judgment of Lord Ellenborough, however, in *Wolff v. Oxholm*, 6 M. & S. 92, appears to me to imply that, in the view of Lord Ellenborough, interest on such a debt would not cease to run during the continuance of the war, but the point does not appear to have been argued. It is difficult to see on what principle the interest is to be forfeited if private property is to be respected.

But in any case, even if these American decisions were right, the consequences contended for by the appellants would not, in my opinion, follow. The question here is not of contract, but of property, and what is equitable as between two partners in respect of the property of the firm. If the English partner uses the machinery which was in part the property of the enemy partner, why should not he in justice make some allowance in respect of this use? The price representing the value of the interest of the machinery has not been paid, and I do not think that it would be in accordance with law to allow a declaration to stand which would bar all right to share in any profits which may be found to be attributable to the use of the machinery, or some allowance by way of interest on the value of the German partner's share in it.

I agree with the reasons given by the majority of the Court of Appeal, and think that this appeal should be dismissed with costs. \* \* \*

Order of the Court of Appeal affirmed and appeal dismissed with costs.



ERTEL BIEBER & CO. v. RIO TINTO CO.  
DYNAMIT ACTIEN-GESELLSCHAFT v. SAME.  
VEREINIGTE KOENIGS UND LAURAHUETTE ACTIEN-  
GESELLSCHAFT v. SAME.

(House of Lords, 1918. L. R. [1918] App. Cas. 280.)

Appeals from three orders of the Court of Appeal affirming judgments of Sankey, J.

The several appellants were German companies carrying on business in Germany. The respondent company was incorporated in England and owned large mines of cupreous sulphur ore in Spain.

These appeals related to contracts entered into before the war for the supply by the respondents of cupreous sulphur ore to the several appellants, and the question for determination was whether such contracts had been entirely abrogated and avoided or whether they were merely suspended during the period of the war.

The facts are fully stated by Lord Dunedin in his judgments in the first and second cases. The third case was admittedly covered by the second and was not argued. \* \* \*

LORD DUNEDIN.\* My Lords, the respondents, whom I shall hereafter call the plaintiffs, taking advantage of the provisions of the Legal Proceedings against Enemies Act, 1915, have raised this action to obtain a declaration as against the appellants, whom I shall hereafter call the defendants, that by the existence of a state of war between Great Britain and Germany on August 4, 1914, two contracts of dates January 27, 1910, and October 9, 1913, with indorsements on the first mentioned of March 15 and October 8, 1912, were abrogated and avoided; and that they were relieved from any duties or obligations under the contracts, without prejudice to liabilities already incurred at the aforesaid date of August 4, 1914.

The plaintiffs are an English company owning extensive mines of cupreous ore situate in Spain. The defendants are a German firm who deal in such ore and resell to various customers in Germany. Both contracts were for a very large quantity of ore. The first was for 1,280,000 tons, 15 per cent. more or less in buyers' option, a quantity which by two indorsements was increased to 1,592,750 tons. The ore was to be delivered in approximately equal quantities between February 1 and November 30 in the years 1911 to 1914. It was to be shipped from Huelva in Spain, and delivered ex ship at Rotterdam, Hamburg, Stettin, and/or other European continental ports except ports in Great Britain, France, Belgium, Spain and Portugal. There were minute arrangements as to quality and price, and various other clauses, to some of which I shall presently advert. The second contract was for 2,200,-

\* The statement of facts is abridged and part of the opinion is omitted.

000 tons, 15 per cent. more or less in buyers' option, to be delivered in equal portions from February 1, 1915, up to November 30, 1919, at same ports as in the first contract. When war broke out between Great Britain and Germany on August 4, 1914, all deliveries had been made under the first contract except about 200,000 to 300,000 tons. Obviously no deliveries had begun under the second contract. No deliveries have been made since the war begun. Sankey, J., gave the plaintiffs the declaration they asked, and his judgment was affirmed by the Court of Appeal. Against these orders the present appeal is brought.

My Lords, the proposition of law on which the judgment of the courts is based is that a state of war between this kingdom and another country abrogates and puts an end to all executory contracts which for their further performance require, as it is often phrased, commercial intercourse between the one contracting party, subject of the king, and the other contracting party, an alien enemy, or any one voluntarily residing in the enemy country. I use the expression "often phrased commercial intercourse" because I think the word "intercourse" is sufficient without the epithet "commercial." As to this I agree with the judgment of the Court of Appeal in the case of *Robson v. Premier Oil & Pipe Line Co.* [1915] 2 Ch. 124, 136, where Pickford, L. J., delivering the judgment of the court, Lord Cozens-Hardy, M. R., himself, and Warrington, L. J., said: "The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction." That so expressed it is an incontrovertible proposition admits, I think, upon the authorities, of no doubt. \* \* \*

The real defence to the action is to be found in a clause which I have not yet mentioned. There is a clause in practically identical terms in both contracts. I will therefore take that in the later contract. It is clause 15, which is in the following terms:

"15. If owing to strikes, war, or any other cause over which the sellers have no control, they should be prevented from shipping the ore from Huelva, or delivering same to the buyers, the obligation to ship and/or deliver shall be suspended during the continuance of such impediment, and for a reasonable time afterwards, to allow the sellers time to resume shipments, and/or deliveries, and if one or more works of buyers' clients should be destroyed or materially damaged by fire, or should war or any other cause, over which the buyers, or their clients, have no control, prevent their receiving such ore, the obligation to receive under this contract shall be reduced in proportion, or suspended during the continuance of such impediment and for a reasonable time afterwards, to allow the buyers time to recommence receipts."

The defendants argue that the effect of this clause is to remove from the contract all necessity for the forbidden thing (intercourse during the war), and that the ratio decidendi of *Esposito v. Bowden*, 7 E. & B. 763, is therefore gone, and that there is no reason why the contract to deliver after the war should not be good.

The learned judges of the courts below have treated this clause by the method of what may be termed confession and avoidance. The clause only purports to suspend deliveries—nothing else. But, say they, there were other duties under the contract besides deliveries. These duties still remain and entail intercourse, so that again the case is brought within the principle of *Esposito v. Bowden*, 7 E. & B. 763. In particular they cite clauses 12, 18, and 19, and they say that the case in respect of these clauses falls directly within the decision of the Court of Appeal which binds them, in the case of *Zinc Corporation v. Hirsch* [1916] 1 K. B. 541. To which the defendants before your Lordships' House reply that the clauses are not analogous, and, further, that the *Zinc Corporation Case* [1916] 1 K. B. 541, was ill decided.

My Lords, I do not think it can be gainsaid that, *Esposito v. Bowden*, 7 E. & B. 763, being, as I have already said, good law, then, if there are duties which remain unaffected by the suspensory clause and these duties involve intercourse, the contract must be avoided. In so far as the *Zinc Corporation Case* [1916] 1 K. B. 541, laid down this proposition it was, in my opinion, right; and it is useless to examine the clauses in that case. It is necessary, however, to examine what the duties are under this contract. In order to make clause 12 intelligible it is necessary first to quote clause 2, which is in these terms:

"2. One-fifth of the above 2,200,000 tons, viz., 440,000 tons, 15 per cent. more or less, is to be shipped in each year, during the period between 1st February and 30th November, and spread as nearly as sellers can arrange uniformly over this period. The sizes of cargoes for Rotterdam, Hamburg and Stettin shall be in sellers' discretion, but for other ports sellers shall arrange as far as possible for such reasonably-sized cargoes, but not exceeding 3,000 tons, as buyers desire. About one-half of the ore is to be lumps and about one-half is to be fines, viz., ore which has passed through a half-inch square mesh screen."

Clause 12, so far as material, is as follows: "The buyers are to declare in writing not later than 1st January of each year the total quantity of fines and lumps separately which they desire delivered during that year, and what quantity of each size is to be delivered at each port."

The defendants contend that there is here no duty, but a mere option on their part. If they do not declare, all that ensues is that the ore falls to be divided equally between fines and lumps. I do not agree with the defendants' view. It is not alone the proportion as between fines and lumps but the total quantity that has to be determined, i. e., the decision as to the 15 per cent. more or less. Moreover, evidence has been led, which there is no reason to disbelieve, by which it is

shown that from the sellers' point of view it is necessary to have these two matters fixed in order to settle the programme for working the mine during the ensuing year. And this yearly duty seems to me quite independent of delivery. I am therefore prepared to agree with the Court of Appeal on this ground of judgment.

As regards clauses 18 and 19, I confess I am doubtful. Clause 18 is an arbitration clause. Now, though I agree with the learned judge who says that arbitration cannot be conducted without intercourse, it seems to me that arbitration is not a necessary, nor indeed a usual, part of the performance at a time when *ex hypothesi* all deliveries under the contract are suspended. There is nothing for the time being to arbitrate about. So also as regards clause 19. This is a very special matter, providing, in the event of a Mr. Julius Ertel ceasing to be a member of the firm of Ertel, Bieber & Co., that his place in the active administration should be filled in a certain way. But Mr. Julius Ertel has not, so far as known, ceased to be a member of the firm, and active administration on the afore-mentioned hypothesis of suspended deliveries is at a standstill.

My Lords, while the construction which I put on clause 12 affords, as I have said, sufficient ground to enable me to say that the judgment of the Court of Appeal should be affirmed, it is, I think, desirable that our judgment should be also based on rather broader grounds. It is the more necessary to express an opinion on this point, because, as I shall hereafter have to say, I think the argument on clause 12 fails to be applicable in the two other cases which your Lordships will presently consider.

My Lords, I confess I cannot read clause 15 without coming to the conclusion that, although war is mentioned *eo nomine* in that clause, it is not war between Great Britain and Germany, with the legal consequences thereon ensuing, that is envisaged, but war between other powers, of whom Great Britain or Germany may be one, and which acts as a practical impediment *via facti* in stopping the possibility of delivery. But it is not necessary, in my view, to decide this question, for the simple reason that the respondents seem to me to be involved in a dilemma. Either the war which is to suspend delivery does not include a war between Great Britain and Germany, in which case the clause does not apply, or if it does mean such a war, with the legal consequences following thereon, then, in my view, the clause is void as against public policy. I apprehend that in saying this I am not inventing a new head of public policy. I respectfully subscribe to the remarks made on this subject by the Earl of Halsbury in *Janson v. Driefontein Consolidated Mines* [1902] A. C. 484, 491. I take my view of what is against public policy from what has been said in a series of cases which have certainly become the law of England.

Let me revert to the leading cases which I have already cited. The case of *The Hoop*, 1 C. Rob. 196, was a case where the goods from

an enemy country, which had been consigned to British subjects and under contract became his property, were confiscated by capture by a British ship. The contract with the enemy subject by which the property in the goods passed was made *pendente bello*. The ground of judgment was that all trading with the enemy is unlawful at common law as against public policy. Why? Not because of the terms of the particular contract, but because contract in general might enhance the resources of the enemy or cripple those of the subjects of the king.

The case of *Furtado v. Rogers*, 3 Bos. & P. 191, 198, 199, advanced the application of the rule a step further. Here the contract, which was one of insurance to indemnify for losses by war was entered into when the countries were at peace. It was held that to allow such a contract, if war meant war between the insurer's country and this country, was unlawful. The ground on which this is put is very important. "We are all of opinion," said Lord Alvanley, "that on the principles of the English law it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interests of his own country; and that such a contract is as much prohibited as if it had been expressly forbidden by act of Parliament. It is admitted that if a man contract to do a thing which is afterwards prohibited by act of Parliament, he is not bound by his contract. This was expressly laid down in *Brewster v. Kitchell*, 1 Salk. 198. And on the same principle, where hostilities commence between the country of the underwriter and the assured, the former is forbidden to fulfil his contract." He then cites a passage from Bynkershoek's *Quæstiones Juris Publici*, "*Hostium pericula in se suscipere quid est aliud quam eorum commercia maritima promovere*," and another from Valin, who, speaking of the conduct of the English during the war of 1756, who at that time permitted these insurances, said, "The consequence was, that one part of that nation restored to us by the effect of insurance what the other took from us by the rights of war." And then he goes on to deal with another argument in a way which seems to apply directly to some of the arguments used in this case. "But it is said that the action is suspended, and that the indemnity comes so late that it does not strengthen the resources of the enemy during the war. The enemy however is very little injured by captures for which he is sure at some period or other to be repaid by the underwriter."

Then came *Esposito v. Bowden*, 7 E. & B. 763, which applied the doctrine to a contract executory and as yet unfulfilled.

From these cases I draw the conclusion that upon the ground of public policy the continued existence of contractual relation between subjects and alien enemies or persons voluntarily residing in the enemy country which (1) gives opportunities for the conveyance of information which may hurt the conduct of the war, or (2) may tend to increase the resources of the enemy or cripple the resources of the king's subjects, is obnoxious and prohibited by our law. I do not quote the recent dicta of learned judges in the cases already cited of Porter

[1915] 1 K. B. 857, Robson [1915] 2 Ch. 124, and Zinc Corporation [1916] 1 K. B. 541, because, although they are to the same effect and I agree with them, the recent cases are in one sense submitted in this case to the review of your Lordships' House.

Let me now apply this rule to clause 15 on the hypothesis that it does suspend delivery during the war. But for it the contract would immediately end, by it the contract is kept alive, and that not for the purpose of making good rights already accrued, but for the purpose of securing rights in the future by the maintenance of the commercial relation in the present. It hampers the trade of the British subject, and through him the resources of the kingdom. For he cannot, in view of the certainly impending liability to deliver (for the war cannot last forever), have a free hand as he otherwise would. He must either keep a certain large stock undisposed of, and thus unavailable for the needs of the kingdom, or, if he sells the whole of the present stock, he cannot sell forward, as he would be able to do if he had not the large demand under the contract impending. It increases the resources of the enemy, for if the enemy knows that he is contractually sure of getting the supply as soon as war is over, that not only allows him to denude himself of present stocks, but it represents a present value which may be realized by means of assignation to neutral countries.

For these reasons I come to the conclusion that clause 15 is void as against public policy and cannot receive effect. Without clause 15 there is an obvious necessity for intercourse, and the contract is therefore avoided as a whole. I am of opinion that the appeal should be dismissed with costs. \* \* \* 10

#### HOARE v. ALLEN et al.

(Supreme Court of Pennsylvania, 1789. 2 Dall. 102, 1 L. Ed. 307.)

This was a scire facias on a mortgage given on the 4th of December, 1773, for securing the payment of £16,000 sterling, with interest. It was tried at Chester, nisi prius, on the 4th May, 1789, before the Chief Justice [McKean], Atlee and Bryan, Justices; when it appeared that the plaintiff was a British subject, resident in London; that Amos Strettle was his attorney in fact, at the time of the execution of the

<sup>10</sup> *Esposito v. Bowden*, cited in the text, is a leading case on the subject of trading with the enemy, in which English authorities are enumerated and analyzed. In the course of his opinion Mr. Justice Willes said:

"It is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the license of the crown, is illegal. \* \* \* As to the mode of operation of war upon contracts of affreightment, made before, but which remain unexpected at, the time it is declared, and of which it makes the further execution unlawful or impossible, the authorities establish that the effect is to dissolve the contract, and to absolve both parties from further performance of it. 7 *Ellis & Bl.*, 763, 779, 783 (1857).

mortgage and after; but it did not appear, whether he continued to act as such subsequently to the war. He resided in the State till his death, which was about ———. The question that was made in this cause was, whether interest should run during the war? \* \* \*

By THE COURT. This action is brought on a mortgage for £16,000, payable on 4th December, 1774. No suit could be brought on the mortgage before the 4th December, 1775. Before that period the war commenced, and on the 10th September, 1775, the Congress prohibited the exportation of commodities, etc., to Great Britain, or any of her dominions. This was obligatory on their constituents, and it became unlawful to make any remittances after this to the enemy. During a war all civil actions between enemies are suspended; debts are suspended also, but restored by the peace. For the term of seven and a half years, viz., from the 10th September, 1775, to the 10th March, 1783, the defendant could not have paid this money to the plaintiff, who was an alien enemy without a violation of the positive laws of this country and of the laws of nations. They ought not, therefore, to suffer for their moral conduct, and their submission to the laws.

Interest is paid for the use or forbearance of money. But in the case before us, there could be no forbearance; because the plaintiff could not enforce the payment of the principal; nor could the defendants pay him, consistent with law; nor could they pay it without going into the enemy's country, where the plaintiff was. Where a person is prevented, by law, from paying the principal, he shall not be compelled to pay interest during the prohibition, as in the case of a garnishee, in a foreign attachment.

It is urged, that a remittance in bills of exchange furnished the enemy with no money. Yet, it is clear that it would furnish the enemy with the means of carrying on the war, within the bowels of the country, without bringing any money into it. It is well known that the bills drawn by the British army were the principal bills that were bought and sold; those drawn by American citizens were generally protested.

It has been said that it might have been paid to Strettle; but that depended upon his pleasure, whether he chose to act as attorney or not.

I have searched for precedents both in the civil law, and in the books of reports; but could find none. We, therefore, determine on principle and analogy, and are unanimously of opinion, that the plaintiff is not entitled to interest from the 10th September, 1775, to 10th March, 1783; but during the rest of the time he must be allowed full interest.

The jury adopted the principles of the charge; but struck off seven and a half years' interest.<sup>11</sup>

<sup>11</sup> In the interesting case of *Foxcraft & Galloway v. Nagle*, 2 Dall. 132, 1 L. Ed. 319 (1791), it appeared that Joseph Galloway, the distinguished Ameri-

## GRISWOLD v. WADDINGTON.

(Court of Errors of New York, 1819. 16 Johns. 438.)

Before the breaking out of the war between the United States and England, in 1812, Joshua Waddington, an American citizen residing in New York, and Henry Waddington, a British subject residing in London, were partners in a commercial business. During the war, N. L. and G. Griswold had transactions with J. Waddington, in the United States. After the close of the war, the Griswolds sued to recover a balance of account arising out of those transactions; and their contention was that H. Waddington, the London partner, was liable for the debt.<sup>12</sup>

This cause came before this court, on a writ of error to the Supreme Court. S. c. 15 Johns. 57. \* \* \*

THE CHANCELLOR [KENT]. The plaintiffs sue for the balance due upon an account current stated and signed by Henry Waddington, at London, on the 1st of January, 1815. This account current is composed of mercantile transactions, arising during the year 1814, and consists, on the debit side, of cash paid, and of portage and commission charges; and on the credit side, of cash and bills received from or on behalf of the plaintiffs. This H. W. was a natural born subject of the king of Great Britain, and had not been in the United States since the year 1798; he was married and settled in London, and had a commercial establishment there; and, during the year 1814, was in great credit, and carried on very large business. The plaintiffs, on the other hand, were citizens of the United States, residing in the city of New York; and one of them, in July, 1813, went to England in the cartel ship Robert Burns, without the production and without the requisite evidence of any passport from our government. He entered himself on the ship's papers as a steward, and told a witness that he was going out in that capacity. He returned to the United States, in May or June, 1814. While in England, he was at the counting-house of H. W., and promised him to make good the balance of his account, and which was soon done by the cash credited in the account current, as of the 28th of February, 1814.

can loyalist, was with the enemy (British Army) while it was in Philadelphia, and that Nagle, the defendant, then lived within three miles of the city and might, therefore, have gone in and come out at pleasure (had such not been expressly forbidden by statute). On these facts and allegations it was held:

"By the Court: It has been frequently settled, that the debt being suspended during the war, no interest could arise upon it. \* \* \* If the plaintiffs mean to make it a point, they will have an opportunity so to do, at the return of the postea. We are all of opinion, however, that the interest during the war should be deducted; that is for seven and a half years. Verdict accordingly."

See, also, *Thomas v. Hunter*, 29 Md. 406 (1868); *Roberts v. Cocke*, 28 Grat. (Va.) 207 (1877); *McVeigh v. Bk. of Old Dominion*, 26 Grat. (Va.) 188 (1875).

<sup>12</sup> Short statement substituted for that of the report and part of the opinion is omitted.



It must be fresh in the recollection of all, that during the years 1813 and 1814, there was open war between England and the United States. The plaintiffs, therefore, on the face of their demand, admit that the contract which they now attempt to enforce, was made by them voluntarily with one of the public enemies of their country, in time of war. However, writers or judges may differ, as to the nature or kind of unlicensed intercourse, which may be tolerated or endured, in time of war, between the subjects of the hostile states, we, in this case, are relieved from the necessity of drawing distinctions. The intercourse in this case was commercial. The account current, and every part of the testimony, show that the dealing here was between commercial houses, and with commercial paper. For what this paper was originally given, is not disclosed. Some of it was British government paper, and we may well presume that these bills were the representative of commercial products, either in the shape of goods, or provisions, or other materials, which the parties have not found it convenient, or not found themselves competent to trace.

The great question, then, meets us at the very threshold of this case. Will our courts sustain a suit in favor of a citizen on his contract made with an enemy, and arising out of his commerce with the enemy in time of war?

The plaintiffs seek to charge the defendant as a partner of H. W., with whom they so dealt in 1814. They contend that the partnership which existed between the defendant and H. W., before the late war, was, in judgment of law, continued in force during the war, from the want of due notice of its dissolution, and that the defendant is chargeable for all the debts of H. W., created during the war. \* \* \*

But before we discuss the question touching the obligation of the defendant as a partner, we must determine whether the law will raise a promise, or permit the plaintiffs to recover upon an account stated with an alien enemy in war, and composed of commercial transactions had between them during the war. If I do not entirely deceive myself, it is settled, upon principles of public policy, and declared by the law of nations, by the law of England, and by the law of this country, that no such promise can be raised, and no such action can be sustained.

On the 18th of June, 1812, Congress by law declared, that war existed between the United Kingdom of Great Britain and Ireland and the United States. This was not a war confined to the two governments or bodies politic, in their political or corporate capacity. Every man is, in judgment of law, a party to the acts of his own government; and war existed between all the individuals of the one, and all the individuals of which the other nation was composed. Government is the representative of the wills of all the people. This is the theory in all governments, and the matter of fact in all free governments. The war was, therefore, declared by the united will of the people of the United States, and there can be no doubt of its being a

moral, as well as a civil duty, in every individual, to obey the law. This is the sound and fundamental principle of civil government. Every American citizen and every British subject resident in their respective countries, became, by the declaration of war, enemies to each other; and the idea that any commercial intercourse or pacific dealing could lawfully subsist between them, without the clear and express sanction of the government, is utterly inconsistent with the new class of duties growing out of a state of war. The point would appear to rest on the obvious dictates of reason, as well as the plainest deductions of public policy. If individuals could carry on a friendly intercourse while the government was at war, the act of government and the acts of individuals would be contradictory. The will of one or of a few would, as far as the example went, contravene the declared will of the whole. Such a principle is certainly the parent of disorder; it inculcates contempt of law; it throws obstacles in the way of the public efforts, and it contains within itself the germ of treason and rebellion.

But on a question of such grave and vital importance, I must beg the indulgence of the court, while I examine the authorities, in order to discover what are the correct opinions and decisions of the enlightened part of mankind. \* \* \*

I have thus given the question arising on the legality of the contract on which this suit is brought, the fullest consideration in my power; and I have arrived with entire satisfaction at the conclusion, that it is an unlawful contract, and cannot be sustained in a court of law. \* \* \*

I now conclude that, as the contract in this case was founded upon dealings during the late war, between the plaintiffs, who were resident citizens of the United States, and Henry W., who was a natural born, and a resident subject of Great Britain, it was an unlawful contract, and cannot be enforced in the courts of this country.

In this view of the subject, it becomes unnecessary to discuss the other point in the cause, whether the defendant was, or was not, a partner with Henry W. during the war. The intercourse and trading were not with him, but with the enemy partner, and he could not be bound by a contract which was null and void when made by his partner.

But as the other point was largely discussed upon the argument, and was, indeed, the only one upon which the decision of the Supreme Court was placed, and as I cannot know how far it may be deemed material by other members of this court, I feel it to be my duty to express an opinion also upon that point.

It appears to me, that the declaration of war did, of itself, work a dissolution of all commercial partnerships, existing at the time, between British subjects and American citizens. By dealing with either party, no third person could acquire a legal right against the other, because one alien enemy cannot, in that capacity, make a private contract binding upon the other. This conclusion would seem to be an

inevitable result from the new relations created by the war. It is a necessary consequence of the other proposition, that it is unlawful to have communication or trade with an enemy. To suppose a commercial partnership (such as this was) to be continued, and recognized by law as subsisting, when the same law had severed the subjects of the two countries, and declared them enemies to each other, is to suppose the law chargeable with inconsistency and absurdity. For what use or purpose could the law uphold such a connection, when all further intercourse, communication, negotiation, or dealing between the partners, was prohibited, as unlawful? Why preserve the skeleton of the firm, when the sense and spirit of it has fled, and when the execution of any one article of it by either, would be a breach of his allegiance to his country? In short, it must be obvious to every one, that a state of war creates disabilities, imposes restraints, and exacts duties altogether inconsistent with the continuance of that relation. Why does war dissolve a charter party, or a commercial contract for a particular voyage? Because, says Valin (tom. 1, p. 626), the war interposes an insurmountable obstacle to the accomplishment of the contract; and this obstacle arising from a cause beyond the control of the party, it is very natural, he observes, that the charter party should be dissolved, as of course. Why should the contract of partnership continue by law, when equally invincible obstacles are created by law to defeat it? If one alien enemy can go on and bind his hostile partner, by contracts in time of war, when the other can have no agency, consultation, or control concerning them, the law would be as unjust as it would be extravagant. The good sense of the thing as applicable to this subject, is the rule prescribed by the Roman law, that a copartnership in any business ceased, when there was an end put to the business itself. "*Item si alicujus rei societas sit, et finis negotio impositus est, finitur societas.*" Inst. 3, 26, 6.

The doctrine, that war does not interfere with private contracts, is not to be carried to an extent inconsistent with the rights of war. Suppose that H. & J. W. had entered into a contract before the war, which was to continue until 1814, by which one of them was to ship, half yearly, to London, consigned to the other, a cargo of provisions, and the other, in return, to ship to New York a cargo of goods. The war which broke out in 1812, would surely have put an end to the further operation of this contract, lawful and innocent as it was when made. No person could raise a doubt on this point; and what sanctity or magic is there in a contract of copartnership, that it must not yield to the same power?

If we examine, more particularly, the nature and objects of commercial partnerships, it would seem to be contrary to all the rules by which they are to be construed and governed, that they should continue to exist, after the parties are interdicted, by the government, from any communication with each other, and are placed in a state of absolute hostility. It is of the essence of the contract that each

party should contribute something valuable, as money, or goods, or skill and labor, on joint account, and for the common benefit; and that the object of the partnership should be lawful and honest business. Watson on Partnership, pp. 5-7; Code Civil, No. 1833; Pothier, *Traité du Contrat de Société*, No. 1, 8, 10, 11, 14; Ferrière sur Inst. 3, 26. But how can the partners have any unity of interest, or any joint object that is lawful, when their pursuits, in consequence of the war, and in consequence of the separate allegiance which each owes to his own government, must be mutually hostile? The commercial business of each country, and of all its people, is an object of attack, and of destruction to the other. One party may be engaged in privateering, or in supplying the fleets and armies of his country with provisions, or with munitions of war; and can the law recognize the other partner as having a joint interest in the profits of such business? It would be impossible for the one partner to be concerned in any commercial business, which was not auxiliary to the resources and efforts of his country in a maritime war. And shall the other partner be lawfully drawing a revenue from such employment of capital, and such personal services directed against his own country?

We cannot contemplate such a confusion of obligation between the law of partnership and the law of war, or such a conflict between his interest as a partner, and his duty as a patriot, without a mixture of astonishment and dread. Shall it be said that the partnership must be deemed to be abridged during war, to business that is altogether innoxious and harmless? But I would ask, How can we cut down a partnership in that manner without destroying it? The very object of the partnership, in this case, was, no doubt, commercial business between England and the United States, and which the hostile state of the two countries interdicted; or it may have been business in which the personal communication and advice of each partner was deemed essential, and without which the partnership would not have been formed. It is one of the principles of the law of partnership, that it is dissolved by the death of any one of its members, however numerous the association may be; and the reason is this: the personal qualities of each partner enter into the consideration of the contract, and the survivors ought not to be held bound without a new assent, when, perhaps, the character of the deceased partner was the inducement to the connection. Pothier, *Traité du Contrat de Société*, No. 146; Inst. 3, 26, 5; Vinnius, h. t. Shall we say that the partnership continues, during the war, in a quiescent state, and that the hostile partners do not share in each other's profits, made in carrying on the hostile commerce of each country? It would be then most unjust to make the party who did not share in profit to share in loss, and to be bound by the other's contracts; but if one partner does not share in profit, that alone destroys a partnership. It would be what the Roman lawyers call "*societas leonina*," in allusion to the fable of the lion, who, hav-

ing entered into a partnership with the other animals of the forest in hunting appropriated to himself all the prey. Dig. 17, 2, 29, s. 2; Pothier, *Traité du Cont. de Soc.* n. 12.

It is one of the fundamental principles of every commercial partnership, that each partner has the power to buy and sell, and pay and receive, and to contract and bind the firm. But then, again, as a necessary check to this power, each partner can interfere and stop any contract about to be made by any one of the rest. This is an elementary rule, derived from the civil law. "*In re pari potiore causam esse prohibentis constat.*" Pothier, *Traité de Cont. de Soc.* n. 90. But if the partnership continues in war between hostile associates, this salutary power is withdrawn, and each partner is left defenceless. If the law continues the connection, after it has destroyed the check, the law is then cruel and unjust.

In speaking of the dissolution of partnerships, the French and civil law writers say, that partnerships are dissolved by a change of the condition of one of the parties which disables him to perform his part of the duty, as by a loss of liberty, or banishment, or bankruptcy, or a judicial prohibition to execute his business, or by confiscation of his goods. Inst. 3. 26. s. 7. 8; Vinnius, h. t. 3. 26. 4; Huberus in Inst. lib. 3. tit. 26. s. 6; Dig. 17. 2. 65; Pothier, *Cont. de Soc.* n. 147, 148; Code Civil, No. 1865; Dict. du Dig. par Thevenot Dessauls, Art. Société, No. 56. The English law of partnership is derived from the same source; and as the cases arise, the same principles are applied. The principle here is, that when one of the parties becomes disabled to act or when the business of the association becomes impracticable, the law as well as common reason, adjudges the partnership to be dissolved.

Pothier, in his treatise on Partnership, says, that every partnership is dissolved by the extinction of the business for which it was formed. This he illustrates, in his usual manner, by a number of easy and familiar examples.

Thus, if a partnership be formed between two or more persons, for bringing together, and selling on joint account, the produce of their farms, or of their live stock, and the produce or the stock of one of them should happen to fail, or be destroyed, the partnership ceases of course, for there can be no longer any partnership, when one has nothing to contribute. So, if two persons form a partnership in a particular business, and the one engages to furnish capital, or the raw materials, and the other his skill and labor, and the latter becomes disabled by the palsy, the partnership is extinguished, because the object of the partnership cannot be fulfilled. So, again, if two or more persons form a partnership to buy and sell goods at a particular place, the partnership is dissolved, whenever the business is terminated. Pothier, *Traité du Cont. de Soc.* No. 140-143. "*Extincto subjecto, tollitur adiunctum,*" is the observation of Huberus, when speaking on this very point.

We can easily perceive with what force their doctrines apply to this case, for a partnership, formed between alien friends, must at once be defeated, when they become alien enemies. They can no more assist each other than if they were palsied in their limbs, or bereft of their understandings, by the visitation of Providence. I have selected these principles of partnership from the treatise of Pothier, because his reputation and great authority are known in this country. He has treated of the law of partnership, as he has of other civil contracts, with a clearness of perception, a precision of style, and a fullness of illustration, above all praise, and beyond all example. If it should be asked, Why is Pothier silent, like the English law, concerning the effect of war on a partnership between the subjects of the two belligerent states? The answer may be given, that the possibility of such a question never could have occurred to a French lawyer, since it has been the law of France, for ages, that all intercourse, communication and commerce, between the subjects of France and her enemies, was prohibited, upon pain of death.

A good deal of stress was laid by the counsel for the plaintiffs, upon the affidavit of the defendant, made on the 9th of March, 1813, in which he speaks of the firms of J., W. & Co. and of H. W. & Co., as then existing. But I think, that the criticism is susceptible of a satisfactory explanation.

Mr. Ogden, who drew the affidavit, says, that he had no particular instructions from the defendant, and that his attention was called to the persons composing the firms, in relation only to the subject-matter of the petition. It is, therefore, exceedingly probable, that the attention of the party in making the affidavit, was not specially drawn to the fact of the continuance of the partnership down to that day, because that was not a point material to the object of the petition. Those who are obliged to examine long complicated bills and answers upon oath, cannot but know, that we are to look to the object and purport of the pleading, and are not to hold responsible the conscience of the party, for a mistake or error, (perhaps in grammatical expression,) in some immaterial part of the document. There is no doubt, that here was, upon the construction of the affidavit, a mistake in point of fact. The partnership of H. W. & Co. did not continue, in the common meaning of the term, down to the 9th of March; for, by the letter of H. W. of the 9th of January preceding, he speaks of the actual dissolution of the partnership, and says, that "a proper line was struck in the books and cash, and that the defendant was no longer interested in any losses or profits on that side."

There is another circumstance in the case that is important. The goods imported were by the firm of J. W. & Co., and the firm of H. W. & Co. was a distinct one, not consisting of the same persons, and had no concern with that shipment. The mention of the firm of H. W. & Co. (and which is the only firm involved in the present case) was alto-

gether unnecessary in the affidavit, and was mere surplusage. How unreasonable, then, would it be, to draw an unfavorable inference against the rights of a party, from such a mistake in an immaterial part of a paper? But in another sense, and, indeed, in the true sense, in respect to the object of the petition and affidavit, the assertion was true, and a partnership was then existing. The parties were still partners as to those goods which had been actually purchased by them before the war, and the parties, as partners, were bound to account to each other for the proceeds of those goods, and equally bound, as partners, to pay for them, if not already paid for. A dissolution of a partnership only has respect to the future. The parties remain bound for all antecedent engagements. The partnership may be said to continue as to every thing that is past, and until all pre-existing matters are wound up and settled. In *Wood v. Bradick*, 1 Taunt. 104, it was observed by one of the judges, that when a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future. With regard to things past, the partnership continues, and always must continue. In reference, therefore, to the subject to which the affidavit applied, they were still partners, bound to account, and bound to pay, as partners, for that shipment.

And after all, what has the intention of the defendant to do with the question before us? If the law holds all partnerships in war between the subjects of the hostile states unlawful, it was not in the power of the parties to create, or to continue, a partnership, in defiance of law. Suppose two or more persons enter into a partnership, or convert an old partnership to unlawful purposes, as, for instance, to carry on a contraband trade, or to commit piratical depredations, under some Mexican flag, would the law regard such an association? Nothing can be plainer than the proposition, that if parties could not lawfully form, or carry on commercial business together, during the war, every agreement for such a purpose would be null and void.

Another objection was raised, from the want of notice of the dissolution of the partnership. The answer to this is extremely easy, and perfectly conclusive. Notice is requisite when a partnership is dissolved by the act of the parties, but it is not necessary when the dissolution takes place by the act of the law. The declaration of war, from the time it was duly made known to the nations, put an end to all future dealings between the subjects and citizens of the two countries, and, consequently, to the future operation of the copartnership in question. The declaration of war was, of itself, the most authentic and monitory notice. Any other notice, in a case like this, between two public enemies, who had each his domicile in his own country, would have been useless. All mankind were bound to take notice of the war, and of its consequence. The notice, if given, could only be given by each partner in his own country; and there it would be useless, as his countrymen could not hold any lawful intercourse with the enemy. It

could not be given as a joint act, for the partners cannot lawfully commune together.

But it was said that the peace had a healing influence, and restored the parties to all their rights, and arrested all confiscations, and forfeitures, which had not previously and duly attached. I do not know that I differ from the counsel in any just application of this doctrine. As far as the war suspended the right of action existing in the adverse party prior to the war, that right revived; but if the contract in this case was unlawful, peace could not revive it, for it never had any legal existence. So, too, the copartnership being once dissolved by the war, it was extinguished forever, except as to matters existing prior to the war.

There are no cases in the English books exactly in point, because the case of the validity of an existing partnership between the subjects of two belligerent powers, does not appear ever to have been raised. The presumption, I think, is that it has been deemed too difficult a proposition to be even hazarded. As far as any connection with the enemy, by any contrivance, or under any cloak or pretension, has been discovered, the courts in England, and in this country, have been sharp and vigilant to detect and to punish it. Thus, in the case of *The Vigilantia*, 1 Rob. 1, it was decided, that if a person concerned in a house of trade, in an enemy's country, in time of war, he shall not protect himself by mere residence in a neutral country. The traffic stamps a national character on the individual. So, though the managing partner resided in a neutral country, yet the property belonging to the partners in England, was, by the English admiralty, condemned, because the transaction was, as to them, illegal, though it was done without their immediate privity or direction. Case of the *Sampsons*, cited in the case of *The Franklin*, 6 Rob. 127. So, where a trade was carried on with the enemy by a house composed partly of neutrals, and partly of British subjects, Sir Wm. Scott held (*The Franklin*, 6 Rob. 127) that the sleeping British partner could not be lawfully concerned in a transaction, in which he could not be engaged as a sole trader. He could not do by a partner or agent, what he could not do by himself. In short, it is already settled, that a subject of one belligerent cannot be concerned in any commercial establishment among the subjects of the other, without being deemed an enemy, in reference to such a concern. Nor can he be concerned in any such trade, indirectly or circuitously, through the intervention of a neutral port, or through the agency of third persons. *The Jonge Pieter*, 4 Rob. 79; *The Samuel*, 4 Rob. 284; *The Rugen*, 1 Wheat. 74, 4 L. Ed. 37. And to avoid all imposition or difficulty, as to the national character of a party, it is settled, that the domicil, or fixed residence, of the party at the commencement of the war, determines his character for the war. *The Venus*, 8 Cranch, 253, 3 L. Ed. 553; *The Indian Chief*, 3 Rob. 26. It appears, also, to have been very recently decided by the Supreme Court



of the United States (if we may rely on the information just received),<sup>13</sup> that if a house of trade be established in the enemy's country, and one of the partners resides in a neutral country, his share, as well as that of his copartner, resident in the enemy's country, is liable to condemnation, as prize of war.

These cases lead us to the conclusion, that the defendant could not have any concern whatever, directly or indirectly, in any trade or commerce of H. W. during the war, without involving his property in the penalty of an illicit connection. How is it possible, then, that any partnership could legally subsist? If the partnership property of one partner be subject to capture by the other partner, and if the joint property be subject to capture by the subjects of either power, nothing can place in a more striking light the absurdity, as well as illegality, of any partnership between two belligerents in time of war.

Having thus endeavored to show the law to be settled, that the contract in this case, made with H. W. was unlawful, and, consequently, not binding on the defendant, even if he had been a partner; and it also appearing to me, that the partnership existing before the war, was, from reason and necessity, dissolved by the act of war, it follows, that, upon either ground the judgment of the Supreme Court ought to be affirmed. \* \* \*<sup>14</sup>

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#### HANGER v. ABBOTT.

(Supreme Court of the United States, 1867. 6 Wall. 532, 18 L. Ed. 939.)

Error to the Circuit Court for the Eastern District of Arkansas.

J. & E. Abbott, of New Hampshire, sued Hanger, of Arkansas, in assumpsit. The latter pleaded the statute of limitations of Arkansas, which limits such action to three years. The former replied the rebellion, which broke out after the cause of action accrued, and closed for more than three years all lawful courts. On demurrer, and judgment against it, and error to this court, the question here was, simply, whether the time during which the courts in Arkansas were closed on account of the rebellion, was to be excluded from the computation of time fixed by the Arkansas statute of limitations within which suits on contracts were to be brought, there being no exception by the terms of the statute itself for any such case.<sup>15</sup> \* \* \*

Mr. Justice CLIFFORD delivered the opinion of the court.

The declaration was in assumpsit, and the plaintiffs alleged that the defendant, on the tenth day of April, 1865, was indebted to them

<sup>13</sup> The case here alluded to, is that of the *Friendschaft*, decided February 25, 1819, and since reported. 4 Wheat. 106, 4 L. Ed. 525.

<sup>14</sup> In *Matthews v. McStea*, 91 U. S. 7, 23 L. Ed. 188 (1875), the question of the effect of war on a partnership was considered, and it was held that under the circumstances of this case, the partnership was not dissolved.

<sup>15</sup> Only selected extracts are given from the opinion of the learned justice.

for divers goods, wares, and merchandise, and also for money had and received, in the sum of ten thousand dollars. \* \* \*

Proclamation of blockade was made by the President on the nineteenth day of April, 1861, and, on the thirteenth day of July, in the same year, Congress passed a law authorizing the President to interdict all trade and intercourse between the inhabitants of the States in insurrection and the rest of the United States. 12 Stat. at Large, 1258, 257.

War, when duly declared or recognized as such by the war-making power, imports a prohibition to the subjects, or citizens, of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country.<sup>16</sup> Upon this principle of public law it is the established rule in all commercial nations, that trading with the enemy, except under a government license, subjects the property to confiscation, or to capture and condemnation.<sup>17</sup>

Partnership with a foreigner is dissolved by the same event which makes him an alien enemy, because there is in that case an utter incompatibility created by operation of law between the partners as to their respective rights, duties, and obligations, both public and private, which necessarily dissolves the relation, independent of the will or acts of the parties.<sup>18</sup> Direct consequence of the rule as established in those cases is, that as soon as war is commenced all trading, negotiation, communication, and intercourse between the citizens of one of the belligerents with those of the other, without the permission of the government, is unlawful. No valid contract, therefore, can be made, nor can any promise arise by implication of law, from any transaction with an enemy. Exceptions to the rule are not admitted; and even after the war has terminated, the defendant, in an action founded upon a contract made in violation of that prohibition, may set up the illegality of the transaction as a defence.<sup>19</sup> \* \* \*

Executory contracts also with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are dissolved by the declaration of war, which operates for that purpose with a force equivalent to an act of Congress. *Esposito v. Bowden*, 4 El. & Bl. 963; same case, 7 El. & Bl. 778.

In former times the right to confiscate debts was admitted as an acknowledged doctrine of the law of nations, and in strictness it may still be said to exist, but it may well be considered as a naked and im-

<sup>16</sup> *The William Bagaley*, 5 Wall. 406, 18 L. Ed. 583 (1866); *Jecker et al. v. Montgomery*, 18 How. 111, 15 L. Ed. 311 (1855); *Wheaton on Maritime Captures*, 209.

<sup>17</sup> *The Rapid*, 8 Oranch, 155, 3 L. Ed. 520 (1814); *The Hoop*, 1 Rob. 196 (1799).

<sup>18</sup> *MacLachlan on Shipping*, 475; *Story on Partnership*, § 316; *Griswold v. Waddington*, 15 Johns. (N. Y.) 57 (1818); *Id.* 16 Johns. (N. Y.) 438 (1819).

<sup>19</sup> *Williamson v. Patterson*, 7 Taunton, 439.

politic right, condemned by the enlightened conscience and judgment of modern times.<sup>20</sup> Better opinion is that executed contracts, such as the debt in this case, although existing prior to the war, are not annulled or extinguished, but the remedy is only suspended, which is a necessary conclusion, on account of the inability of an alien enemy to sue or to sustain, in the language of the civilians, a *persona standi in judicio*. 1 Kent's Com. (11 Ed.) 76; *Flint v. Waters*, 15 East, 260.

Trading, which supposes the making of contracts, and which also involves the necessity of intercourse and correspondence, is necessarily contradictory to a state of war, but there is no exigency in war which requires that belligerents should confiscate or annul the debts due by the citizens of the other contending party. \* \* \*

Under the thirty-fourth section of the Judiciary Act, the statutes of limitations of the several states, where no special provision has been made by Congress, form the rule of decision in the courts of the United States, and the same effect is given to them as is given in the courts of the state.<sup>21</sup> \* \* \*

When our ancestors immigrated here, they brought with them the statute of 21 Jac. I, c. 16, entitled "An act for limitation of actions, and for avoiding of suits in law," known as the statute of limitations. \* \* \*

Persons within the age of twenty-one years, *femes covert*, non compos mentis, persons imprisoned or beyond the seas, were excepted out of the operation of the third section of the act, and were allowed the same period of time after such disability was removed. Just exceptions indeed are to be found in all such statutes, but when examined it will appear that they were framed to prevent injustice and never to encourage laches or to promote negligence. Cases where the courts of justice are closed in consequence of insurrection or rebellion are not within the express terms of any such exception, but the statute of limitations was passed in 1623, more than a century before it came to be understood that debts due to alien enemies were not subject to confiscation. Down to 1737, says Chancellor Kent, the opinion of jurists was in favor of the right to confiscate, and many maintained that such debts were annulled by the declaration of war. Regarding such debts as annulled by war, the law-makers of that day never thought of making provision for the collection of the same on the restoration of peace between the belligerents. Commerce and civilization have wrought great changes in the spirit of nations touching the conduct of war, and in respect to the principles of international law applicable to the subject.

Constant usage and practice of belligerent nations from the earliest time subjected enemy's goods in neutral vessels to capture and con-

<sup>20</sup> Kent's Com. (11th Ed.) 73.

<sup>21</sup> Angell on Limitations, § 24; *McCluny v. Silliman*, 3 Pet. 270, 7 L. Ed. 676 (1830); *Bank of United States v. Daniel*, 12 Pet. 82, 9 L. Ed. 989 (1838); *Porterfield v. Clark*, 2 How. 125, 11 L. Ed. 185 (1844).

demnation as prize of war, but the maxim is now universally acknowledged that "free ships make free goods" which is another victory of commerce over the feelings of avarice and revenge. Individual debts, as a general remark, are no longer the subject of confiscation, and the rule is universally admitted that if not confiscated during the war, the return of peace brings with it both "the right and the remedy." Wolff v. Oxholm, 6 Maule & Selwyn, 92. \* \* \*

Old decisions, made when the rule of law was that war annulled all debts between the subjects of the belligerents, are entitled to but little weight, even if it is safe to assume that they are correctly reported, of which, in respect to the leading case of *Prideaux v. Webber*, 1 Levinz, 31, there is much doubt. *Miller v. Prideaux*, 1 Keble, 157; *Lee v. Rogers*, 1 Levinz, 110; *Hall v. Wybourne*, 2 Salkeld, 420; *Aubrey v. Fortescue*, 10 Modern, 205, are of the same class, and to the same effect. All of those decisions were made between parties who were citizens of the same jurisdiction, and most of them were made nearly a hundred years before the international rule was acknowledged, that war only suspended debts due to an enemy, and that peace had the effect to restore the remedy. The rule of the present day is, that debts existing prior to the war, but which made no part of the reasons for undertaking it, remain entire, and the remedies are revived with the restoration of peace.<sup>22</sup> \* \* \*

Text writers usually say, on the authority of the old cases referred to, that the non-existence of courts, or their being shut, is no answer to the bar of the statute of limitations, but Plowden says that things happening by an invincible necessity, though they be against common law, or an act of Parliament, shall not be prejudicial, that, therefore, to say that the courts were shut, is a good excuse on voucher of record. Exceptions not mentioned in the statutes have sometimes been admitted, and this court held that the time which elapsed while certain prior proceedings were suspended by appeal, should be deducted, as it appeared that the injured party in the meantime had no right to demand his money, or to sue for the recovery of the same; and in view of those circumstances, the court decided that his right of action had not accrued so as to bar it, although not commenced within six years. *Montgomery v. Hernandez*, 12 Wheat. 129, 6 L. Ed. 575.

But the exception set up in this case stands upon much more solid reasons, as the right to sue was suspended by the acts of the government, for which all the citizens are responsible. Unless the rule be so, then the citizens of a state may pay their debts by entering into an insurrection or rebellion against the government of the Union, if they are able to close the courts, and to successfully resist the laws, until the bar of the statute becomes complete, which cannot for a moment be admitted. Peace restores the right and the remedy, and as that cannot be if the limitation continues to run during the period

<sup>22</sup> 1 Kent's Com. (11th Ed.) 169; Grotius, B. 3, c. 20, §§ 16-18.

the creditor is rendered incapable to sue; it necessarily follows that the operation of the statute is also suspended during the same period. \* \* \*

Judgment affirmed with costs.

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NEW YORK LIFE INSURANCE CO. v. STATHAM et al.

SAME v. SEYMS.

MANHATTAN LIFE INSURANCE CO. v. BUCK, Executor.

(Supreme Court of the United States, 1876. 93 U. S. 24, 23 L. Ed. 789.)

The first of these cases is here on appeal from, and the second and third on writs of error to, the Circuit Court of the United States for the Southern District of Mississippi.

The first case is a bill in equity, filed to recover the amount of a policy of life assurance, granted by the defendant (now appellant) in 1851, on the life of Dr. A. D. Statham, of Mississippi, from the proceeds of certain funds belonging to the defendant attached in the hands of its agent at Jackson, in that state. It appears from the statements of the bill that the annual premiums accruing on the policy were all regularly paid, until the breaking out of the late civil war, but that, in consequence of that event, the premium due on the 8th of December, 1861, was not paid; the parties assured being residents of Mississippi, and the defendant a corporation of New York. Dr. Statham died in July, 1862. \* \* \* [The other cases are similar.]

Each policy contained various conditions, upon the breach of which it was to be null and void; and amongst others the following: "That in case the said [assured] shall not pay the said premium on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or in any part thereof, and this policy shall cease and determine." The Manhattan policy contained the additional provision, that, in every case where the policy should cease or become null and void, all previous payments made thereon should be forfeited to the company.

The non-payment of the premiums in arrear was set up in bar of the actions; and the plaintiffs respectively relied on the existence of the war as an excuse, offering to deduct the premiums in arrear from the amounts of the policies.<sup>22</sup>

The decree and judgments below were against the defendants. \* \* \*

Mr. Justice BRADLEY, after stating the case, delivered the opinion of the court.

<sup>22</sup> The statement of facts is shortened and part of the opinion is omitted.

We agree with the court below, that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. \* \* \* Each instalment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread over the whole life. \* \* \*

The case, therefore, is one in which time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here. Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence.

But the court below bases its decision on the assumption that, when performance of the condition becomes illegal in consequence of the prevalence of public war, it is excused, and forfeiture does not ensue. It supposes the contract to have been suspended during the war, and to have revived with all its force when the war ended. Such a suspension and revival do take place in the case of ordinary debts. But have they ever been known to take place in the case of executory contracts in which time is material? If a Texas merchant had contracted to furnish some Northern explorer a thousand cans of preserved meat by a certain day, so as to be ready for his departure for the North Pole, and was prevented from furnishing it by the civil war, would the contract still be good at the close of the war five years afterwards, and after the return of the expedition? If the proprietor of a Tennessee quarry had agreed, in 1860, to furnish, during the two following years, ten thousand cubic feet of marble, for the construction of a building in Cincinnati, could he have claimed to perform the contract in 1865, on the ground that the war prevented an earlier performance?

The truth is, that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive.

In the case of life insurance, besides the materiality of time in the performance of the contract, another strong reason exists why the policy should not be revived. The parties do not stand on equal ground in reference to such a revival. It would operate most unjustly against the company. The business of insurance is founded on the law of averages; that of life insurance eminently so. The average rate of mortality is the basis on which it rests. By spreading their risks over a large number of cases, the companies calculate on this average with reasonable certainty and safety. Anything that interferes with it deranges the security of the business. If every policy lapsed by reason of the war should be revived, and all the back pre-

miums should be paid, the companies would have the benefit of this average amount of risk. But the good risks are never heard from; only the bad are sought to be revived, where the person insured is either dead or dying. Those in health can get new policies cheaper than to pay arrearages on the old. To enforce a revival of the bad cases, whilst the company necessarily lose the cases, which are desirable, would be manifestly unjust. An injured person, as before stated, does not stand isolated and alone. His case is connected with and correlated to the cases of all others insured by the same company. The nature of the business, as a whole, must be looked at to understand the general equities of the parties.

We are of opinion, therefore, that an action cannot be maintained for the amount assured on a policy of life-insurance forfeited, like those in question, by non-payment of the premium, even though the payment was prevented by the existence of the war.

The question then arises, Must the insured lose all the money which has been paid for premiums on their respective policies? If they must, they will sustain an equal injustice to that which the companies would sustain by reviving the policies. At the very first blush, it seems manifest that justice requires that they should have some compensation or return for the money already paid, otherwise the companies would be the gainers from their loss; and that from a cause for which neither party is to blame. The case may be illustrated thus: Suppose an inhabitant of Georgia had bargained for a house, situated in a Northern city, to be paid for by instalments, and no title to be made until all the instalments were paid, with a condition that on the failure to pay any of the instalments when due, the contract should be at an end, and the previous payments forfeited; and suppose that this condition was declared by the parties to be absolute and the time of payment material. Now, if some of the instalments were paid before the war, and others accruing during the war were not paid, the contract, as an executory one, was at an end. If the necessities of the vendor obliged him to avail himself of the condition, and to resell the property to another party, would it be just for him to retain the money he had received? Perhaps it might be just if the failure to pay had been voluntary, or could by possibility, have been avoided. But it was caused by an event beyond the control of either party,—an event which made it unlawful to pay. In such case, whilst it would be unjust, after the war, to enforce the contract as an executory one against the vendor contrary to his will, it would be equally unjust in him, treating it as ended, to insist upon the forfeiture of the money already paid on it. An equitable right to some compensation or return for previous payments would clearly result from the circumstances of the case. The money paid by the purchaser, subject to the value of any possession which he may have enjoyed, should, *ex æquo et bono*, be returned to him. This would clearly be demanded by justice and right.

And so, in the present case, whilst the insurance company has a right to insist on the materiality of time in the condition of payment of premiums, and to hold the contract ended by reason of non-payment, they cannot with any fairness insist upon the condition, as it regards the forfeiture of the premiums already paid; that would be clearly unjust and inequitable. The insured has an equitable right to have this amount restored to him, subject to a deduction for the value of the assurance enjoyed by him whilst the policy was in existence; in other words, he is fairly entitled to have the equitable value of his policy. \* \* \*

We are of opinion, therefore, first, that as the companies elected to insist upon the condition in these cases, the policies in question must be regarded as extinguished by the non-payment of the premiums, though caused by the existence of the war, and that an action will not lie for the amount insured thereon.

Secondly, that such failure being caused by a public war, without the fault of the assured, they are entitled *ex œquo et bono* to recover the equitable value of the policies with interest from the close of the war. \* \* \*

In estimating the equitable value of a policy, no deduction should be made from the precise amount which the calculations give, as is sometimes done where policies are voluntarily surrendered, for the purpose of discouraging such surrenders; and the value should be taken as of the day when the first default occurred in the payment of the premium by which the policy became forfeited. In each case the rates of mortality and interest used in the tables of the company will form the basis of the calculation.

The decree in the equity suit and the judgments in the actions at law are reversed, and the causes respectively remanded to be proceeded with according to law and the directions of this opinion. \* \* \*

Mr. Justice CLIFFORD, with whom concurred Mr. Justice HUNT, dissenting:

Where the parties to an executory money-contract live in different countries, and the governments of those countries become involved in public war with each other, the contract between such parties is suspended during the existence of the war, and revives when peace ensues; and that rule, in my judgment, is as applicable to the contract of life-insurance as to any other executory contract. Consequently, I am obliged to dissent from the opinion and judgment of the court in these cases.<sup>24</sup>

<sup>24</sup> In *New York Life Ins. Co. v. Davis*, 95 U. S. 425, 433, 24 L. Ed. 453 (1877), the facts were the same, except that the Insurance Company had an agent in the Confederacy to whom the insured, a major in the Confederate service, vainly tendered the premium as it fell due. Under the circumstances, the court, following the principal decision, said per Mr. Justice Bradley:

"We do not mean to say that, if the defendant had continued its authority to the agent to act in the receipt of premiums during the war, and he had done so, a payment or tender to him in lawful money of the United States



would not have been valid; nor that a stipulation to continue such authority in case of war, made before its occurrence, would not have been a valid stipulation; nor that a policy of life insurance on which no premiums were to be paid, though suspended during the war, might not have revived after its close. We place our decision simply on the ground that the agency of Garland was terminated by the breaking out of the war, and that, although by the consent of the parties it might have been continued for the purpose of receiving payments of premiums during the war, there is no proof that such assent was given, either by the defendant or by Garland; but that, on the contrary, the proof is positive and uncontradicted, that Garland declined to act as agent."

In the course of its opinion, the court considered and approved as authorities for payment to agents in an enemy's country: *Conn v. Penn.*, Pet. C. C. 496, Fed. Cas. No. 3,104 (1818), the leading authority; *Denniston v. Imbrie*, 3 Wash. C. C. 398, Fed. Cas. No. 3,802 (1818); *Buchanan v. Curry*, 19 Johns. 137, 10 Am. Dec. 200 (1821); *Ward v. Smith*, 7 Wall. 447, 19 L. Ed. 207 (1868); *Brown v. Hiatts*, 15 Wall. 177, 21 L. Ed. 128 (1872); *Montgomery v. U. S.*, 15 Wall. 395, 21 L. Ed. 97 (1872); *Fretz v. Stover*, 22 Wall. 198, 22 L. Ed. 769 (1874).

In regard to the influence of war on life insurance policies it may be said that three essentially distinct views have been held by courts of last resort, and reference is made to *Abell v. Penn. Mutual Life Ins. Co.*, 18 W. Va. 400, 423-435 (1881), for their enumeration, and criticism of the authorities cited.

In *Semmes v. Hartford Ins. Co.*, 13 Wall. 158, 20 L. Ed. 490 (1871), the action was upon a policy of fire insurance containing the express stipulation that no suit should be sustainable thereunder unless brought within twelve months after the loss or damage occurred. The Civil War broke out during the twelve months within which the suit should and no doubt would have been brought. As it was impossible to bring suit during the war, this condition was not performed. It was held by the court that the condition was entire and not divisible; that as performance became impossible by operation of law, the assured was entirely released from the obligation of bringing suit within the twelve months; that the action could, therefore, be maintained at any time within the statute of limitations. In other words, war suspends but does not extinguish conditions of a contract, so that on the return of peace the entire conventional stipulation as regards time revives as of right. In case of a statutory limitation within which the suit may or must be brought, the period during which the courts were closed by reason of war is deducted and the plaintiff is given the balance of time to bring the action which the war prevented him from doing. See *Wambaugh, A Selection of Cases on Insurance* (1902) 651, note, for an exhaustive citation of adjudged cases.

## CHAPTER VII

### INTERCOURSE BETWEEN BELLIGERENTS

#### SECTION 1.—GENERAL PROHIBITION<sup>1</sup>

##### THE HOOP.

(High Court of Admiralty, 1799. 1 C. Rob. 196.)

This was a case of a claim of several British merchants for goods purchased on their account in Holland, and shipped on board a neutral vessel.

The affidavit annexed to the claim set forth, that Mr. Malcolm of Glasgow, and several other merchants of North Britain, had, long prior to hostilities, been used to trade extensively with Holland, in the importation of various articles of the produce of Holland, which were particularly wanted for the use of Glasgow, and essentially necessary to the agriculture and manufacture of that part of the kingdom; that, after the irruption of the French into Holland, they had constantly applied for, and obtained special orders of his majesty in council, permitting them to continue that trade; that after the passing of the acts of Parliament, 35 Geo. III, c. 15,<sup>2</sup> and 80; 36 Geo.

<sup>1</sup> In *Small's Adm'r v. Lumpkin's Ex'x et al.*, 28 Grat. 832, 834, 835 (1877), decided by the Court of Appeals of Virginia in 1877, Judge Burks said:

"In a foreign or international war, from the time it is declared or recognized, all the people in the territory and subject to the dominion of each belligerent, without regard to their feelings, dispositions or natural relations, become, in legal contemplation, and so continue to the close of hostilities, the enemies of all the people resident in the territory of the other belligerent; and all negotiation, trading, intercourse or communication between them, unless licensed by the government, is unlawful. Such a war, as between the citizens or subjects of the respective belligerents, ipso facto dissolves all commercial partnerships, and all contracts wholly executory and requiring for their continued existence commercial intercourse or communication; and while it does not abrogate, yet it suspends all other existing contracts and obligations and the remedies thereon, and renders all contracts, with rare exceptions, entered into pending hostilities, illegal and void.

"These familiar principles of public law, regulating conduct in foreign wars, have been applied by the courts of this country, state and federal, to the late war between the United States and the Confederate States. *Griswold v. Waddington*, 16 Johns. (N. Y.) 438 [1819]; *Prize Cases*, 2 Black's U. S. 635, Fed. Cas. No. 18,283 [1862]; *Mrs. Alexander's Cotton*, 2 Wall. (U. S.) 404, 17 L. Ed. 915 [1864]; *The William Bagaley*, 5 Wall. (U. S.) 377, 18 L. Ed. 583 [1866]; *Hanger v. Abbott*, 6 Wall. (U. S.) 532, 18 L. Ed. 939 [1867]; *Matthews v. McStea*, 91 U. S. 7, 23 L. Ed. 188 [1875]; *Billgerry v. Branch & Sons*, 19 Grat. (Va.) 393, 100 Am. Dec. 679 [1869]; *Walker v. Beauchler*, 27 Grat. (Va.) 511 [1876]."

<sup>2</sup> The 35 Geo. III, c. 15 (16th March 1795), reciting and confirming the Orders of Council of the 16th and 21st of January (which allowed goods

III, c. 76; 37 Geo. III, c. 12, confirming and continuing the orders of council of the 16th and 21st January, it was apprehended in that part of Great Britain, that by these acts the importation of such goods was made legal. But for the greater security, they still made application to the commissioners of customs at Glasgow, to know what they considered to be the interpretation of the said acts, and whether his majesty's license was still necessary; and that in answer to such application, the merchants were informed, under the opinion of the law advisers of the said commissioners, that no such orders of council were necessary, and that all goods brought from the United Provinces, would in future be entered without them; and that in consequence of such information, they had caused the goods in question to be shipped at Rotterdam for their account; ostensibly documented for Bergen to avoid the enemy's cruisers.

Sir W. SCOTT.<sup>3</sup> This is the case of a ship, laden with flax, madder, geneva, and cheese, and bound from Rotterdam ostensibly to Bergen; but she was in truth coming to a British port, and took a destination to Bergen to deceive French cruisers; and as the claim discloses (of which I see no reason to doubt the truth), the goods were to be imported on account of British merchants, being most of them articles of considerable use in the manufactures and commerce of this country, and being brought under an assurance from the commissioners of the customs in Scotland that they might be lawfully imported without any license, by virtue of the statute 35 Geo. III, cc. 15 and 80.

It is said that these circumstances compose a case entitled to great indulgence; and I do not deny it. But if there is a rule of law on the subject binding the court, I must follow where that rule leads me; though it leads to consequences which I may privately regret, when I look to the particular intentions of the parties.

In my opinion there exists such a general rule in the maritime jurisprudence of this country, by which all trading with the public enemy, unless with the permission of the sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoek as an universal principle of law. "*Ex natura belli commercia inter hostes cessare non est dubitandum. Quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsæ indictiones bellorum satis declarant,*" etc. He proceeds to observe, that the interests of trade, and the necessity of

coming to ports of this kingdom directly from any port of Holland, and navigated in any manner, to be landed and secured in warehouses for the use of the proprietors till farther orders), enacts, that it shall be lawful to import such goods belonging to subjects of the United Provinces, or to any who were subjects before the 19th of January, 1795, or to any subject of his Majesty, to be landed and secured in warehouses for the benefit of the proprietor, and for the security of the revenue. The subsequent acts contain further regulations for property coming from Holland, in the ambiguous situation of the two countries at that time.

<sup>3</sup> Parts of the opinion are omitted.

obtaining certain commodities have sometimes so far overpowered this rule, that different species of traffic have been permitted, "*prout e re sua, subditorumque suorum esse censent principes.*" Bynk. Q. J. P. bk. 1, c. 3. But it is in all cases the act and permission of the sovereign. Wherever that is permitted, it is a suspension of the state of war *quo ad hoc*. It is, as he expresses it, "*pro parte sic bellum, pro parte pax inter subditos utriusque principes.*" It appears from these passages to have been the law of Holland; Valin, l. iii., tit. 6, art. 3, states it to have been the law of France, whether the trade was attempted to be carried on in national or in neutral vessels. It will appear from a case which I shall have occasion to mention, *The Fortuna*, to have been the law of Spain; and it may, I think, without rashness be affirmed to have been a general principle of law in most of the countries of Europe.

By the law and constitution of this country, the sovereign alone has the power of declaring war and peace. He alone therefore who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient. But it is not for individuals to determine on the expediency of such occasions on their own notions of commerce, and of commerce merely, and possibly on grounds of private advantage not very reconcilable with the general interest of the state. It is for the state alone, on more enlarged views of policy, and of all circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. In my opinion, no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the state. Who can be insensible to the consequences that might follow, if every person in a time of war had a right to carry on a commercial intercourse with the enemy, and under color of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them (if necessary) under the eye and control of the government, charged with the care of the public safety?

Another principle of law, of a less politic nature, but equally general in its reception and direct in its application, forbids this sort of communication as fundamentally inconsistent with the relation at that time existing between the two countries; and that is, the total inability to sustain any contract by an appeal to the tribunals of the one country, on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain in the language of the civilians a *persona standi in judicio*. The peculiar law of our own country applies this principle with

great rigor. The same principle is received in our courts of the law of nations; they are so far British courts, that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice*. But otherwise he is totally *ex lex*; even in the case of ransoms which were contracts, but contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill; but the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country, for the recovery of his freedom. A state in which contracts cannot be enforced, cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction; they have no legal existence; and the whole of such commerce is attempted without its protection and against its authority. Bynkershoek expresses himself with great force upon this argument in his first book, chapter 7, where he lays down that the legality of commerce and the mutual use of courts of justice are inseparable. He says, that cases of commerce are undistinguishable from cases of any other species in this respect. "*Si hosti semel permittas actiones exercere, difficile est distinguere ex quâ causâ oriantur, nec potui animadvertere illam distinctionem unquam usu fuisse servatam.*"

Upon these and similar grounds it has been the established rule of law of this court, confirmed by the judgment of the Supreme Court, that a trading with the enemy, except under a royal license, subjects the property to confiscation; and the most eminent persons of the law sitting in the Supreme Courts have uniformly sustained such judgments. \* \* \*

I omit many other cases of the last and the present war merely on this ground that the rule is so firmly established, that no one case exists which has been permitted to contravene it—for I take upon me to aver, that all cases of this kind which have come before that tribunal have received an uniform determination. The cases which I have produced, prove that the rule has been rigidly enforced. Where acts

\* In support of this rule Sir W. Scott reviews a large number of cases decided on appeal by the Lords of Appeal. These cases are the following: The *Ringende Jacob* (1750); The *Lady Jane* (1749); *Deergaden* (1747); The *Elizabeth* (1749); The *Juffrow Louisa Margaretha* (1781); The *St. Louis* (1781); The *Victoria* (1781); The *Comte de Wohrougoff* (1781); The *Gnidita* (1785); The *Eenigheld* (1795); The *Fortuna* (1795); The *Freedom* (1795); The *William* (1795).

These were all cases in which the property in question was condemned, though some of them, like the case of *The Hoop*, were cases of great hardship upon British merchants.

of Parliament have on different occasions been made to relax the navigation law and other revenue acts; where the government has authorized, under the sanction of an act of parliament, a homeward trade from the enemy's possessions, but has not specifically protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence; that it has been enforced where strong claim not merely of convenience, but almost of necessity, excused it, on behalf of the individual; that it has been enforced where cargoes have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities; and that it has been enforced not only against the subjects of the crown, but likewise against those of its allies in the war, upon the supposition that the rule was founded on a strong and universal principle, which allied states in war had a right to notice and apply, mutually, to each other's subjects. Indeed it is the less necessary to produce these cases, because it is expressly laid down by Lord Mansfield, as I understand him, that such is the maritime law of England. *Gist v. Mason*, 1 T. R. 85. \* \* \*

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POTTS v. BELL et al.

(Court of King's Bench, 1800. 8 Term R. 548.)

Upon a writ of error brought from the Court of Common Pleas, it appeared that Bell and others brought an action against Potts, upon a policy of insurance on the ship *Elizabeth*, and goods on board, at and from Rotterdam to Hull, with liberty to touch and stay at any ports or places, etc., and declared as for a loss of the goods loaded on board by capture by enemies. There were other counts for money had and received, and upon an account stated; to which the general issue was pleaded.

At the trial a verdict was found for the plaintiffs below; and a bill of exceptions was tendered and allowed on the part of the plaintiff in error, whereby it appeared, that at the trial the plaintiffs below proved in evidence the policy of assurance in the declaration mentioned, subscribed by Potts, and dated the 7th of December, 1797; and that the policy was effected in London by Barrett & Company, insurance brokers there, by the orders, and for the benefit and risk of the plaintiffs, then and still being British merchants resident in London, and interested in the goods insured to the value mentioned. That the ship *Elizabeth* was a neutral ship belonging to H. Bannermann and Son, of Greetsil and Embden, in Prussia, bound on the voyage insured from Rotterdam to Hull. \* \* \* That the ship *Elizabeth*, having the goods insured afterwards on the 18th of December, 1797, sailed from Rotterdam for Hull, and was captured on her voyage the next day by a French ship, an enemy to the King. \* \* \* The bill

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of exceptions then stated the judge's direction to the jury, to find a verdict for the plaintiffs below, the finding of such verdict accordingly, and the assignment of errors thereon in the usual form.

This case was first argued in Michaelmas term last. \* \* \* In the course of the argument, the counsel on both sides referred to some cases which had been decided at the Admiralty Court, and at the Cockpit; and this court, considering that the subject was more frequently discussed there than in Westminster Hall, desired to hear a second argument by civilians.<sup>5</sup> Accordingly, in Hilary term last, the case was argued by

Sir John Nicholl,<sup>6</sup> the King's Advocate, for the plaintiff, in error. A subject of this country cannot trade with an enemy without the King's licence; and under the circumstances stated in the special verdict, if these goods had been taken at sea by any of our cruisers, and brought into the Court of Prize, they must necessarily have been condemned as prize. This rule has been long settled; and is so undeniable, that it is unnecessary to enter into the principles on which it is founded, which must now be presumed to be politic, wise, and just. Nor will it be necessary to enter into arguments to shew that there can be no distinction between policies of insurance and other contracts in this respect; for if trading with an enemy be illegal generally, it must be so in this particular instance; and every contract of indemnity against the risks attendant on such trading, must also be illegal. There is no distinction between policies of insurance made to protect an adventure against the common law, and those against the law of the admiralty, which equally forms a branch of the general jurisprudence of the kingdom. Neither is it important to discuss the policy of trading with an enemy for particular articles useful in manufactures, agriculture, or war; because the crown will, in its discretion, judge of each particular instance, and grant or refuse a licence to trade accordingly. Nor is there any distinction as to the question of prize, between a declaration of war generally and a proclamation for reprisals; the consequence would be the same in either case upon the question now before the court. War puts every individual of the respective governments, as well as the governments themselves, into a state of hostility with each other. There is no such thing as a war for arms and a peace for commerce. In that state all treaties, civil contracts, and rights of property, are put an end to. Vattel, b. 3, c. 5, § 70. The same author (b. 3, c. 15, § 226) shews that the principle of the law imposes a duty on every subject to attack the enemy, and seize his property wherever found; though by custom this is restrained to those individuals only who have commissions for that purpose from their government. Now trading, which supposes the existence of civil contracts and relations, and a reference to courts of justice<sup>7</sup>

<sup>5</sup> The statement of facts is abridged

<sup>6</sup> Friday, February 7th.

<sup>7</sup> Vide Bynk. b. 1, c. 7, and the case of *The Hoop*, Rob. Adm. 201 (1799).

and the rights of property, is necessarily contradictory to a state of war. Besides, it is criminal in a subject to aid and comfort the enemy; and trading affords that aid and comfort in the most effectual manner, by enabling the merchants of the enemy's country to support their government. Export duties are to be paid when goods are brought from an enemy's country, which is furnishing the very sinews of war to the hostile government. These considerations apply with peculiar force to maritime states, where the principal object is to destroy the marine and commerce of the enemy, in order to enforce them to peace. It may be said indeed, that such a trading also benefits ourselves, especially if the balance of trade be in our favour. However, it belongs not to individuals, but to the state alone, to balance these benefits; and such a power will best be exercised by granting licences to particular persons, or as to particular commodities, according to the exigency of particular circumstances; for the same reasons, a subject cannot trade with an enemy, even from a neutral country, unless he has acquired a right of citizenship in that country; but certainly, if he reside in this country, he cannot so trade through the medium of a neutral agent; and, a fortiori, it is unlawful for him to do so where the trading, as in this case, is direct from the enemy's country to this. The above reasoning is further strengthened by this consideration, that if such direct trading were to be permitted, it would facilitate the means of carrying on a traitorous correspondence, which would greatly counterbalance any little advantage likely to accrue to the individual members of the community from such trading. Further, it has been the practice in all wars to obtain licences from the crown for any direct intercourse with an enemy's country; and the same has been done during the present war. \* \* \*

Dr. Swabey, contra, admitted that, so far as the question of prize affected the decision of this case, the principles advanced and authorities cited on the part of the plaintiff in error by the King's Advocate, could not be disputed; but how far that concluded the question as to the legality of the insurance, at common law, or whether the obtaining of a licence from the crown prior to the capture, would make any difference, he begged leave to refer to the arguments of the common lawyers on behalf of the defendants in error.

Curia adv. vult.

LORD KENYON, C. J., now said, that the court had very fully considered the question immediately after the very learned argument which had been made by the King's Advocate in the last term; that the reasons which he had urged, and the authorities he had cited, were so many, so uniform, and so conclusive, to shew that a British subject's trading with an enemy was illegal, that the question might be considered as finally at rest; that those authorities, it was true, were mostly drawn from the decisions of the Admiralty Courts; and that, after all the diligence which had been used, there was only one direct authority on the subject to be found in the common law books, and



that one was to the same effect; but that the circumstance of there being that single case only, was strong to shew that the point had not been since disputed, and that it might now be taken for granted that it was a principle of the common law, that trading with an enemy without the King's licence, was illegal in British subjects; that it was therefore needless, in this case, to delay giving judgment for the sake of pronouncing the opinion of the court in more formal terms; more especially as they could do little more than recapitulate the judgment, with the long train of authorities already to be found, in the clearest terms, in the printed report of the case of *The Hoop*, published by Dr. Robinson; that the consequence was, that the judgment of the Court of Common Pleas must be reversed.

PER CURIAM. Judgment reversed.

### THE PANARIELLOS.

(Privy Council, 1916. 2 British and Colonial Prize Cas. 47.)

In May, 1914, a French company contracted to sell to a German firm at Frankfort a quantity of silver lead f. o. b. Ergasteria, in Greece. In pursuance of the contract the French company chartered a steamer for a voyage to Antwerp and Newcastle to carry the lead to the purchasers from the German firm. Before the loading, which began on July 29, was finished, war broke out between Great Britain and her allies and Germany. On August 11 the vessel sailed. The French company then entered into negotiations with the London office of the German firm as regards the delivery of the lead, but on August 23 that office was closed by order of the Home Secretary, the negotiations fell through, and the French company diverted the vessel to Swansea, where the cargo, the property in which admittedly remained in the French company, was seized as prize.<sup>a</sup>

Appeal by the *Compagnie Française des Mines du Laurium*, a French company, from a judgment of Sir Samuel Evans, sitting in the Prize Court, which had condemned 1,020 tons of silver lead, the property of the appellants, part of the cargo of the steamship *Panariellos*, as lawful prize on the ground that after the declaration of war there had been trading with the enemy in respect of it. \* \* \*

Their Lordships took time to consider their judgment.

LORD SUMNER. \* \* \* The general principles upon which trading with the enemy is forbidden to the subjects, or those who stand in the place of subjects, of His Majesty and of his allies, are well settled and need not be restated. Ample citations from the authorities are to be found in the learned and elaborate judgment in the Court be-

<sup>a</sup> The headnote of the case in first instance (1 British and Colonial Prize Cases, 195 [1915]) has been substituted for the elaborate statement of the case contained in Lord Sumner's judgment.

low. Before their Lordships, little if any, stress was laid on points much relied on at the trial—namely, that the *administrateur délégué* of the company had no intention of offending, and believed that what was done was legitimate as long as Beer, Sondheimer & Co.'s office [in London] had not been closed; that in these proceedings a French company was more favourably situated than an English company; and that the intercourse in this case fell short, somehow of technical "trading." Their Lordships think it sufficient to say that none of these points avail the appellants.

The questions with which it is necessary to deal are, first, whether at any time the goods condemned were engaged in trading with the enemy; and, secondly, whether such trading had not ended before seizure, so that the goods were no longer liable to condemnation.

In their Lordships' opinion, the dispatch of the ore from Ergasteria, for delivery as directed by Beer, Sondheimer & Co., of Frankfort, and for their benefit engaged the goods in forbidden intercourse with the enemy. Consignment of goods to an enemy port and vesting of them in an enemy while on passage though common features in the reported cases, are not essential to the imputation of forbidden trading. Geographical destination alone is not the test. Intercourse with an enemy subject, resident in the enemy country, is forbidden even though it takes place through his agent in the United Kingdom. The development of communications, the increased complexity of commercial intercourse, and the multiplication of facilities for enemy dealings with goods though at a distance from the enemy country, are incidents in the growth of modern commerce, to which in its application the rule of law must be adapted. They do not in themselves operate to defeat the application of an established principle. In the present case it is true that on shipment the consignors retained the indicia of title to the goods and the *jus disponendi* over them; that the lead ore was shipped for discharge at an English port, and that the enemy buyers selected as the actual recipients of the ore a firm carrying on business in London, which had a manager there who, though not licensed to trade, was in one sense tolerated, since for some days his business premises were not officially closed. Indeed, this agent was informed by the Board of Trade—with what authority, if any, does not appear—that he needed no licence; but this advice was given on the express representation, made on his behalf, that his intention was to trade only in the United Kingdom or with allied or neutral countries. Hence this official reply had no reference to or effect upon dealings with this ore, which, if Beer, Sondheimer & Co., of London, entered into them at all, would plainly be dealings on behalf of Beer, Sondheimer & Co., of Frankfort. These circumstances do not take the case out of the rule.

Their Lordships being of opinion that the ore was so shipped as to be engaged in commercial intercourse with the enemy, the burden is upon the claimants to establish that subsequently such events happened

or such a course was taken as effectually relieved it from liability to forfeiture. \* \* \*

Their Lordships are of the opinion that upon these facts the appellants have failed to discharge their obligation to shew that the engagement of the ore in enemy trading had been abandoned in time. It is not enough to shew a mere repentance, or a change of intention, without some dealing with the res. There must be something which withdraws the goods from the forbidden adventure. \* \* \*

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed, but, as the Procurator General made no submission that costs should be allowed, that this appeal should be dismissed without costs.

Appeal dismissed.

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### THE RAPID.

(Supreme Court of the United States, 1814. 8 Cranch, 155, 3 L. Ed. 520.)

This was an appeal from the sentence of the Circuit Court for the district of Massachusetts. \* \* \*

Monday, March 7, 1814. (Absent, TODD, J.)

JOHNSON, J., delivered the opinion of the court, as follows:

This capture was made on the high seas, about a month after the declaration of war. The claimant, Harrison, had purchased a quantity of English goods, in England, "a long time," to use his own language, before the declaration of war, and deposited them on a small island, called Indian island, near to the line between Nova Scotia and these states. Upon the breaking out of the war, his agents in Boston hired the *Rapid*, a licensed vessel in the cod-fishery, to proceed to the place of deposit and bring away these goods. On her return, she was captured by the Jefferson privateer, and was condemned for trading with the enemy's country.

On the argument, it was contended, in behalf of the appellant, that this was not a trading, within the meaning of the cases cited, to support the condemnation; that, on the breaking out of a war, every citizen had a right, and it was the interest of the community to permit her citizens, to withdraw property lying in an enemy's country and purchased before the war; finally, that neither the declaration of war, nor the commission of the privateer authorized the capture of this vessel and cargo, as they were, in fact, American property.

It is understood, that the claim of the United States for the forfeiture, is not now interposed. The court, therefore, enters upon this consideration unembarrassed by a claim which would otherwise ride over every question now before us.

This is the first case, since its organization, in which this court has

\* The statement of facts and part of the opinion are omitted.

been called upon to assert the rights of war against the property of a citizen. It is, with extreme hesitation, and under a deep sense of the delicacy of the duty which we are called upon to discharge, that we proceed to adjudge the forfeiture of private right, upon principles of public law, highly penal in their nature, and unfortunately, too little understood.

But a new state of things has occurred—a new character has been assumed by this nation, which involves it in new relations, and confers on it new rights; which imposes a new class of obligations on our citizens, and subjects them to new penalties. The nature and consequences of a state of war must direct us to the conclusions which we are to form on this case.

On this point, there is really no difference of opinion among jurists: there can be none among those who will distinguish between what it is, in itself, and what it ought to be, under the influence of a benign morality and the modern practice of civilized nations. In the state of war, nation is known to nation only by their armed exterior; each threatening the other with conquest or annihilation. The individuals who compose the belligerent states, exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat. War strips man of his social nature; it demands of him the suppression of those sympathies which claim man for a brother; and accustoms the ear of humanity to hear with indifference, perhaps exultation, "that thousands have been slain." These are not the gloomy reveries of the bookman. From the earliest time of which historians have written or poets imagined, the victor conquered but to slay, and slew but to triumph over the body of the vanquished. Even when philosophy had done all that philosophy could do, to soften the nature of man, war continued the gladiatorial combat: the vanquished bled, wherever caprice pronounced her fiat. To the benign influence of the Christian religion it remained to shed a few faint rays upon the gloom of war; a feeble light but barely sufficient to disclose its horrors. Hence, many rules have been introduced into modern warfare, at which humanity must rejoice, but which owe their existence altogether to mutual concession, and constitute so many voluntary relinquishments of the rights of war. To understand what it is in itself, and what it is under the influence of modern practice, we have but too many opportunities of comparing the habits of savage, with those of civilized warfare.

On the subject which particularly affects this case, there has been no general relaxation. The universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy—because the enemy of his country. It is not necessary to quote the authorities on this subject; they

are numerous, explicit, respectable, and have been ably commented upon in the argument.

But after deciding what is the duty of the citizen, the question occurs, what is the consequence of a breach of that duty? The law of prize is part of the law of nations. In it, a hostile character is attached to trade, independently of the character of the trader who pursues or directs it. Condemnation to the use of the captor is equally the fate of the property of the belligerent, and of the property found engaged in anti-neutral trade. But a citizen or ally may be engaged in a hostile trade, and thereby involve his property in the fate of those in whose cause he embarks.

This liability of the property of a citizen to condemnation as prize of war, may be likewise accounted for under other considerations. Everything that issues from a hostile country is, *prima facie*, the property of the enemy; and it is incumbent upon the claimant to support the negative of the proposition. But if the claimant be a citizen or an ally, at the same time that he makes out his interest, he confesses the commission of an offence which, under a well-known rule of the civil law, deprives him of his right to prosecute his claim.

This doctrine, however, does not rest upon abstract reason. It is supported by the practice of the most enlightened (perhaps we may say of all) commercial nations. And it affords us full confidence in our decision, that we find, upon recurring to the records of the court of appeals in prize cases, established during the revolutionary war, that in various cases, it was reasoned upon as the acknowledged law of that court. Certain it is, that it was the law of England, before the revolution, and therefore, constitutes a part of the admiralty and maritime jurisdiction conferred on this court in pursuance of the constitution.

After taking this general view of the principal doctrine on this subject, we will consider the points made in behalf of the claimant in this case, and 1. Whether this was a trading, in the eye of the prize law, such as will subject the property to capture? The force of the argument on this point depends upon the terms made use of. If by trading, in prize law, was meant that signification of the term, which consists in negotiation or contract, this case would certainly not come under the penalties of the rule. But the object, policy and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent states. Negotiation or contract has, therefore, no necessary connection with the offence. Intercourse inconsistent with actual hostility, is the offence against which the operation of the rule is directed; and by substituting this definition for that of trading with an enemy, an answer is given to this argument.

2. Whether, on the breaking out of a war, the citizen has a right to remove to his own country with his property, is a question which we conceive does not arise in this case. This claimant certainly had not a right to leave the United States, for the purpose of bringing home his property from an enemy's country; much less could he

claim it as a right to bring into this country, goods, the importation of which was expressly prohibited. As to the claim for the vessel, it is founded on no pretext whatever; for the undertaking, besides being in violation of two laws of the United States, was altogether voluntary and inexcusable. With regard to the importations from Great Britain about this time, it is well known that the forfeiture was released on grounds of policy and a supposed obligation induced by the assurances which had been held out by the American chargé d'affaires in England. But this claimant could allege no such excuse.

3. On the third point, we are of opinion that the foregoing observations furnish a sufficient answer. If the right to capture property thus offending, grows out of the state of war, it is enough to support the condemnation in this case, that the act of Congress should produce a state of war, and that the commission of the privateer should authorize the capture of any property that shall assume the belligerent character. Such a character we are of opinion this vessel and cargo took upon herself; or at least, she is deprived of the right to prove herself otherwise.

We are aware that there may exist considerable hardship in this case; the owners, both of vessel and cargo, may have been unconscious that they were violating the duties which a state of war imposed upon them. It does not appear that they meant a daring violation either of the laws or belligerent rights of their country. But it is the unenvied province of this court to be directed by the head, and not by the heart. In deciding upon principles that must define the rights and duties of the citizen and direct the future decisions of justice, no latitude is left for the exercise of feeling. \* \* \*

## SECTION 2.—PERMISSIBLE INTERCOURSE

## THE GOEDE HOOP.

(High Court of Admiralty, 1809. Edwards, 327.)

This was a leading case, and became of importance, as it furnished the court with an opportunity of stating generally the principles by which its decisions would be governed, in questions arising on the capture of vessels sailing under British licenses. \* \* \*

Sir W. SCOTT.<sup>12</sup> This was the case of a vessel under Oldenburg colors, which was captured in the prosecution of a voyage from Rochelle to Hull, and brought to Plymouth. There was a license on board granted to Henry Nodin, on behalf of himself and other British merchants, for four vessels under particular colors, which are enumerated to proceed with cargoes of brandies from Charente, Bordeaux, or any port of France not blockaded, to any port of Great Britain, and permitting the masters to receive their freights, and depart with their vessels and crews. The license is dated 15th November, 1808, and is to remain in force six months from that period. Now the ship was taken the 29th of June last, and, therefore, according to the literal construction of the license, after the time had expired during which it was to continue in operation.

This question has led to some discussion on the rules of interpretation to be applied to licenses generally; and as those rules will, of necessity, embrace a great variety of cases, it is extremely desirable that they should be settled now, as far as this can be done by the authority of this court. These licenses owe their origin to the general prohibition, which declares it to be unlawful for the subjects of this country to trade with the enemies of the king, without his permission; for a state of war is a state of interdiction of communication. That is a law which is not peculiar to this country, but one which obtains very generally among the states of Europe. In former wars this prohibition was attended with very little inconvenience, as the greater part of the countries in the neighborhood remained neutral, and presented to the belligerents various channels of communications, through which they obtained from each other such commodities as they stood in need of. While the world, therefore, continued in that state, of course licenses would be granted only in very special cases, where it appeared that there was a necessity to have a direct communication with the enemy; and, being matter of special indulgence, the application of them was *strictissimi juris*. At the same time, when I so describe them, I do not mean to say that there ever was a period in which a

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rational exposition, allowing a fair and liberal construction of the intention of the grantor, would not have been received. \* \* \*

But it has happened that, in consequence of the extraordinary and unprecedented course of public events, these licenses have, in a certain degree, changed their character, and are no longer to be considered exactly in the same light. It is notorious that the enemy has in this war directed his attacks more immediately against the commerce of this country than in former wars; and a circumstance of still greater weight is, that he has possessed himself of all those places that in former wars remained in a state of neutrality. To what part of the continent can we now look for a country which is not either under the actual dominion of France, or in that state of subjection to it which operates with all the effect of dominion? It is a state of things in which it has become impossible for England to carry on its foreign commerce, without placing it on a very different footing from what its convenience required in former wars. To say you shall have no trade with the enemy, would be, in effect, to say that you shall not trade at all; because that commerce which is essential to the prosperity of the country cannot be carried on in those small and obscure nooks and corners of Europe, if any such can be found, which are still independent. The question, then, comes to this, how is the foreign commerce of the country to be maintained? It must be either by relaxing the ancient principle entirely, and permitting an unlimited intercourse with the ports of the enemy, and when the ports of other nations are put under blockade (as they are by the orders in council) for other reasons than those of a direct hostile character, they become liable to be considered and treated in like manner, so far as the purposes of blockade require; or it must be by giving a greater extension to the grant of licenses.

As to the relaxation of the general principle, by which an open and general intercourse with the enemy would be allowed, the consent of both parties is requisite to make that effectual; and even if the enemy permitted it, the legislature would probably not think proper to proceed to that length, and for reasons, I presume, connected with the public safety. It has, therefore, tolerated a resort to the other mode, of permitting a trade by licenses; which, though they are so denominated, are likewise, in effect, expedients adopted by this country to support its trade, in defiance of all those obstacles which are interposed by the enemy. They are not mere matters of special and rare indulgence, but are granted with great liberality to all merchants of good character, and are expressed in very general terms, requiring, therefore, an enlarged and liberal interpretation. At the same time, they are not free from control. Restrictions, dictated by prudent caution, are annexed; and, where they are so annexed, those restrictions must be supposed to have an operative meaning. It is not, therefore, in the power of this court to apply such an interpretation to a license as would be in direct contradiction to its express terms, or to say that

effect should be given to one part and not to another. If the permission is for a ship to go in ballast, it would be impossible for the court to say that it shall go with a cargo; for that would not be an interpretation, but a contravention, of the license. But where it is evident that the parties have acted with perfect good faith, and with an anxious wish to conform to the terms of the license, I presume that I am only carrying into effect the intention of the grantor, when I have recourse to the utmost liberality of construction which it is in the power of this court to apply. As a general rule, therefore, it is to be understood that, where no fraud has been committed, where no fraud has been meditated, as far as appears, and where the parties have been prevented from carrying the license into literal execution by a power which they could not control, they shall be entitled to the benefit of its protection, although the terms may not have been literally and strictly fulfilled. If I assume too much in laying down this rule, it must be rectified in the superior court.

But looking to the intentions of the government, not only to what they are, but to what I am led to suppose they must be; looking to the extreme difficulty of carrying on the commerce of the country in the struggle which it has to maintain, not only against the power but against the craft of the enemy; looking to the frequency and the suddenness with which he lays on or takes off his embargoes, according to the exigency of the moment; looking to the various obstructions that present themselves in obtaining vessels, in consequence of the small remainder that there is of neutral navigation in Europe; looking, also, to this circumstance, that all this intercourse must be carried on by the subjects of the enemy, that it must be a confidential transaction, to be conducted by an enemy shipper at great risk and hazard to himself; looking to the total change which has taken place in the nature and character of these licenses, if that denomination is to be continued; I say, looking to all these considerations, where there is clearly an absence of all fraud and of all discoverable inducement to fraud, I must go to the utmost length of protection that fair judicial discretion will warrant, though there may, under such circumstances, have been a considerable failure in the literal execution of the terms of the license. There may be great inconvenience in the whole system of licenses, as indeed it is scarce possible, in the present state of the world, that there should not be great practical inconvenience in any mode of conducting its commerce. That is a question of policy, with which this court has nothing to do. It has only to enforce the just execution of legitimate orders, issued by competent authority.

Having laid it down, therefore, as a general principle, that where there is clear bona fides in the holder, this court, though it certainly will not contravene the terms of a license, will give it the most liberal construction, I come now to apply that rule to the case before me. The principle ground of objection is, the delay which took place in the sailing of the vessel; but I must observe, that having called on the

counsel for the captors to point out what particular fraud could have been intended by this procrastination, I have only been answered by a sort of general suggestion, that such an extension of the period allowed might afford an opportunity of bringing the license into use a second time. But that any such use was made, or intended to be made, of the license, in the present instance, has not been suggested, and therefore, it is to be taken as a case clear of that act or intention of fraud. \* \* \*

Now the whole labor of the argument has been employed to show, that some fraud or other must be presumed, from the length of time which elapsed after the expiration of the license. But what is the natural presumption in this case? why, that the party would not countenance an unnecessary delay, which must be contrary to his own direct interest. This furnishes a very strong ground to suppose that it was by accident that the ship was prevented from completing her voyage within the time expressed in the license. If it could be shown that the license had been used before, and that the delay in the present instance arose from its previous use, or that there was any other fraudulent purpose to be answered, most certainly I should then call for more particular explanations; but as no fraudulent motive has been pointed out, I must suppose that the party was not dilatory in furthering the completion of his own mercantile adventure. The only thing suggested is the fact that the time limited by the license had expired. That has been accounted for by the intervention of an alleged embargo. Shall I, under these circumstances, order the fact of the embargo to be established by further proof, when it is so probable in itself, and load this table with French decrees and ordinances, which would, after long delay, in all probability, lead to the same conclusion at last? Looking to the local circumstances of the country in which the transaction originated, and to the conduct of the French government at that particular period, I think it my duty to stand upon the presumption that the embargo did exist, and to hold the parties entitled to restitution, paying the captors their expenses, which I cannot refuse, where the parties are acting in apparent contravention of the literal terms of their license. In such cases his Majesty's officers have a right to be satisfied, and they are entitled, in justice, to be protected in their expenses. It is an inconvenience not arising from capture, but from the present state of affairs, and from which the court cannot relieve the claimants, however it may regret that they should be subjected to it. The license, I observe, is only to bring a cargo of brandy, and as there are other goods on board, those goods must be condemned, as the permission is limited to the brandy.

## USPARICHA v. NOBLE.

(King's Bench, 1811. 13 East, 332.)

This was an action on a policy of insurance on fish on board the Prussian ship Carlota, at and from Poole to St. Andero and Bilboa, both, or either, subscribed by the defendant for £150., on the 29th Feb., 1808, a copy of which policy was annexed to this case. \* \* \* At the trial at the sittings after last Michaelmas term at Guildhall before Lord Ellenborough, C. J., a verdict was found for the plaintiff, for £137. 10s., subject to the opinion of the court upon the following case :

The plaintiff is a Spaniard by birth, but has been domiciled as a merchant in this country for the last eight years. In February, 1808, the plaintiff purchased<sup>18</sup> 5,400 quintals of fish, and shipped the same in the Prussian ship the Carlota for St. Andero, in consequence of orders from the agent of Mr. Lemona Uria, a merchant resident in Bilboa, and Mr. Uriarte, a Spanish gentleman resident at Vera Cruz in Spanish America, but who was in England at the time of the purchase and shipment, upon a temporary occasion. \* \* \* On the 21st of December, 1807, the British government granted a license for the ship Carlota with her said cargo to proceed on the voyage in question. By the decrees of the French and Spanish governments at the commencement of the war with Great Britain, all ships and goods coming from England were declared lawful prize. The Carlota sailed from Poole on the 28th of February, 1808; and while in prosecution of her voyage, was captured (without the limits of the ports of St. Andero or Bilboa) by two French privateers belonging to Bayonne, and was carried into Castro, a port of Spain, where the ship and cargo were condemned and sold by the sentence of a French consular court, held in Spain, on the 8th of June, 1808. At the time of the capture and condemnation France and Spain were co-belligerent allies at war with this country. The question was, whether the plaintiff were entitled to recover? If he were so entitled, the verdict was to stand: if not, then the verdict was to be set aside and a nonsuit entered. The policy referred to was in the common printed form, and was stated to be made by the plaintiff, as well in his own name, as for and in the name and names of all and every other person or persons to whom the same did, should or might, appertain, for himself and them and every of them, at 10 guineas per cent.; and liberty was reserved for the ship "to have any clearances and carry any simulated papers"; and also it was "lawful for the said ship in the voyage to proceed and sail to, and touch and stay at any ports or places whatsoever and wheresoever to load, unload, and reload goods, without being deemed a deviation." \* \* \*

<sup>18</sup> It was agreed in the course of the argument that the goods were purchased and shipped by the plaintiff, on account of his correspondents, and not on his own account.

And the king, by his license referred to, reciting that "whereas Manuel de Munoz y Usparicha (the plaintiff) hath humbly represented to us that he is desirous of obtaining our Royal license for permitting the Prussian ship Charlotte, M. F. J., master, of about 300 tons burthen, to proceed from Poole to Bilboa or Santander, with a cargo of fish and such goods as are permitted by virtue of our order of the 11th of November, 1807, to be exported"; thereby directed the commanders of all his ships of war and privateers "not to interrupt the said vessel, but to suffer her to proceed as aforesaid." This license was to remain in force for four months, and at the expiration thereof, or sooner if the voyage were before completed, was to be deposited with the commissioners of the customs at the port of London, or with the collector of the customs at the outports. Dated 21st December, 1807.

Barnewall, for the plaintiff, observing that the plaintiff's claim was resisted on the principle laid down in *Conway v. Gray and Others*, 10 East, 536, that the assent of every subject is virtually implied to every act of his own government, and therefore that a foreigner could not recover here upon a policy of insurance where the loss happened by the acts of the government to which he was subject, contended that that principle did not apply to this case, where the capture to which the loss was to be attributed was made by a French and not by a Spanish force; and though the French and Spanish governments had a common interest at the time for some purposes, yet the fact of their being co-belligerent allies in the war against this country did not so far identify the subjects of Spain with the government of France as to make them answerable for its acts within the principle of that case. Neither will the condemnation of the vessel by the French consular court sitting in Spain work that effect, for the loss was by the capture and not by the condemnation, and that condemnation was in the name and by the authority of the French and not of the Spanish government. But at all events the effect of the King's license was to make the licensed Spaniard an alien friend instead of an alien enemy, and thereby to except him from his implied responsibility for the acts of his native government. \* \* \*

Richardson, contra, contended that this case came directly within the principle of *Conway v. Gray*, 10 East. 536, and the other cases decided at the same time, by which every foreign subject was considered as a party to the acts of his own government, and therefore precluded from recovering upon a policy of insurance for a loss occasioned, as it may be said, by his own act. This principle was established without any relation to the question of neutrality; for it would apply as well to the case of a friendly as of a hostile alien. \* \* \*

LORD ELLENBOROUGH, C. J., observed that the license was given to a Spanish subject domiciled here, and did not extend to every Spanish subject resident elsewhere. But as the principle on which the cases on the American embargo were decided had been much pressed upon

the Court in the argument, although at present it appeared to him that this case was distinguishable from those, they would consider further of it before they delivered their opinion. And afterwards in this term his Lordship gave judgment (after stating the facts):

It appears by the case that this was an action brought by a native Spaniard domiciled here in time of war with Spain, and specially-licensed by His Majesty for the purpose of the very commerce which it was the object of the policy declared upon in this action to insure. The case cited of *Wells v. Williams*, 1 Lord Raym. 282, establishes that a plaintiff, an alien enemy in respect of the place of his birth, may, under similar circumstances of domicile, be allowed to sue in our courts. The legal result of the license granted in this case is, that not only the plaintiff, the person licensed, may sue in respect of such licensed commerce in our courts of law, but that the commerce itself is to be regarded as legalized for all purposes of its due and effectual prosecution. To hold otherwise would be to maintain a proposition repugnant to national good faith and the honor of the crown. The crown may exempt any persons and any branch of commerce, in its discretion, from the disabilities and forfeitures arising out of a state of war: and its license for such purpose ought to receive the most liberal construction. To say that the plaintiff might export the goods specified in the license from Great Britain to an enemy's country for the benefit of himself or others (and the license contains no restriction in this particular); and yet to hold that where he has so done, he could not insure; or, having insured, could not recover his loss, either on account of his original character of a native Spaniard, or on account of the places to which, or of the persons to whom the goods were destined; would be to convert the license itself into an instrument of deception and fraud. The crown, in licensing the end, impliedly licenses all the ordinary legitimate means of attaining that end. For adequate purposes of state policy and public advantage, the crown, it must be presumed, has been induced in this instance to license a description of trading with an enemy's country, which would otherwise be unquestionably illegal. Whatever commerce of this sort the crown has thought fit to permit (which in respect of its prerogatives of peace and war, the crown is by its sole authority competent to prohibit or permit) must be regarded by all the subjects of the realm, and by the courts of law, when any question relative to it comes before them, as legal, with all the consequences of its being legal: one of which consequences is a right to contract with other subjects of the country for the indemnity and protection of such property in the course of its conveyance to its licensed place of destination, though an enemy's country, and for the purpose (as it probably will be in most cases) of being there delivered to an alien enemy, as consignee or purchaser.

In the present case the license was obtained for the purpose of pro-

tecting the subject-matter insured in the course of its conveyance by sea from England to certain ports in Spain, to be there delivered to the purchasers thereof, who are the persons in whom the interest is averred in the first and second counts of this declaration: and the action is well brought, upon the principles above stated, in the name of the plaintiff for their benefit. For the purpose of this licensed act of trading (but to that extent only) the person licensed is to be regarded as virtually an adopted subject of the crown of Great Britain; his trading, as far as the disabilities arising out of a state of war are concerned, is British trading; and of course any argument to be drawn from a virtual participation in and supposed privity to the acts of his own native country, then at war with the crown of Great Britain, is excluded or superseded in point of effect by an express privity to and immediate participation in the adverse acts of the British government. As far as the plaintiff and the Spanish purchasers of this cargo are concerned, they are actually privy to the objects of the British government, and acting in furtherance thereof, and in direct opposition to the laws and policy of their own country. And it will not be contended to be illegal to insure a trade carried on in contravention of the laws of a state at war with us, and in furtherance of the policy of our country and its trade; and which this trade in question, sanctioned as it is by His Majesty's license, must be deemed to have been. It is not therefore necessary to consider upon this occasion the ingenious superstructure which has been endeavoured to be raised on the determination of this court in the case of *Conway v. Gray*, 10 East. Nor (if the principle of that case did at all apply to the present, circumstanced as it is in consequence of His Majesty's license) how far its operation might be restrained or affected, as has been argued, by the particular provision in this policy, that "in case of capture, seizure, or detention, the underwriter should pay a loss within two months, without waiting for condemnation or restitution." All these points are immaterial, with a view to the judgment upon this case, provided the property insured be in virtue of the King's license, for the purpose of the insurance, to be considered as fully legalized; and we are clearly of opinion that it ought to be so considered.

Judgment for the plaintiff.<sup>14</sup>

<sup>14</sup> In *Flindt v. Scott*, 5 Taunt. 674 (1814), it was held, as stated in the headnote, that:

"A license to G. F. & Co. of London, merchants, on behalf of themselves and others, to export on board a ship named, bearing any flag except the French, to a hostile port, and to import from thence specified goods, notwithstanding all the documents may represent the ship to be destined to a neutral or hostile port, and to whomsoever such property may appear to belong, authorizes an enemy, subject of the hostile country to which the ship is licensed, legally to export from London."

In delivering the opinion of the court, Thomson, C. B., held that, the license being legal, the insurance was likewise so; that "the sovereign may, during a war, equally license the trading of any of his subjects with an enemy, or

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license enemies to trade with his subjects"; that licenses were to be liberally construed "in order to effectuate the benefits intended to result from them"; and that there was, in the present instance, "nothing, either in the terms of the license, or in the principles of public policy, which ought to restrict the operation of the authority given to the exportation of property belonging to the subjects of this country only." *Id.* 697.

In *Williams v. Marshall*, 6 Taunt. 390 (1815), it was held that a license to export "on or before the 10th September" would not protect an exportation after that date.

A license to trade is not assignable (unless clearly general in its terms and intent). *Felze v. Thompson*, 1 Taunt. 121 (1808); *The Acteon*, 2 Dod. 48 (1815). If subject to condition, license is void if condition is not complied with. *Camelo v. Britten*, 4 B. & Ald. 184, 195 (1820):

"We have arrived at this conclusion with great reluctance, because it appears that in this case there was no intention to violate the law, and that this was the usual mode of carrying on the trade. We, however, feel ourselves obliged to say that the terms of the license have not been complied with; the consequence of which is, that the plaintiff cannot recover" (per Abbott, C. J.).

License to one set of British merchants cannot be used to cover trading by other British merchants, without connecting them together. *Busk v. Bell*, 16 East, 3 (1812). Importation of more goods than license warrants will not vitiate insurance on goods licensed. *Pieschell v. Allnut*, 4 Taunt. 792 (1813); *Keir v. Andraade*, 2 Marsh. 196 (1816). License as to goods in ship will legalize insurance on ship and competent for British agent of both parties, in whose name insurance was effected, to sue upon the policy in time of war. *Kensington v. Inglis*, 8 East, 273, 290 (1807).

While it is true that conditions of license must be complied with, and that trading may not extend beyond time limited in the license, perils of the sea, absence of laches, and fraud will extend for the completion of the voyage the time of the license. *Siffkin v. Glover*, 4 Taunt. 717 (1813); *Siffken v. Allnut*, 1 M. & S. 39 (1813); *Freeland v. Walker*, 4 Taunt. 478 (1812), in which Gibbs, J., observed, in the course of the argument, that "there had been at least fifty cases in the King's Bench, where the plaintiffs had recovered, although the license had expired at the time of the loss, and it never had been attempted to put the case upon the point of the license being expired at the time of the capture."

In accordance with English cases and the general practice of nations, licenses have been granted by the United States in the course of its wars. It seems to be settled law that the subject may be regulated by act of Congress, or it is believed that the President may issue licenses without a specific statute to that effect. In *Matthews v. McStee*, 91 U. S. 7, 10, 11, 23 L. Ed. 188 (1875), Mr. Justice Strong, delivering the unanimous opinion of the court, quoted with approval the following passage from Halleck's *International Law*, 677 (1861):

"In the United States, as a general rule, licenses are issued under the authority of an act of Congress; but in special cases, and for purposes immediately connected with the prosecution of the war, they may be granted by the authority of the President, as commander-in-chief of the military and naval forces of the United States."

See the case of *The Sea Lion*, 5 Wall. 630, 18 L. Ed. 618 (1866).

In *Coppell v. Hall*, 7 Wall. 542, 19 L. Ed. 244 (1868), the question of licenses was again considered, and it was held, *inter alia*, that it was the sovereign's prerogative to allow or disallow trade and to prescribe the manner in which trade, if permitted, might be exercised; that such power being sovereign in its nature, could only be exercised by the sovereign or his duly authorized agent, and that a military commander, as such, could not arrogate to himself nor exercise such power. In the course of the opinion authorities, English and American, are cited and analyzed.

For the theory and practice of the United States in the matter of licensing trade with the enemy, and for a résumé of the decisions of courts in this country and in England, see *U. S. v. One Hundred Barrels of Cement*, 27 Fed. Cas. 292, No. 15,945, 3 Am. Law Register, N. S. 735 (1862).

## RICORD v. BETTENHAM.

(King's Bench, 1765. 1 W. BL 568.)

Action on the case against the master of the ship Syren, on a ransom bill, given by the defendant to the plaintiff, who, in the late French war, was captain of the Badine, privateer, to ransom the said ship, then taken by the said privateer. On non assumpsit pleaded, and the trial of the issue at Guildhall, the following special facts were stated for the opinion of the court, subject to which, the jury found a verdict for the plaintiff, £236.: "That the Syren was taken by the Badine four leagues off Cape Negrillo, 24th August, 1762. That the plaintiff was a natural-born subject of the French king, and was commissioned by him, and that the defendant was a natural-born subject of Great Britain, and the Syren the property of his owners, being British subjects. That at the capture, Joseph Bell, the defendant's mate, was given as a hostage; and the plaintiff, the defendant, and the said Bell, gave and signed the ransom bill, 24th of August, 1762, which ransom bill purported: 'That the ship (then going to take in her cargo at Lucca Martha Brea), and her captain, were ransomed for 300 pistoles, and had a month's time to repair to her destined port; and the defendant obliged himself and owners to pay the said sum within two months after date; and gave his said mate for hostage, whom he agreed to maintain till the day of payment.' That the value of 300 pistoles was £236., and that the Syren was of greater value. That Joseph Bell, the hostage, died in prison, at Port au Prince, 12th October, 1762. That the Syren, after said ransom, arrived at her destined port of Lucca Martha Brea. That at the time of the capture, and till 3d November, 1762, there was actual war between Great Britain and France."

Chambers, for the plaintiff, argued that, unless some special reason be assigned to the contrary, the court will compel the execution of this contract. Both parties are able to contract. \* \* \*

Dunning, for the defendant. This is an action of the first impression in this or any other country. \* \* \*

LORD MANSFIELD, C. J. There is no doubt, but the master has a power to contract, so as to bind his owners. These ransom bills seem equally for the benefit of the captors, who are thereby enabled to pursue and take other ships, and of the vanquished, who are thereby released at half value. But if it be true, that no action of this sort is allowed in other countries, it deserves to be well considered before we establish the precedent. Otherwise upon principles I have no doubt.

Blackstone, who was retained for a second argument for the defendant (against Norton, Attorney General, for the plaintiff), thereupon offered to make enquiry in the next vacation into the practice of France and Holland.

LORD MANSFIELD. Let it therefore stand over upon the single point of that enquiry.

Afterwards, in Michaelmas term, Blackstone acquainted the court, that he had stated the case to M. Meerman, Pensionary of Rotterdam, and M. de Beaumont, Avocat du Parlement de Paris; that the former had informed him that the case had never happened in their courts, but that he and all the lawyers of that country, whom he had consulted, were of opinion, that such an action would be sustained in their courts: that M. de Beaumont (to whom the case was stated as between an Englishman and a Spaniard) was entirely of the same opinion, and added that the very case had a few years before been decided in the Parliament of Normandy in favour of the captors, under which the parties acquiesced.

LORD MANSFIELD, C. J. I imagined the enquiry would turn out as it has done. Ransom bills are to be encouraged, as lessening the horrors of war. Justice ought in time of war to be administered to foreigners in our courts in the most extensive and liberal manner, because the crown cannot here interpose, as it can in absolute monarchies, to compel the subject to do justice, in an extrajudicial manner.

Postea to the plaintiff.<sup>15</sup>

<sup>15</sup> In *The Charming Nancy*, Burrell & Marsden's Admiralty Cases, 398 (1761), it appeared that the ship arrived at its destined port and had unlvered part of its cargo, that the ransom had not been paid, and that the hostages still remained prisoners. In reply to the question whether action might be brought against the master of the vessel under the circumstances in that case, Sir George Hay delivered the following opinion:

"In the first instance I think you cannot proceed against the master. If the ship and goods will not produce the sum stipulated for the ransom, and you can show that the master fraudulently ransomed, I think he may then be prosecuted on behalf of the hostages."

In the case of *The Patixent*, Burrell & Marsden's Admiralty Cases, 398 (1781), William Wynne delivered the following opinion:

"I think that the owner of this ransom bill may maintain a suit in the Court of Admiralty for the recovery of the sum for which the bill was given; but I apprehend they must make it appear that the hostage is not at liberty, if he is living, before they can obtain payment of the money. The proper way of commencing such a suit would be by arresting the ransomed ship with the cargo on board. But if that cannot be done, I think it will be sufficient to bring the suit against Lush, the master who drew the bill, and Messrs. Glassford & Co., the owners of the vessel, upon whom it is drawn."

In *Cornu v. Blackburne*, 2 Douglas, 641 (1781), an enemy's ship which had ransomed a British vessel being recaptured with the hostage and ransom bill on board, but the bill secreted and not delivered up to the recaptor, Lord Mansfield held that the first captor could recover upon the ransom bill.

In *Anthon v. Fisher*, 3 Doug. 166 (1782), the main question argued was the same as in *Cornu v. Blackburne*. Owing to a difference of opinion among the judges as to whether the common-law court had jurisdiction, judgment was entered pro forma for the plaintiff. Upon appeal, the judgment of the King's Bench was reversed, the judges of the Common Pleas and the Exchequer unanimously holding that an alien enemy could not, by the municipal law of Great Britain, "sue for the recovery of a right claimed to be acquired by him in actual war."

In *The Hoop*, 1 C. Rob. 196, 201 (1799), Sir William Scott said, generally, that an alien enemy was forbidden to sue by the law of almost every country, and he added that, "even in the case of ransoms which were contracts, but contracts arising ex jure belli, and tolerated as such, the enemy was not per-

## GOODRICH &amp; DE FOREST v. GORDON.

(Supreme Court of New York, 1818. 15 Johns. 6.)

In 1813, the defendant, jointly with certain other persons, was owner of the sloop Hope, and he authorized one Napier, the master of the sloop, to ransom the vessel in case of capture, for a sum not exceeding two thousand dollars, and bound himself to honor the bill if so drawn upon. During the voyage the Hope was captured by the British frigate Endymion, and was ransomed by the master pursuant to defendant's instructions for the sum of \$2,000, for which amount he drew a bill upon the defendant.

THOMPSON, C. J., delivered the opinion of the court.<sup>18</sup>

There can be no doubt that the contract for the ransom of the vessel was a lawful contract. Such contracts are sanctioned by the laws of nations, and are not deemed a trading with the enemy, 2 Azuni, 313; nor was the passport given by the captors, upon the ransom, and accepted by the master of the captured vessel, in violation of the act of Congress (2d August, 1818). It was merely a certificate, given by the captors, to serve as a passport, and protect the ransomed vessel from all other armed vessels belonging to the nation of which the captors were subjects, and to prevent another capture. 2 Azuni, 316. It may, perhaps, come within the exception to the act of Congress (2d section), which declares that the Act shall not prevent the acceptance of a passport, granted by the commander of any ship of war of the enemy, to any ship or vessel of the United States, which may have been captured and given up, for the purpose of carrying prisoners, captured by the enemy, to the United States. Admitting, however, that the instrument given in the case before us is not the one contemplated by this provision, still, I think, the act does not at all extend to such certificates.

The only question in this case, then, is whether the defendant is chargeable as an acceptor of this bill. \* \* \*

Judgment for the plaintiff.<sup>19</sup>

mitted to sue in his own proper person for the payment of the ransom bill; but the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country, for the recovery of his freedom."

By an act of 22 Geo. III, c. 25 (1782), ransom contracts were forbidden. In an "Act for Regulating Naval Prize of War," 27 and 28 Vict. c. 25, § 45 (1864), the subject of ransom was thus treated:

"Her Majesty in Council may from time to time, in relation to any war, make such orders as may seem expedient, according to circumstances, for prohibiting or allowing, wholly or in certain cases, or subject to any conditions or regulations or otherwise, as may from time to time seem meet, the ransoming or the entering into any contract or agreement for the ransoming of any ship or goods belonging to any of Her Majesty's subjects, and taken as prize by any of Her Majesty's enemies."

<sup>18</sup> A shortened statement has been substituted for that of the original report and part of the opinion is omitted.

<sup>19</sup> In his Commentaries on American Law, vol. 1 (1st Ed. 1826, p. 99; later editions, p. 105), Kent quotes the principal case as authority for the state-

## ANTOINE v. MORSHEAD.

(Court of Common Pleas, 1815. 6 Taunt. 237.)

This was an action upon five bills of exchange, all drawn by the father of the defendant, a British subject, on the 12th of September, 1806, while he was detained a prisoner at Verdun in France during the late war with that country, payable, some to Tyndall, some to Estwicke, both British subjects in like manner detained prisoners there, at one year after date, indorsed to the plaintiff, who was a French subject and a banker at Verdun, and accepted by the defendant. The cause was tried at Guildhall at the sittings after Easter term, 1815, before Gibbs, C. J., when it was contended on the part of the defendant, that it would be treason to pay the bills, by the statute 34 G. III, c. 9, §§ 1, 4. Gibbs, C. J., refused to hear the objection: he did not know to what extent it might be carried, but if it could be supported to its full extent, many of our miserable fellow subjects detained in France must have starved. It was also objected, that this being a contract with an alien enemy, was not merely suspended during the war, but absolutely void; the Chief Justice thought otherwise, and the jury found a verdict for the plaintiff.

Vaughan, Serjt., on a former day in this term moved for a rule nisi on both these objections, when, it being suggested on the part of the plaintiff, that the statute 34 G. III, c. 9, had expired at the peace of 1800 and never been re-enacted, the court gave time to ascertain that fact, and that being found to be the case, Vaughan now moved upon the second objection only, namely, that the indorsement of the bill to an alien enemy was void. For this he cited *Anthon v. Fisher*, Doug. 650, note to *Cornu v. Blackburne*, where it is held that no action can be maintained by an alien in the courts of this country on a ransom bill, because it is a right claimed to be acquired by him in actual war. Lord Ashburton's argument in *Ricord v. Bettenham*, 3 Burr. 1734, which decision is overruled by *Anthon v. Fisher*, is to be called in aid. If a bond be given to an alien enemy, it is good quoad the obligor, but void quoad the obligee, that is, it enures only for the benefit of the crown. And if so of a bond, the law must be the like on a bill of exchange. So is it of contracts of insurance made with an alien enemy. *Flindt v. Waters*, 15 East, 266, Lord Ellenborough, C. J., says the defense of alien enemy may go to the contract itself, on which the plaintiff sues, and operate as a perpetual bar; though in that case the con-

ment that ransom contracts "have never been prohibited in this country; and the act of Congress of August 2, 1813, interdicting the use of British licenses or passes, did not apply to the contract of ransom."

For the practice of nations in the matter of ransom bills, see Dana's edition of *Wheaton's Elements of International Law* (1866) 506, note No. 199.

On the general subject of ransom, see the elaborate opinion of Mr. Justice Story, sitting at circuit, in *Maisonnaire v. Keating*, 2 Gall. 325, Fed. Cas. No. 8,978 (1815).

tracting party having become an enemy after the contract, it was held to be only a temporary suspension of the right to sue, but he showed a disposition to confirm the cases of *Brandon v. Nesbitt*, 6 T. R. 23, and *Bristow v. Towers*, 6 T. R. 35. No case has decided that a contract made with an alien enemy in time of war may be ever afterwards enforced. Chief Baron Gilbert lays it down, that upon the plea of alien enemy the right of the plaintiff is forfeited to the crown, as a species of reprisal upon the state committing hostility.

GIBBS, C. J. It will not be useless to consider what legal propositions can be deduced from the cases cited on behalf of the defendant, and to try how far they are applicable to the present case. This is no bill of exchange drawn in favour of an alien enemy, but by one subject in favour of another subject, upon a subject resident here, the two first being both detained prisoners in France; the drawer might legally draw such a bill for his subsistence. After the bill is so drawn, the payee indorses it to the plaintiff, then an alien enemy. How was he to avail himself of the bill, except by negotiating it, and to whom could he negotiate it, except to the inhabitants of that country in which he resided? I can collect but two principles from the cases cited by the counsel for the defendant, and they are principles on which there never was the slightest doubt. First, that a contract made with an alien enemy in time of war and that of such a nature that it endangers the security, or is against the policy of this country, is void. Such are policies of insurance to protect an enemy's trade. Another principle is, that however valid a contract originally may be, if the party become an alien enemy he cannot sue. The crown, during the war, may lay hands on the debt, and recover it, but if it do not, then, on the return of peace the rights of the contracting alien are restored, and he may himself sue. No other principle is to be deduced. The first may be laid out of the case, for this was not in its creation a contract made with an alien enemy. The second question is, whether the bill came to the hands of the plaintiff by a good title? Under the circumstances of this case, not meaning to lay down any general rule beyond this case, I am of opinion that the indorsement to the plaintiff conveyed to him a legal title in this bill, on which the king might have sued in the time of the war, and he not having so done, the plaintiff might sue after peace was proclaimed.

HEATH, J., was absent.

CHAMBRE, J. I am perfectly of the same opinion, and it would be of very mischievous consequence if it were otherwise.

DALLAS, J. This is not a contract between a subject of this country and an alien enemy, nor is it a contract of that sort to which the principle can be applied. That principle is, that there shall be no communication with the enemy in time of war, but this is a contract between two subjects in an enemy's country, which is perfectly legal.

Rule refused.

## THE DAIFJIE.

(High Court of Admiralty, 1800. 3 C. Rob. 139.)

**SIR W. SCOTT.**<sup>20</sup> These are two Dutch vessels, captured on the 7th May, and claimed as cartel ships. The question is, whether from the circumstances under which they were taken, they are to be considered under the protection of that character or not. It is a practice of no very ancient introduction among the states of Europe, to exchange prisoners of war in this manner; it has succeeded to the older practice of ransoming, which succeeded to the still more ancient practice of killing, or carrying them into captivity; I say it is a practice of no remote antiquity, because, on looking into Grotius, I find not a word of exchange, in the sense in which we are now speaking of it. It is a practice, therefore, which, at least as far as his writings seem to indicate, was not of very familiar and general use in his time, though perhaps not altogether unknown. It is, however, of a nature highly deserving of every favorable consideration, upon the same principles as are all other *commercium belli*, by which the violence of war may be allayed, as far as is consistent with its purposes, and by which, something of a pacific intercourse may be kept up, which, in time, may lead to an adjustment of differences, and end ultimately in peace. At the same time, it is highly proper that it should be conducted with very delicate honor on both sides, so as to leave no ground of suspicion, that a practice introduced for the common benefit of mankind, should be made a stratagem of war, or become liable to fraudulent abuse. I presume the terms of cartel are usually settled by agreement between the two states; in the present instance, we are not informed what those terms of agreement are; if they appeared, there might perhaps be no question left; perhaps the very letter of it might decide the present case; or, supposing it not to be within the letter, it might still be within the spirit of the agreement, liberally construed. Judging, without such information, and on general principles, I must lay it down as clear, that ships are to be protected in this office, *ad eundem et redeundum*, both in carrying prisoners, and returning from that service. Whether there is any stipulation usually made, as to the species of ships to be employed, does not appear; I should rather understand from the return made by the transport board, that there is not any stipulation on this point; and perhaps it may be immaterial, whether they are merchant ships, or ships of war, that are so employed. It may indeed be possible to put an extreme case, in which the nature of the ship might be material; as, if a fire ship was to be sent on such service to Portsmouth or Plymouth, though she had prisoners on board, she would undoubtedly be an unwelcome visitor to a naval arsenal, and her particular character might fairly justify a refusal to admit

<sup>20</sup> The statement of facts and parts of opinion are omitted.

her; but, in general, the nature of the vessel does not appear to be of consequence.

A particular circumstance in this case is, that these vessels were not actually employed as cartel ships, nor taken in *trajectu* either way, either going or returning, between the ports of the two belligerents; they were not in the actual discharge of those functions which would entitle them to protection *eundo et redeundo*, for they were going from the Texel to Flushing, there, as they say, to take the prisoners on board. It is the employment, and not the future intention, that protects; they ask protection, therefore, beyond the reach of the strict principle, which allows it only *eundo* and *redeundo*. I think, however, that the protection may be not improperly extended, if it appears that they had in any manner entered upon their functions, by being put into a state of actual preparation and equipment for their employment. \* \* \*

#### CRAWFORD et al. v. THE WILLIAM PENN.

(Circuit Court of the United States, D. New Jersey, 1819. 3 Wash. C. C. 484, Fed. Cas. No. 3,873.)

WASHINGTON, Circuit Justice.<sup>21</sup> This is a libel founded upon a bottomry bond, executed on the 13th of April, 1813, at Jamaica, by the master of the ship William Penn, on the ship, her tackle, and apparel, for the necessary repairs and outfit of the ship, to enable her to perform her voyage from that island to the United States. The libel states, that the libellants did, on the day above mentioned, at Port Royal, in the island of Jamaica, lend on bottomry, on the said ship, her freight, tackle, and apparel, to the master of the said ship, £1,370. 8s. 4d., current money of Jamaica; the said port being a foreign port, and none of the owners of the said ship being at or near the same; the said captain being otherwise unable to procure the necessary moneys, to refit and victual the said ship, to complete his intended voyage, etc.; a copy of which bond is annexed to the libel, as part thereof, etc. To this libel, ten distinct pleas have been filed, some of which, with the replications to them, have given rise to the questions which the court is now called upon to decide; and which may be comprised under the following heads: (1) Whether there is such a variance between the libel and the bottomry bond, as ought to prevent a decree passing in favour of the libellants? (2) Whether the contract, being made with alien enemies, is void? (3) Whether the bond is void, upon the ground that the advances were made, not to enable the master to complete his original voyage, which was to Lisbon, but to return to the United States, under a new contract to bring home American prisoners, as appears from the pleadings and the evidence to have been the case? \* \* \*

2. This is the important question in the cause. \* \* \*

<sup>21</sup> The statement of facts and part of the opinion are omitted.



Having disposed of these preliminary points, we come to the consideration of the main question—whether this contract, being made with an enemy, is void? The general rule is admitted, that contracts, made with an alien enemy, are void. Such is the law of nations, and of most, if not of all, the civilized nations of the world. The English and American decisions are positive in the establishment of this doctrine. But to this, as to most general rules, there are exceptions. Contracts, made with an enemy, under the license of the government, are valid; and may, in certain cases, be enforced even during the war; and that, too, whether the contract arose directly or collaterally out of such licensed trade. So, if the enemy, with whom the contract is made, be in the hostile country by license of that government. So, a ransom bond, given to an enemy, to procure the discharge of the property and the person of the captured, we hold to be valid. Such was decided to be the law of England, in the case of *Ricord v. Bettenham*, 3 Burrows, 1734, and in *Cornu v. Blackburne*, 2 Doug. 641. Such, too, is the law of other countries on the continent of Europe. We are aware of the decision in the case of *Anthon v. Fisher*, in the Exchequer, which is to the contrary (2 Doug. 649, note); but, never having met with a full report of the case, it is not easy to understand what were the particular reasons which led to that decision. How far it may have been influenced by the statute, making it criminal to give a ransom bond, which had passed prior to this decision, but after the ransom, is not clear. At all events, it was a case decided long after our Declaration of Independence, and even after the treaty of peace; and is therefore not to be considered as authority in the courts of this country, so as to overrule the decision in *Ricord v. Bettenham*, which was made in 1765.

There are other cases, which are considered as exceptions, even in England, where the general rule is upheld with considerable rigour, founded upon the peculiar necessity of the case. The case of *The Madonna delle Gracie*, 4 C. Rob. Adm. 195, is, to say the least of it, a very liberal relaxation of the general rule. It would seem, from the modern cases, that contracts, made by prisoners of war in the enemy's country, have been supported. In the case of *Sparenburgh v. Bannatyne*, 1 Bos. & P. 163, Chief Justice Eyre observes that "modern civilization has introduced great qualifications to soften the rigours of war, and allows a degree of intercourse with enemies, and particularly with prisoners of war, which can hardly be carried on without the aid of our courts of justice." The other judges agree with him. Recoveries at *nisi prius*, we understand, are common, upon contracts made with the enemy by prisoners of war, upon parol, for their subsistence. *Willison v. Patteson* (Easter Term, 1817, C. P.) 7 Taunt. 439. The case of *Antoine v. Morshead*, 6 Taunt. 237, is that of a bill of exchange, drawn on England, in the enemy's country, by one British subject, a prisoner of war, in favour of another British subject, also a prisoner of war,

and by him endorsed to an alien enemy; in which case the contract was supported. It is true, that the court seems to rely very much upon the circumstance, that the original contract was between British subjects. But it is impossible not to perceive, that the right of the alien enemy to recover upon such bill, after the return of peace, was founded upon a new contract with an alien enemy, by virtue of the endorsement; and that, if in all cases, a bill drawn by one subject in favour of another, may pass, by endorsement, into the hands of an alien enemy, the general rule of law might be indirectly subverted. We understand this case, therefore, as going the full length of establishing an exception to the general rule, in favour of prisoners of war, in the country of the enemy, contracting for necessaries. Chief Justice Gibbs seems to place it upon this ground by saying that, "if the objection could be supported to its full extent, many of our miserable fellow subjects, detained in France, must have starved." The case of *Daubuz v. Morshead*, Id. 332, is a case like the former, in principle.

The principle on which this doctrine is founded, is strongly supported by the decision of the supreme court of the United States, in the case of *Hallet v. Jenks*, 3 Cranch (7 U. S.) 210, 2 L. Ed. 414. That was the case of an insurance upon a cargo, purchased at St. Domingo, by the owner of an American vessel, which had been forced into that island by distress, and was compelled by the government to dispose of her outward cargo, with the proceeds of which the cargo insured was purchased. The objection made to the recovery was that the cargo so insured was purchased contrary to the express provisions of the non-intercourse law; and that the trade, being therefore illicit, the policy was void. But the Supreme Court maintained the validity of the contract, upon the ground, that the vessel having been forced into the island by a cause which could not be resisted, and the owner having been compelled by the government of the country to dispose of his cargo, it was not a trading contrary to the spirit of the law, to invest the proceeds in a return cargo. Now, that was the case of a trading, as expressly prohibited by the municipal laws of the United States, as a trading with the enemy is by the law of nations, and found its justification in a necessity, not imperious and irresistible, but one which was induced by a desire to save property. The owner might have avoided a breach of the law, strictly construed, if he had chosen to abandon his property. But the court was of opinion, that he was not bound to do so, notwithstanding the strong and unqualified expressions of the law. It is difficult to discover a difference, in principle, between that case and the present. In both, the vessel was forced into a forbidden port by a vis major; in both, a voluntary trading was forbidden; and in both, the contract, which would have been void, upon general principles of law, was predicated upon a necessity, not otherwise indispensable, than in order to save property. There is, indeed, this difference between the two cases, which, however, is all on the side

of the validity of this contract: In the former, the master might have brought away his vessel and crew, with no other loss than that of the cargo, and that too, from a nation with which the United States were at peace; whereas, in the latter, the departure of both depended upon the contract now objected to, and that from the country of the enemy. We cannot take leave of the case just referred to, without citing certain expressions of the chief justice, applicable to a case precisely like the present. He observes that "even if an actual and general war had existed between this country and France, and the plaintiff had been driven into a French port, and a part of his cargo seized, and he had been permitted by the officers of the port to sell the residue, and to purchase a new cargo; I am of opinion that it would not have been deemed such a traffic with the enemy as would vitiate the policy upon such new cargo."

Had the hypothetical case been the very case before the court, it would have been directly in point, and would have gone on all fours with the present. It corresponds, however, in principle, so precisely with the main case decided, that the opinion of this learned and highly distinguished judge is entitled to more than ordinary respect. The ground which the court takes in deciding this case is, that the contract grew out of real necessity, produced by a state of war, and was itself the offspring of an act of hostility. The vessel was captured as prize of war, libelled as such, and on account of her having a British license on board, was acquitted. She was disabled from availing herself of this discharge, and returning to her own country with her crew, without being repaired and victualled. This could not otherwise be effected, than by hypothecating the vessel for those repairs and outfits. In a moral point of view, therefore, it cannot be said, that this was a voluntary contract. The decision in this case, can never be relied on to sanction contracts with the enemy, under cover of a pretended necessity, or in which there is the slightest tincture of fraud, upon the general rule of law. Upon the whole, then, we are of opinion, that this bottomry bond is not void, on the ground of its being a contract made with enemy. \* \* \* 23

<sup>23</sup> In an earlier stage of the case (*Crawford et al v. The William Penn*, 1 Peters, C. C., 106, 6 Fed. Cas. 778, 780, No. 3,372 [1815]), Mr. Justice Washington thus spoke of cartel ships:

"The only remaining question is, can a contract, made with an alien enemy, by the owner or master of a cartel vessel, in relation to the navigation of that vessel, upon the service in which she is engaged, be enforced in a court proceeding according to the rules of the civil law, and having jurisdiction of the subject-matter? What is the character of a cartel vessel, and of the persons concerned in her navigation? The flag of truce which she carries, throws over her and them the mantle of peace. She is, *pro hac vice*, a neutral licensed vessel; and all persons concerned in her navigation, upon the particular service in which both belligerents have employed her, are neutral, in respect to both, and under the protection of both. She cannot carry on commerce under the protection of her flag, because this was not the business for which she was employed, and for which the immunities of that flag were granted to her. She is engaged in a special service, to carry prisoners from

## KERSHAW v. KELSEY.

(Supreme Court of Massachusetts, 1868. 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142.)

GRAY, J. <sup>28</sup> The defendant, a citizen of Massachusetts, in February, 1864, in Mississippi, took from the plaintiff, then and ever since a citizen and resident of Mississippi, a lease for one year of a cotton plantation in that state, and therein agreed to pay a rent of ten thousand dollars, half in cash, and half "out of the first part of the cotton crop, which is to be fitted for market in reasonable time." The lessor also agreed to deliver, and the lessee to receive and pay the value of the corn then on the plantation. It does not appear whether the defendant went into Mississippi before or after the beginning of the war of the rebellion; and there is no evidence of any intent on the part of either party to violate or evade the laws, or oppose or injure the government of the United States. The defendant paid the first

one place to another; and, whilst so engaged, she is under the protection of both belligerents, in relation to every act necessarily connected with that service. It follows, that all contracts made for equipping and fitting her for this service, are to be considered as contracts made between friends, and consequently ought to be enforced in the tribunals of either belligerents, having jurisdiction of the subject. The agreement of the two nations, by their agents, to make her a cartel, amounts to a license by both, to perform the service in which she is employed, and sanctifies all the means necessary to that end."

The cartel need not be concluded during, but may be made in peace in anticipation of war, *The Carolina*, 6 C. Rob. 336 (1807); as it effects the exchange of prisoners, it is confined to the belligerents, *The Rose in Bloom*, 1 Dod. 57, 60 (1811).

Vessels actually employed under the agreement are protected both going and coming in the line of duty, but vessels about to enter or sailing with the intention of entering into the service on reaching a particular port are not thus privileged and protected, *The Daifjle*, 8 C. Rob. 139, 141 (1800); a formal contract is the rule, but an informal agreement, followed by use as cartel ship, will be enforced, *La Gloire*, 5 C. Rob. 192 (1804); a cartel ship is primarily for the ransom of prisoners, but not exclusively so; it may therefore be used to carry into effect previous treaty stipulations of the contracting parties. *The Carolina*, supra; the court construes the cartel liberally and is satisfied with a bona fide and substantial performance of the requirements, but trade of all kinds carried on in the vessel subjects the cargo, *La Rosine*, 2 C. Rob. 372 (1800); and at times the vessel to confiscation, *The Venus*, 4 C. Rob. 355 (1803); merchandise carried by express permission will not, though goods carried in excess of the permission will be confiscated, *The Carolina*, supra; prisoners carried home are bound to refrain from hostilities of all kinds on board, hence capture or recapture from the enemy of a vessel of their own country is illegal and vests no title in the captor, *The Mary*, 5 C. Rob. 200 (1804); a cartel is not a treaty in the sense of the Constitution, and the cartel for the exchange of prisoners, between the United States and Great Britain, in 1813, was ratified by the Secretary of State, not the Senate (May 14), 2 Halleck, (4th Ed., 1908) 362; but, when concluded, it is of such force that the sovereign power may not annul it, *Henderson's Case*, 2 Pittsburg, R. 440 (1863). See case last cited for the question of parole, and for the matter of capitulation, see *Rucker's Case*, 1 Am. Law Rev. 217 (1866).

<sup>28</sup> Only a portion is given of the opinion of the learned judge.

instalment of rent, took possession of the plantation and corn, used the corn on the plantation, provided it with supplies to the amount of about five thousand dollars, and planted and sowed it, but early in March was driven away by rebel soldiers and never returned to the plantation, except once in April following, after which he came back to Massachusetts. The plaintiff continued to reside on the plantation, raised a crop of cotton there, and delivered it in Mississippi to the defendant's son, by whom it was forwarded in the autumn of the same year to the defendant; and he sold it and retained the profits amounting to nearly ten thousand dollars.

The plaintiff sues for the unpaid instalment of rent and the value of the corn. The claims made in the other counts of the declaration have been negatived by the special findings of the jury.

The defendant, in his answer, denied all the plaintiff's allegations; and at the trial contended that the lease, having been made during the civil war, was illegal and void, as well by the principles of international law, as by the terms of the act of Congress of 1861, c. 3, § 5, and the proclamations issued by the President under that act, declaring "all commercial intercourse by and between" the state of Mississippi and other states in which the insurrection existed "and the citizens thereof, and the citizens of the rest of the United States," to be unlawful so long as such condition of hostility should continue, and that "all goods and chattels, wares and merchandise," coming from such states into other parts of the United States, or proceeding to such states by land or water, together with the vessel or vehicle conveying them, or conveying persons to or from such states, without the license of the President, should be forfeited to the United States. 12 U. S. Sts. at Large, 257, 1262; 13 Id. 731.

The judge presiding at the trial ruled that the contracts sued on were legal, and the jury having returned a verdict for the plaintiff, the question of the correctness of this ruling is reported for our decision; the parties agreeing that, if the ruling was correct, the case shall be sent to an assessor; but if incorrect, judgment shall be entered for the defendant.

This case presents a very interesting question, requiring for its decision a consideration of fundamental principles of international law. It is universally admitted that the law of nations prohibits all commercial intercourse between belligerents, without a license from the sovereign. Some dicta of eminent judges and learned commentators would extend this prohibition to all contracts whatever. In a matter of such grave importance, the safest way of arriving at a right result will be to examine with care the principal adjudications upon the subject, most of which were cited in the argument. \* \* \*

<sup>24</sup> The cases to which the learned justice referred were the following: *The Hoop*, 1 C. Rob. 196 (1799); *The Indian Chief*, 3 C. Rob. 22 (1800); *Sander-son v. Morgan*, 39 N. Y. 231 (1868); *Mayor, etc., of City of New York v.*

The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well as any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision. The more sweeping statements in the text books are taken from the dicta which we have already examined, and in none of them is any other example given than those just mentioned. At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war.

The trading or transmission of property or money which is prohibited by international law is from or to one of the countries at war. An alien enemy residing in this country may contract and sue like a citizen. 2 Kent, Com. 63. When a creditor, although a subject of the

Erben, 38 N. Y. 308 (1868); *Whelan v. Cook*, 29 Md. 1 (1868); *Bell v. Chapman*, 10 Johns. (N. Y.) 183 (1813); *Ricord v. Bettenham*, 3 Burr., 1734; *Id.*, 1 W. Bl. 563 (1765); *Anthon v. Fisher*, 2 Doug. 650, 8 Doug. 178 (1782); *Brandon v. Nesbitt*, 6 Term R. 23 (1794); *Hutchinson v. Brock*, 11 Mass. 119, 122 (1814); *Sparenburgh v. Bannatyne*, 1 Bos. & P. 163 (1797); *McConnell v. Hector*, 3 Bos. & P. 113 (1802); *West v. Sutton*, 2 Ld. Raym. 853, 1 Salk. 2, Holt, 3 (1703); *Vanbrynen v. Wilson*, 9 East, 321 (1808); *Buckley v. Lytle*, 10 Johns. (N. Y.) 117 (1813); *Owens v. Hanney*, 9 Cranch, 180, 3 L. Ed. 697 (1815); *Potts v. Bell*, 8 Term R. 548 (1800); *Antoine v. Morshead*, 6 Taunt. 237 (1815); *Id.*, 1 Marsh. 558 (1815); *Willison v. Patteson*, 1 Moore, 133 (1817); *Id.*, 7 Taunt. 440 (1817); *Esposito v. Bowden*, 7 El. & Bl. 763 (1857); *Hannay v. Eve*, 3 Cranch, 242, 2 L. Ed. 427 (1806); *Kennett v. Chambers*, 14 How. 38, 14 L. Ed. 816 (1852); *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch, 191, 3 L. Ed. 701 (1815); *Prize Cases*, 2 Black, 635, 17 L. Ed. 459 (1862); *The Rapid*, 1 Gall. 295, Fed. Cas. No. 11,576 (1812); *The Julia*, 1 Gall. 594, 601-604, Fed. Cas. No. 7,575 (1813); *The Emulous*, 1 Gall. 563, 571, Fed. Cas. No. 4,479 (1813); *Brown v. United States*, 8 Cranch, 110, 3 L. Ed. 504 (1814); *The Rapid*, 8 Cranch, 155, 3 L. Ed. 520 (1814); *The Joseph*, 1 Gall. 545, Fed. Cas. No. 7,533 (1813); *Id.*, 8 Cranch, 451, 3 L. Ed. 621 (1814); *Scholefield v. Elchelberger*, 7 Pet. 586, 8 L. Ed. 798 (1833); *Jecker v. Montgomery*, 18 How. 110, 15 L. Ed. 311 (1855); *Hanger v. Abbott*, 6 Wall. 532, 18 L. Ed. 939 (1867); *The Ouachita Cotton*, 6 Wall. 521, 18 L. Ed. 935 (1867); *United States v. Lane*, 8 Wall. 185, 19 L. Ed. 445 (1868); *McKee v. United States*, 8 Wall. 163, 19 L. Ed. 329 (1868); *Griswold v. Waddington*, 16 Johns. (N. Y.) 438 (1819); *Clarke v. Morey*, 10 Johns. (N. Y.) 69, 71, 72 (1813); *Mrs. Alexander's Cotton*, 2 Wall. 404, 17 L. Ed. 915 (1864); *Ex parte Boussmaker*, 13 Ves. Jr. 71 (1806); *Coolidge v. Inglee*, 13 Mass. 26 (1816); *Patton v. Nicholson*, 3 Wheat. 204, 4 L. Ed. 371 (1818); *Capen v. Barrows*, 1 Gray (Mass.) 376, 380 (1854); *Musson v. Fales*, 16 Mass. 332 (1820).

enemy, remains in the country of the debtor, or has a known agent there authorized to receive the amount of the debt, throughout the war, payment there to such creditor or his agent can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor; it is not made to an enemy, in contemplation of international or municipal law; and it is no objection that the agent may possibly remit the money to his principal in the enemy's country; if he should do so, the offence would be imputable to him, and not to the person paying him the money. *Conn. v. Penn*, Peters, C. C. 496, Fed. Cas. No. 3,104; *Denniston v. Imbrie*, 3 Wash. C. C. 396, Fed. Cas. No. 3,802; *Ward v. Smith*, 7 Wall. 447, 19 L. Ed. 207; *Buchanan v. Curry*, 19 Johns. 137, 10 Am. Dec. 200. The same reasons cover an agreement made in the enemy's territory to pay money there out of funds accruing there and not agreed to be transmitted from within our own territory; for, as was said by the Supreme Court of New York, in the case last cited, "The rule is founded in public policy, which forbids, during war, that money or other resources shall be transferred so as to aid or strengthen our enemies. The crime consists in exporting the money or property, or placing it in the power of the enemy." \* \* \*

The lease now in question was made within the rebel territory where both parties were at the time, and would seem to have contemplated the continued residence of the lessee upon the demised premises throughout the term; the rent was in part paid on the spot, and the residue, now sued for, was to be paid out of the produce of the land; and the corn, the value of which is sought to be recovered in this action, was delivered and used thereon. No agreement appears to have been made as part of or contemporaneously with the lease, that the cotton crop should be transported, or the rent sent back, across the line between the belligerents, and no contract or communication appears to have been made across that line, relating to the lease, the delivery of possession of the premises or of the corn, or the payment of the rent of the one or the value of the other. The subsequent forwarding of the cotton by the defendant's son from Mississippi to Massachusetts may have been unlawful; but that cannot affect the validity of the agreements contained in the lease. Neither of these agreements involved or contemplated the transmission of money or property, or other communication, between the enemy's territory and our own. We are therefore unanimously of opinion that they did not contravene the law of nations or the public acts of the government, even if the plantation was within the enemy's lines; and that the plaintiff, upon the case reported, is entitled to recover the unpaid rent, and the value of the corn. \* \* \*

<sup>25</sup> It may not be without interest to note that a friendly letter written by Mr. Caleb Cushing to Mr. Jefferson Davis, after outbreak of the Civil War, SCOTT INT. LAW—42

both having been members of President Pierce's Cabinet, prevented Cushing's confirmation as Chief Justice of the United States in 1874.

In a special message dated January 13, 1874, to the Senate of the United States, President Grant said:

"Since nominating Hon. Caleb Cushing for Chief Justice of the Supreme Court of the United States, information has reached me which induces me to withdraw him from nomination as the highest judicial officer of the government, and I do therefore hereby withdraw said nomination." 7 Richardson's Messages and Papers of the Presidents, 1789-1897, 259 (1898).

The London Gazette of December 13, 1921, No. 32547, p. 10123, contains the following announcement:

"British Nationality and Status of Aliens Acts, 1914 and 1918.

"In the Matter of Sir Edgar Speyer, Bt.

"Revocation of Certificate of Naturalization.

"Whereas, I am satisfied, as the result of an enquiry conducted by the Certificates of Naturalization (Revocation) Committee, that Sir Edgar Speyer, Baronet, a member of His Majesty's Most Honourable Privy Council, to whom a certificate of naturalization number A 7015 was granted on the 29th February, 1892, (1) has shown himself by act and speech to be disaffected and disloyal to His Majesty; and (2) has, during the war in which His Majesty was engaged, unlawfully communicated with subjects of an enemy state and associated with a business which was to his knowledge carried on in such manner as to assist the enemy in such war;\*

"And whereas, I am satisfied that the continuance of the said certificate is not conducive to the public good:

"Now, therefore, by this order, made in pursuance of the powers conferred on me by section 7 of the British Nationality and Status of Aliens Act, 1914, I revoke the said certificate; and I direct such revocation to have effect from the date hereof; and I further order the said certificate to be given up and to be cancelled; and I further direct that Leonora Speyer, the wife of the said Sir Edgar Speyer, and Pamela Speyer, Leonora Speyer, and Vivien Clare Speyer, the minor children of the said Sir Edgar Speyer, shall cease to be British subjects.

Edward Shortt,

"One of His Majesty's Principal Secretaries of State.

"Whitehall, 1st December, 1921.

\*Note.—This finding does not involve any reflection upon any partner in the firm of Speyer Brothers, London, other than Sir Edgar Speyer.

"At the Court at Buckingham Palace, the 13th day of December, 1921.

"Present: The King's Most Excellent Majesty in Council.

"It is this day ordered by His Majesty in Council that the name of Sir Edgar Speyer, Bt., be struck out of the list of His Majesty's Most Honourable Privy Council.

"Almeric FitzRoy."

SCOTT INT.LAW



## CHAPTER VIII

## DOMICILE

## THE INDIAN CHIEF.

(High Court of Admiralty, 1801. 8 C. Rob. 12.)

Sir W. Scott.<sup>1</sup> This is the case of a ship seized in the port of Cowes, where she came to receive orders respecting the delivery of a cargo taken in at Batavia, with a professed original intention of proceeding to Hamburg; but on coming into this country for particular orders, the ship and cargo were seized in port. It does not appear clear to the court that it might not be a cargo intended to be delivered in this country, as many such cargoes have been, under the Dutch property act. I mention this to meet an observation that has been thrown out, "that it is doubtful whether the ship might not be confiscable on the ground of being a neutral ship coming from a colony of the enemy, not to her own ports or to the ports of this country." I cannot assume it as a demonstrated fact in the case, that the cargo was to be delivered at Hamburg. The vessel sailed in 1795, and as an American ship with an American pass, and all American documents; but nevertheless if the owner really resided here, such papers could not protect his vessel. If the owner was resident in England, and the voyage such as an English merchant could not engage in, an American residing here, and carrying on trade, could not protect his ship merely by putting American documents on board. His interest must stand or fall according to the determination which the court shall make on the national character of such a person.

There are two positions which are not to be controverted; that Mr. Johnson is an American generally by birth, which is the circumstance that first impresses itself on the mind of the court; and also by the part which he took on the breaking out of the American war. He came hither when both countries were open to him; but on the breaking out of hostilities he made his election which country he would adhere to, and in consequence thereof went to France. As to the doubt that has been suggested whether he would be deemed an American, not having been personally there at the time of the declaration of the independence of that country, I think that is sufficiently cleared up, by the circumstance of his being adopted as such by the act of the American government, declaring him and his family to be American subjects,<sup>2</sup> and by the official character which that government has intrusted to

<sup>1</sup> Statement of the case is omitted.

<sup>2</sup> January 15, 1785.

him. I am of opinion, therefore, that he has not lost the benefit of his native American character. He came, however, to this country in 1783, and engaged in trade, and has resided in this country till 1797. During that time he was undoubtedly to be considered as an English trader; for no position is more established than this, that if a person goes into another country and engages in trade, and resides there, he is, by the law of nations, to be considered as a merchant of that country. I should therefore have no doubt in pronouncing that Mr. Johnson was to be considered as a merchant of this country at the time of sailing of this vessel on her outward voyage. That leads me to take a view of the circumstances of this case; the ship went out in 1795 with Mr. Hewlet on board, and Mr. Johnson says "he sent out Mr. Hewlet as supercargo, and put the vessel under his control to take freight for America, but that his designs were frustrated by various circumstances;" and the ship actually went to Madeira, Madras, Tranquebar, and Batavia, and from thence to Cowes where she was arrested.

Now there can be no doubt that if Mr. Johnson had continued where he was at the time of sailing, if he had remained resident in England, it must be considered as a British transaction, and therefore a criminal transaction, on the common principle that it is illegal in any person owing an allegiance, though temporary, to trade with the public enemy. But it is pleaded that he had quitted this country before the capture, and that he had done this in consequence of an intention which he had formed of removing much earlier, but that he had been prevented by obstacles that obstructed his wish. To this effect the letter of March, 1797, is exhibited, which must have been preceded by private correspondence and application to some of his creditors. It does, I think, breathe strong expressions of intention, and of an ardent desire to get over the restraint that alone detained him; and it affords conclusive reason to believe that if he had been a free man, and at liberty to go where he pleased, he would have removed long before; and that he was detained here as a hostage, as he describes himself, to his creditors, on motives of honor creditable to his character. On the 9th of September, 1797, he did actually retire. Of the sincerity of his quitting this country there can hardly be a doubt entertained; it is almost impossible to represent stronger or more natural grounds for such a measure; and I do not think the court runs any risk of encountering a fraudulent pretension, put forward to meet the circumstances of the moment, without anything of an original and bona fide intention at the bottom of it.

The ship was sent out under the management of the supercargo, and it is said that Mr. Hewlet exceeded his commission. The affidavit does not go so far; it does not appear from that, that the agent had not the power to enter into such an engagement. But this, I think, appears clearly, that it was the understanding both of Mr. Johnson, and of his agent, Mr. Hewlet, who had been his clerk, and to whom he re-

fers for a confirmation of his avowed design of removing, that before the completion of such a voyage Mr. Johnson would be in America. Therefore, if the illegality of the voyage must be supposed to have presented itself to their minds, as a British transaction, owing to Mr. Johnson's residence in England, there was reason enough for them to conclude that Mr. Johnson would be removed; and, on that view of the matter, although it is certain that an agent would bind his employer in such a case, there is ground sufficient to presume that the agent acted fairly and bona fide, and under the expectation that Mr. Johnson would be returned to America.

The ship arrives a few weeks after his departure; and taking it to be clear, that the national character of Mr. Johnson as a British merchant was founded in residence only, that it was acquired by residence, and rested on that circumstance alone; it must be held that from the moment he turns his back on the country where he has resided, on his way to his own country, he was in the act of resuming his original character, and is to be considered as an American. The character that is gained by residence ceases by residence. It is an adventitious character which no longer adheres to him, from the moment that he puts himself in motion, bona fide, to quit the country, *sine animo revertendi*. The courts that have to apply this principle, have applied it both ways, unfavorably in some cases, and favorably in others. This man had actually quitted the country. Stronger was the case of Mr. Curtissos (*The Snelle Zeylder*, Lds. Ap. 25, 1783); he was a British born-subject, that had been resident in Surinam and St. Eustatius, and had left those settlements with an intention of returning to this country; but he had got no farther than Holland, the mother country of those settlements; when the war broke out. It was determined by the Lords of Appeal, that he was in *itinere*, that he had put himself in motion, and was in pursuit of his native British character; and as such, he was held to be entitled to the restitution of his property. So here, this gentleman was in actual pursuit of his American character; and, I think, there can be no doubt that his native character was strongly and substantially revived, not occasionally, nor colorably, for the mere purposes of the present claim; and therefore I shall restore this ship.<sup>2</sup>

<sup>2</sup> An earlier and a leading case on this subject is *The Harmony*, 2 C. Rob. 322 (1800).

See, also, the *Laurent Case*, before the American and British Claims Commission under Convention of February 8, 1853, Report of Decisions, 120, maintaining, as stated in the headnote, that:

"Where claimants, who were originally British subjects, had become domiciled in Mexico and continued to reside there, engaged in trade, during war between Mexico and the United States, held, that they had so far changed their national character that they could not be considered 'British subjects' within the meaning of these terms as used in the convention for the settlement of claims of British subjects upon the government of the United States."

This case is especially valuable for the argument of counsel, who collected the precedents, and for the opinions of the commissioners, who applied them to the facts of the case.

## THE PORTLAND.

(High Court of Admiralty, 1800. 3 C. Rob. 41.)

This was a question, depending in various claims, on the national character of Mr. Ostermeyer.

Sir W. SCOTT.<sup>4</sup> This case is one of ten, in which claims have been given for Mr. Jacob Ostermeyer, described as domiciliated at Blankenese, and as having a house of trade at Altona. \* \* \* There remain nine other, four of which, The Portland,<sup>5</sup> The Spazamheid, Jonge Ferdinand, and The Hoop, do not appear to have any connection with Ostend. With respect to The Portland, I find it determined by my predecessor, in one instance, that the claim of Mr. Marsh, a British subject, should be restored; by which the court must virtually have declared, that the destination was not to Ostend, but in truth to Hamburg; because if the destination had been to Ostend, the property of a British merchant embarked in that trade must have been condemned. It appeared that the ship was to touch at Ostend, to deliver some prisoners there on the part of this government; but there is no reason to doubt of the ulterior destination to Hamburg; and there can be no question of the propriety of the former judgment; on which indeed if I could entertain a private doubt, I should not take upon myself to shake the declaration of my predecessor.

The Spazamheid<sup>6</sup> was bound from London to Embden; and although it does appear that some of the goods were to find their way to Ostend, it is sworn "that the destination was to Embden," and there is no reason to think that there was in this destination any view towards Ostend. The Jonge Ferdinand<sup>7</sup> was going from Spain to Hamburg, and the Hoop<sup>8</sup> from Amsterdam to Bourdeaux. In these no ground of suspicion whatever arises, pointing to Ostend; I shall therefore consider these four cases as having nothing to do with that place.

The character in which Mr. Ostermeyer claims, as arising out of his general history, makes this circumstance of a destination to Ostend of great importance. Mr. Ostermeyer says, "that he had been domiciled at Ostend, as a partner of a house of great trade; but that on the irruption of the French into that country he removed himself; that he

<sup>4</sup> Parts of the opinion are omitted.

<sup>5</sup> Portland, an American ship taken December 20, 1795. Restored. Voyage from Hamburg to London. Claim of Mr. Ostermeyer for a considerable part of the cargo.

<sup>6</sup> Taken December, 18, 1795. Claim of Mr. Ostermeyer for some parcels of tobacco, a part of the cargo.

<sup>7</sup> The Jonge Ferdinand. Claim of Mr. Ostermeyer for some parts of the cargo.

<sup>8</sup> Hoop, Witzes, a Prussian ship taken January 6, 1798. Voyage from Amsterdam to Bourdeaux. Claim of Mr. Ostermeyer for some parts of the cargo.

quitted Ostend, and has since had no connection or interference with that partnership." On the other side it is contended that this is not a bona fide renunciation, that his name still continues a prominent name in the firm of that house, and therefore that he is liable to be considered as a merchant of Ostend. It is contended, besides, that if he is not a partner in that house, still he is to be considered a trader of Ostend, as a sole trader; that his connection with that place still continuing, he is to be considered as a merchant of Ostend, and as such liable to have his property condemned. Now, as to the circumstance of his being engaged in trading with Ostend, either under a partnership, or as a sole trader, I think it will be difficult to extend the consequences of that act, whatever they may be, to the trade which he was carrying on at Hamburg, and having no connection with Ostend; because, call it what you please, a colorable character, as to the trade carried on at Ostend, I cannot think that it will give such a color to his other commerce, as to make that liable for the frauds of his Ostend trade.

- In the case of Mr. Sontag\* it appeared that he had emigrated from Holland, and had settled at Altona, but still continued to carry on the trade of Holland. If he had been engaged in other trade totally distinguishable from the trade of Holland, I do not see how that would have affected him. In the present case, as far as the person is concerned, there is a neutral residence; as far as the commerce is concerned, the nature of the transaction, and the destination, are perfectly neutral, unless it can be said that trading in an enemy's commerce, makes the man, as to all his concerns, an enemy, or that being engaged in a house of trade in the enemy's country would give a general character to all his transactions. I do not see how the consequences of Mr. Ostermeyer's trading to Ostend can affect his commerce in other parts of the world. I know of no case, nor of any principle, that could support such a position as this, that a man, having a house of trade in the enemy's country, as well as in a neutral country, should be considered in his whole concerns as an enemy's merchant, as well in those which respected solely his neutral house, as in those which belonged to his belligerent domicil. The only light in which it could affect him would be, as furnishing a suggestion that the partners in the house at Ostend were also partners at Altona. But on this part of the case, I think the evidence of the merchants at Hamburg, certifying that they have inspected his books at Altona, and find no trace of a connection with Ostend, is good evidence; because, although it is but slight proof to destroy entirely a suspicion of a connection with Ostend, yet it is of great importance as to the trade carried on at Altona; they swear "that there is nothing appearing in his books which points in any way to a connection with any partnership at Ostend."

It comes then to this question, Whether Mr. Ostermeyer having con-

\* *Indiana, and other cases, Lords, February 7, 1800.*

nection at Ostend, either as a partner in a house of trade, or as a sole trader, would be liable to be considered as an Ostend merchant, in respect to a transaction originating with another house, and having no connection with Ostend? I am of opinion that the consequences of the transaction must be limited to the transaction at Ostend, and that his other trade must be exonerated; I think, therefore, with respect to these four ships, without going into the particular evidence, that they are cases of restitution; at the same time I think I am under the necessity of saying, that the captors have done nothing more than what the situation of Mr. Ostermeyer compelled them to do, in bringing these cases to adjudication; and therefore I pronounce them to be entitled to their expenses—desiring at the same time to be understood, as not laying down any general rule from this precedent. Considering the circumstances of the several cases, that the Portland was going on her primary destination to Ostend, and that in the Spazamheid there were goods clearly designed for Ostend, I think it is but reasonable that the captors' expenses should be paid. \* \* \*

### THE DANOUS.

(Lords Commissioners of Appeal, 1802. 4 C. Rob. 255, note.)

Mr. ———, a British-born subject, resident in the English factory at Lisbon, was allowed the benefit of a Portuguese character, so far as to render his trade with Holland (at war with England, but not with Portugal) not impeachable as an illegal trade. Farther proof was ordered to be made of the property.<sup>10</sup>

<sup>10</sup> In *The President*, 5 C. Rob. 277, 280 (1804), Sir William Scott held that: "It is next said, that the claimant is entitled to the benefit of an intention of removing to Philadelphia in a few months. A mere intention to remove has never been held sufficient without some overt act; being merely an intention, residing secretly and undistinguishably in the breast of the party, and liable to be revoked every hour. The expressions of the letter, in which this intention is said to be found, are, I observe, very weak and general, of an intention merely in futuro. Were they even much stronger than they are, they would not be sufficient; something more than mere verbal declaration, some solid fact, showing that the party is in the act of withdrawing, has always been held necessary in such cases. Nothing of that sort is averred. The court is, therefore, under the necessity of considering this gentleman as a merchant of the enemy's country, and of pronouncing the ship, as his property, liable to condemnation."

For the earlier cases on this subject, see *Amory and Others v. McGregor*, 15 Johns. (N. Y.) 24, 8 Am. Dec. 205 (1818).

In *The Clan Grant*, 1 British and Colonial Prize Cases, 272 (1915), it was held, as stated in the headnote, that:

"The property of an enemy subject who is domiciled in any enemy country, but has a house of trade in a neutral country, will be treated as enemy property; and if the property belongs to a partnership, in the absence of evidence to the contrary, it will be presumed to be divided proportionately between the partners, and the share attributable to the partner with an enemy domicile will be condemned."

<sup>11</sup> The English cases uniformly hold that residence in a foreign country subject to the law of extraterritoriality does not change domicile; that is to

## THE LIESBET VAN DEN TOLL.

(High Court of Admiralty, 1804. 5-O. Rob. 283.)

This was a question respecting the national character of a fishing adventure, carried on by a native Dutchman who had become by domicile a subject of Prussia, and had purchased the vessel, formerly a Dutch vessel, in February, at Embden. It appeared that he had since been employed in fishing off the Dutch coast, having sold his cargoes to English ships, and having once or twice resorted to Dutch ports, not for the purpose of selling his cargoes, but merely to procure bait.

Sir W. SCOTT. It appears to me that this case is very favorably distinguished from that<sup>12</sup> of yesterday, where there was reason to believe, from the evidence of the mate, that the master had delivered his cargoes in Dutch ports; although that circumstance was altogether suppressed by the master in his deposition. That fact, connected with

say, a British subject residing in Shanghai, China, for instance, retains his British domicile.

One of the most recent cases on this subject in which the authorities are reviewed is *The Derfflinger* (No. 1) 1 British and Colonial Prize Cases, 386 (1916), in which it is held that the private effects of a German official in the service of the Chinese government, shipped aboard a German vessel, for delivery in Germany, were subject to confiscation as enemy property, on the ground, as stated in the headnote, that:

"European powers having the privilege of extraterritorial jurisdiction in China, a German subject resident in Shanghai does not acquire a civil domicile in China for war purposes, as he remains subject to the jurisdiction of his own state."

In so deciding, the Egyptian Prize Court followed *In re Tootal's Trusts*, L. R. 23 Ch. D. 532 (1882).

The whole subject was re-examined by the House of Lords in *Casdagli v. Casdagli*, [1919] A. C. 145 (1918), in which that august tribunal held that there was no rule of law which prevented a British subject, residing in Egypt and registered in the British consulate as a British subject, from acquiring an Egyptian domicile, although he enjoys certain privileges and immunities by reason of the extraterritorial jurisdiction which Great Britain exercises in Japan.

In the case of *The Will of Young John Allen*, 1 American Journal of International Law, 1029, 1039 (1907), Wilfey, J., speaking for the United States Court for China, held:

"First.—That there is nothing in the theory or practical operation of the law of extraterritoriality inconsistent with or repugnant to the application of the American law of domicile to American citizens residing in countries with which the United States has treaties of extraterritoriality.

"Second.—That Dr. Young J. Allen, having lived in China for a period of forty-seven years and having expressed his intention to live here permanently, thereby acquired an extraterritorial domicile in China; consequently this court in the administration of his estate will be guided by the law which Congress has extended to Americans in China, which is the common law."

This view was later followed by the Supreme Court of Maine, in *Mather v. Cunningham*, 105 Me. 326, 74 Atl. 809, 29 L. R. A. (N. S.) 761, 18 Ann. Cas. 692 (1909), the court holding that "Henry J. Cunningham, the decedent, at the time of his decease, had abandoned his domicile of origin in Waldo county, and had acquired a domicile of choice in Shanghai."

Both of these cases are cited and quoted with approval in *Casdagli v. Casdagli*, *supra*, 167-168.

<sup>12</sup> *Jonge Jeroen, Krom*, condemned October 9, 1804.

the original character of the vessel, and of the master, seemed to the court to amount to a case of Dutch occupation, and the vessel was on that ground condemned. Here the occupation is certainly much slighter. It is not denied that a native Prussian might have engaged in such an adventure, without drawing on himself the consequences of a Dutch character. He might unquestionably have resorted to the Dutch coast for the purpose of fishing; as it is, indeed, not unusual for fishermen to frequent very distant shores. Then the only question will be, whether this man, being a native Dutchman, and a Prussian subject by domicile only, but of seven years' continuance, and not having recently taken it up for any purposes connected with the present war, would be differently affected by this employment. I am disposed to hold that he would not. It was open to him to go to the coasts of Holland to carry on his fishery in his Prussian character; he was also at liberty to sell his cargoes at sea, as he appears to have done, in every instance, to British vessels, who have lately been very numerous on the coasts of Holland, and might be expected to furnish a good market for commodities of that kind. The only circumstance that can raise a doubt is, that he appears to have resorted to the Texel for bait. It is said that this, though in itself a slight circumstance, affords no immaterial indication of the Dutch character, and of the Dutch origin of this employment. But I am not prepared to say that this circumstance alone, unconnected with any habits of delivering his cargoes in the Dutch ports, will be sufficient to affect him with a Dutch character. To hold otherwise, would, I think, be to press the doctrine of occupation rather too rigidly, against a class of cases which has usually been very favorably considered, and treated with peculiar lenity and forbearance. Restitution.

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### THE HYPATIA.

(Probate, Divorce and Admiralty Division, 1916. L. R. [1917] Prob. Div. 36.)

Suit for condemnation of cargo as prize.

The facts, which are fully set out in the judgment, shortly were that, under a bill of lading dated July 10, 1914, 100 bales of wool were shipped at Buenos Aires on the British steamship Hypatia for carriage to Hamburg. War having broken out with Germany while the Hypatia was in the course of her voyage, she was diverted to Liverpool, where the goods were seized as prize. They were claimed by the shippers, H. Fuhrmann & Co., on the ground that the property had not passed to the buyers, and that, as the goods of a firm with a commercial domicile in a neutral country, they had a neutral character. All the partners of the firm of H. Fuhrmann & Co. were Germans. None of them resided in Buenos Aires, the business being carried on there entirely by managers and clerks. The only active partner left Buenos Aires in 1910 and took up his residence in Antwerp,



where the two other partners already resided. Shortly after the outbreak of war all three were expelled by the Belgian authorities as enemy subjects. \* \* \*

1916, Dec. 21. THE PRESIDENT (SIR SAMUEL EVANS) read the following judgment:<sup>13</sup> \* \* \*

The three partners in the claimants' firm being Germans, the question arises whether they in fact or in law acquired a commercial domicile in the Argentine Republic.

It is well known that according to the English and American views of international law (although not according to the French or German or general European view) a subject of a belligerent state can have a commercial domicile in a neutral state, which would protect his property from capture at sea.<sup>14</sup> But I think that residence in the neutral state is an essential condition of such a domicile.

I know of no case where, merely by reason of carrying on business through agents or clerks in a neutral state, subjects of an enemy can acquire a commercial domicile without residence in that state.

In his celebrated judgment in *The Indian Chief*, 3 C. Rob. 12, 18, 1 Eng. P. C. 251, 252, Lord Stowell said of Mr. Johnson, the American consul: "He came to this country in 1783, and engaged in trade, and has resided in this country till 1797; during that time he was undoubtedly to be considered as an English trader; for no position is more established than this, that if a person goes into another country, and engages in trade, and resides there, he is, by the law of nations, to be considered as a merchant of that country."

In the case of *The Venus* (1814) 8 Cranch, 253, 3 L. Ed. 553, where the Supreme Court of the United States discussed questions of commercial domicile so fully, it will be seen that throughout the judgments residence was regarded as an essential ingredient. On this question Chancellor Kent says: "If [a person] resides in a belligerent country, his property is liable to capture as enemy's property, and if he resides in a neutral country, he enjoys all the privileges, and is subject to all the inconveniences, of the neutral trade." Kent's Commentaries (14th Ed.) vol. 1, p. 103.

Mr. Dicey also in his *Conflict of Laws* deals with the matter thus: "A commercial domicile \* \* \* is such a residence in a country for the purpose of trading there as makes the person's trade or business contribute to or form part of the resources of such country, and renders it, therefore, reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country. When a person's civil domicile is in question, the matter to be determined is whether he has or has not so settled in a given country as to have made it his home. When a person's commercial domicile

<sup>13</sup> Part of the opinion is omitted.

<sup>14</sup> The leading French case on the subject is *Le Hardy*, decided in 1801. For the text of this important decision, see, post, p. 686.

is in question, the matter to be determined is whether he is or is not residing in a given country with the intention of continuing to trade there." Dicey's *Conflict of Laws* (2d Ed., 1908) p. 742.

It is sometimes said that Lord Stowell in *The Jonge Klassina* (1804) 5 C. Rob. 297, 302, 1 Eng. P. C. 485, 488, expressed the opinion that a man may acquire a commercial domicile in more countries than one. The passage referred to is as follows: "A man may have mercantile concerns in two countries, and if he acts as a merchant of both, he must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries. That he has no fixed counting-house in the enemy's country will not be decisive. How much of the great mercantile concerns of this kingdom is carried on in coffee-houses? A very considerable portion of the great insurance business is so conducted. It is indeed a vain idea, that a counting-house or fixed establishment is necessary to make a man a merchant of any place. If he is there himself, and acts as a merchant of that place, it is sufficient; and the mere want of a fixed counting-house there, will make no breach in the mercantile character which may well exist without it."

That case was one involving the question of carrying on a trade outside and beyond that authorized by a particular license to trade. It is no decision that the existence of a fixed counting-house or house of trade in a neutral country without residence by a trader or partner in that country will endow him with a neutral commercial domicile which will give him, though an enemy subject, protection for his goods from maritime seizure. Indeed the passage itself seems to assume the presence of the trader in the neutral country.

I note that in dealing with this case the late Mr. Westlake said: "Without having or being a partner in a house of business established in a given country, a man may in that country make contracts or do other acts of a trader, not linked together otherwise than through his person. Then we have the state of facts with regard to which Lord Stowell said that 'a man may have mercantile concerns in two countries, and if he acts as a merchant of both he must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries.'" Westlake's *International Law*, part II, p. 164.

It must not be taken that I am expressing any opinion as to whether a man can have a commercial domicile in two neutral countries which would entitle him to be regarded as a neutral trader in both. I can conceive that it is possible that he might establish a sufficient residence in both for the purpose. Nor am I considering the case of a corporation or incorporated company which might theoretically have a "residence" in the country where it was registered. Dealing with the case now before the court, in my view a commercial domicile such as is here claimed cannot be established without proof of a sufficient

residence of the partners or some of them in the country where the business is carried on, or where the house of trade is situate. \* \* \*

I find that the wool at the time of capture was enemy property on a British ship; and accordingly I adjudge its condemnation as prize to the crown as droits of admiralty. \* \* \*<sup>15</sup>

### THE HAMBORN.

(Privy Council, 1919. L. R. [1919] App. Cas. 993.)

The judgment of their Lordships was delivered by

LORD SUMNER.<sup>16</sup> The late President condemned the steamship Hamborn upon the ground that she was "a German vessel belonging to German owners." Her owners, the appellants, contend that they are a limited liability company, incorporated in Holland according to Dutch law, and that their ship was on the Dutch register of shipping and that she flew, as well she might, the flag of the kingdom of the Netherlands. Literally all this is true. The President spoke of her as being "nominally" owned by a Dutch company but held that she "must be regarded as belonging to German subjects" and, quoting from *The Fortuna*, 1 Dods. 81, 87, that "it is no inconsiderable part of the ordinary occupation of a prize court to pull off this mask, and exhibit the vessel so disguised in her true character," he laid it down that "the court is not bound to determine the neutral or enemy character of a vessel according to the flag she is flying, or may be entitled to fly, at the time of capture." In fact, however, in this case there is no mask to be pulled off, if by that is meant some deception to be exposed. The appellant company really is a Dutch company; the ship was bought before the war and really was the company's property. The company is not shown to be a nominee holding in trust for other persons. There seems to have been no disguise or concealment or attempt to delude either the captors or the court, and, according to the municipal law

<sup>15</sup> "It is often a matter of difficulty for prize courts to determine to whom goods seized as maritime prize actually belong, since there is no distinct and generally accepted fundamental principle as to the test to be applied. There is, in fact, an opposition between the British and American criterion of domicile, and the French and Italian criterion of nationality. \* \* \* Under the circumstances we may, therefore, expect a diversity of practice between the French and Italian prize decisions which strictly adhere to nationality (*The Martha-Bockhahn*, 1919, *Journal Officiel*, March 2, 1919, p. 2348; *The Moravia*, 1916, *Gazetta Ufficiale*, April 26, 1916, No. 98), and the British decisions which consider the domicile of the owner as the determining factor: 'It appears reasonably certain that the question whether a particular individual ought to be regarded as an enemy or otherwise depends, prima facie, on his domicile, and domicile is, according to international law, a matter of inference from residence.' The Privy Council in *The Anglo-Mexican*, 1917, 34 *Times Law Reports*, p. 149." C. J. Colombos, "Cargoes in the Prize Courts of Great Britain, France, Italy and Germany," *The Journal of Comparative Legislation and International Law*, 3d series, vol. 3, part 4, pp. 286, 289 (October, 1921).

<sup>16</sup> The statement of facts is omitted.

applicable, namely that of Holland, the appellants are a Dutch corporation, and the ship is theirs and enjoys the rights and is subject to the obligations which attach to a Dutch ship. Evidently there is some inaccuracy, no doubt inadvertent, in the language employed by the President and on this the appellants' argument is rested.

The facts are these. The appellant company, the Naamlouze Vennootschap Maatschappij Stoomschip Hamborn (or the Hamborn Steamship Company), is a single-ship company and the whole of its shares belong in equal moieties to two other Dutch companies, the Naamlouze Vennootschap Handels en Transport Maatschappij Vulcaan of Rotterdam (or the Transport Company) and the Vulcaan Kohlen Maatschappij, also of Rotterdam (or the Coal Company). As to the Transport Company, all the shares but two, which belong to the German firm of Thyssen & Co. of Mulheim on the Ruhr, are the property of a German company, the Gewerkschaft Deutsche Kaiser of Hamborn. The shares of the Coal Company are held exclusively by three companies, the Vulcaan Transport Company above-mentioned and two German companies, the Gewerkschaft Rhein and the Gewerkschaft Lohberg, both of Hamborn. All the directors and shareholders of the last two companies are Germans, resident in Germany. So are the directors of the Vulcaan Transport Company, and they have under their supervision and control as managers two Germans, who have resided in Holland since the formation of the appellant company in 1913 and attend to the practical business details of the Vulcaan Transport Company, which in its turn holds the office of manager to the Hamborn Steamship Company. It does not appear that they have any business of their own, and before the appellant company was formed they were clerks employed by the Deutsche Kaiser Company, the one till 1907, the other till 1910.

Sufficient details are given of the ship's regular trade to make it quite clear what she was bought for. Her trade was, with unimportant exceptions, to load ore at Spanish ore ports for Rotterdam, going out with coal from South Wales to French ports to save a ballast voyage. When the war broke out, she was sent across the Atlantic and was trading on time charter there when she was captured. The Transport Company, which owns half the capital of the appellant company, was incorporated to own and manage lighters and tugs for the carriage of cargo up the Rhine and its tributaries, on behalf among others of the Deutsche Kaiser Company, for whom it carries ore. Thyssen & Company and the Deutsche Kaiser Company own ironworks in Germany, and there was not a single person interested in any of these companies at the time of her capture who was not an enemy subject. Their Lordships entertain no doubt that the Hamborn was bought and employed as a useful tender to the German iron industry on the Ruhr, that her other trading was ancillary, and that her Dutch flag, Dutch ownership and local management at Rotterdam were adopted merely for the convenience of her German import trade. For some purposes no

doubt she belonged to and was counted as part of the mercantile marine of the kingdom of the Netherlands, but in substance she and her trade were a support to and a part of the commerce and the shipping of the German Empire. The legal effect of all this, particularly on her liability to capture, is another matter.

The true question is one, in the President's phrase, of determining the neutral or enemy character of the *Hamborn*. Unless either her Dutch flag or the country of incorporation of the owning company or the place of residence of her subordinate managers or some or all of these matters be conclusive, she bore a character which justified her condemnation, for she formed part of that enemy commerce which a belligerent is entitled to disable and restrain.

It may be as well to put on one side certain aspects of the effect of using a national flag, which are not now relevant and are really only false analogies. If a ship for her own purposes has assumed and used a national flag to which she is not really entitled, she may in some circumstances be held bound by the nationality which she has thus assumed without warrant. If a ship lawfully flies a national flag, she may in some cases be said, by a figure of speech, to derive from her flag the system of municipal law by which her contracts or her civil liabilities are governed. In the first case, she cannot deny as against captors the national character, which she has irregularly taken; in the second, she derives from the national character, which is actually hers and is indicated by her flag, the system of legal rights and liabilities applicable to her. Neither case touches the position, where in a question with captors it becomes necessary to consider whether the ship, though in contemplation of technical municipal law a neutral ship, of neutral registry, and entitled to the benefits of a neutral flag, is, in the view of the law of nations, a ship of enemy character and liable to be treated in accordance with that character. If the case turned on her user *de facto* at the time of capture it would be simple: so it would be, if her owners were natural persons of neutral nationality *de jure*, neither adhering to the enemy nor allowing their chattel to be used in enemy service.

The present case is more complex. The criteria for deciding enemy character in the case of an artificial person differ from those applicable to a natural person, since in the nature of things conduct, which is one of the most important matters, can in the former case only be the conduct of those who act for or in the name of the artificial person. It was decided in the case of *Daimler Company v. Continental Tyre and Rubber Company*, [1916] 2 A. C. 307, that, in the case of an incorporated company, the right and power of control may form a true criterion, the control, that is, of those persons who are the active directors of the company and whose orders its officers must obey, or the control of those persons who in their turn are the masters of the directorate and make or unmake it by the use of the controlling majority of votes. The application of this test presents no difficulty

here, for no living person and no sentient mind exercised or possessed any control over the Hamborn Steamship Company, except persons and minds of enemy nationality. The residence of the two German managers in Rotterdam, if not altogether immaterial, at any rate cannot affect the result, since the question is not one of trading with enemy subjects, resident or carrying on business in a neutral country, but is one of the character of an artificial persona, whose trade is carried on for it under the supreme direction and control of enemies born. Their Lordships agree with a passage of the President's judgment, which sufficiently represents the true gist of his reasoning ([1918] P. 25): "The centre and whole effective control of the business of the Hamborn Steamship Company was in Germany. Having regard to these facts, the vessel must be regarded in this court as belonging to German subjects," in a claim by captors for condemnation.

One small point remains. By article 57 of the Declaration of London, varying the rule of international law, the neutral or enemy character of a ship is simply determined by the flag which she is entitled to fly. Down to October 20, 1915, the crown, by adopting the Declaration of London, had waived its right to rely on other criteria. On that day was published an Order in Council, by which that waiver was withdrawn. The ship was captured on October 27. It is said that the appellant company was unaware of this order, but its ignorance cannot have the effect of compelling the crown to continue to waive rights which in truth were in full effect, nor, if knowledge of this kind could matter, would it be the knowledge of the company, which merely owned the ship, but that of the time charterers, who sent her to sea, as to whom nothing is proved.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

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### THE VENUS.

(Supreme Court of the United States, 1814. 8 Cranch, 253, 3 L. Ed. 553.)

Appeal from the sentence of the Circuit Court for the District of Massachusetts.

The following were the facts of the case, as stated by WASHINGTON, J., in delivering the opinion of the court:

This is the case of a vessel which sailed from Great Britain, with a cargo belonging to the respective claimants, as was contended, before the declaration of war by the United States against Great Britain was or could have been known by the shippers. She sailed from Liverpool on the 4th of July, 1812, under a British license, for the port of New York, and was captured on the 6th of August, 1812, by the American privateer *Dolphin*, and sent into the district of Massachusetts, where the vessel and cargo were libelled in the District Court.

The ship, 100 casks of white lead, 150 crates of earthenware, 35 cases and 3 casks of copper, 9 pieces of cotton bagging, and a quantity of coal, were claimed by Lenox and Maitland. 198 packages of merchandize and 25 pieces of cotton bagging were claimed by Jonathan Amory, as the joint property of James Lenox, William Maitland and Alexander McGregor; not distinguishing the proportions of each: but the 25 pieces of cotton bagging were afterwards claimed for McGregor as his sole property, and also 5 trunks of merchandize. 21 trunks of merchandize were claimed by James Magee, of New York, as the joint property of himself and John S. Jones, residing in Great Britain.

The District Court, on the preparatory evidence, decreed restitution to Magee and Jones, and also to Lenox and Maitland, except as to the 100 casks of white lead; as to which, and as to the claim of McGregor, further proof was ordered. From this decree, so far as it ordered restitution of the merchandize to Magee and Jones, and to Maitland, and of the ship to Lenox and Maitland, the captors appealed to the Circuit Court, where the decree was affirmed pro forma, and an appeal was taken to this court.

In April, 1813, the cause was heard on further proof in the District Court; and in August the claim of McGregor was rejected, as well as that of Lenox and Maitland to the white lead. But at another day, on a further hearing, the court ordered restitution to McGregor of one fourth of the property claimed by him, and condemned the other three fourths as belonging to his partners, being British subjects. Both parties appealed, as did also Lenox and Maitland in relation to the white lead. A pro forma decree of affirmance was made, from which an appeal was taken to this court.

Maitland, McGregor and Jones were native British subjects, who came to the United States many years prior to the present war, and, after the regular period of residence were admitted to the rights of naturalization. Some time after this, but long prior to the declaration of war, they returned to Great Britain, settled themselves there, and engaged in the trade of that country where they were found carrying on their commercial business at the time these shipments were made, and at the time of the capture. Maitland is yet in Great Britain, but has, since he heard of the capture, expressed his anxiety to return to the United States; but has been prevented from doing so by various causes set forth in his affidavit. McGregor actually returned to the United States some time in May last—Jones is still in England. \* \* \*

Saturday, March 12th, 1814. Absent, LIVINGSTON, J.

WASHINGTON, J., after stating the facts of the case, delivered the opinion of the majority of the court as follows: <sup>17</sup> \* \* \*

The great question involved in this, and many other of the prize cases which have been argued is, whether the property of these claim-

<sup>17</sup> Part of the opinion is omitted, together with the dissenting opinion of Chief Justice Marshall.

ants who were settled in Great Britain, and engaged in the commerce of that country, shipped before they had a knowledge of the war, but which was captured, after the declaration of war, by an American cruizer, ought to be condemned as lawful prize. It is contended by the captors, that as these claimants had gained a domicile in Great Britain, and continued to enjoy it up to the time when war was declared, and when these captures were made, they must be considered as British subjects, in reference to this property, and, consequently, that it may legally be seized as prize of war in like manner as if it had belonged to real British subjects. But if not so, it is then insisted, that these claimants having, after their naturalization in the United States, returned to Great Britain, the country of their birth, and there re-settled themselves, they became reintegrated British subjects, and ought to be considered by this court in the same light as if they had never emigrated. On the other side it is argued, that American citizens settled in the country of the enemy, as these persons were, at the time war was declared, were entitled to a reasonable time to elect, after they knew of the war, to remain there, or to return to the United States; and that, until such election was, bona fide, made, the courts of this country are bound to consider them as American citizens, and their property shipped before they had an opportunity to make this election, as being protected against American capture.

There being no dispute as to the facts upon which the domicile of these claimants is asserted, the questions of law alone remain to be considered. They are two: First, By what means and to what extent, a national character may be impressed upon a person, different from that which permanent allegiance gives him? and secondly, What are the legal consequences to which this acquired character may expose him, in the event of a war taking place between the country of his residence and that of his birth, or in which he had been naturalized?

1. The writers upon the law of nations distinguish between a temporary residence in a foreign country, for a special purpose, and a residence accompanied with an intention to make it a permanent place of abode. The latter is styled by Vattel, domicile, which he defines to be, "a habitation fixed in any place, with an intention of always staying there." \* \* \*

The question, whether the person to be affected by the right of domicile had sufficiently made known his intention of fixing himself permanently in the foreign country, must depend upon all the circumstances of the case. If he had made no express declaration on the subject, and his secret intention is to be discovered, his acts must be attended to, as affording the most satisfactory evidence of his intention. On this ground it is, that the courts of England have decided, that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes, by these acts, such evidence of an intention permanently to reside there, as to stamp him



with the national character of the state where he resides. In questions on this subject, the chief point to be considered, is the *animus manendi*; and courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appear that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicile is acquired by a residence even of a few days. This is one of the rules of the British courts, and it appears to be perfectly reasonable. Another is, that a neutral or subject, found residing in a foreign country is presumed to be there *animus manendi*; and if a state of war should bring his national character into question, it lies upon him to explain the circumstances of his residence. The Bernon, 1 Rob. 86, 102. \* \* \*

2. The next question is, what are the consequences to which this acquired domicile may legally expose the person entitled to it, in the event of a war taking place between the government under which he resides and that to which he owes a permanent allegiance? A neutral in his situation, if he should engage in open hostilities with the other belligerent, would be considered and treated as an enemy. A citizen of the other belligerent could not be so considered, because he could not, by any act of hostility, render himself, strictly speaking, an enemy, contrary to his permanent allegiance. But although he cannot be considered an enemy, in the strict sense of the word, yet he is deemed such, with reference to the seizure of so much of his property concerned in the trade of the enemy, as is connected with his residence. It is found adhering to the enemy. He is himself adhering to the enemy, although not criminally so, unless he engages in acts of hostility against his native country, or, probably, refuses, when required by his country, to return. The same rule, as to property engaged in the commerce of the enemy, applies to neutrals; and for the same reason. The converse of this rule inevitably applies to the subject of a belligerent state domiciled in a neutral country; he is deemed a neutral by both belligerents, with reference to the trade which he carries on with the adverse belligerent, and with all the rest of the world.

But this national character which a man acquires by residence, may be thrown off at pleasure, by a return to his native country, or even by turning his back on the country in which he has resided, on his way to another. To use the language of Sir W. Scott, it is an adventitious character gained by residence, and which ceases by non-residence. It no longer adheres to the party from the moment he puts himself in motion, *bona fide*, to quit the country *sine animo revertendi*. 3 Rob. 17, 12, The Indian Chief. The reasonableness of this rule can hardly be disputed. Having once acquired a national character by residence in a foreign country, he ought to be bound by all the consequences of it, until he has thrown it off, either by an actual return to his native country, or to that where he was naturalized, or by commencing his removal, *bona fide*, and without an intention of returning. If any thing short of actual removal be admitted to work

a change in the national character acquired by residence, it seems perfectly reasonable that the evidence of a bona fide intention to remove should be such as to leave no doubt of its sincerity. Mere declarations of such an intention ought never to be relied upon, when contradicted, or at least rendered doubtful, by a continuance of that residence which impressed the character. They may have been made to deceive; or, if sincerely made, they may never be executed. Even the party himself ought not to be bound by them, because he may afterwards find reason to change his determination, and ought to be permitted to do so. But when he accompanies those declarations by acts which speak a language not to be mistaken, and can hardly fail to be consummated by actual removal, the strongest evidence is afforded which the nature of such a case can furnish. And is it not proper that the courts of a belligerent nation should deny to any person the right to use a character so equivocal, as to put it in his power to claim which ever may best suit his purpose, when it is called in question? If his property be taken trading with the enemy, shall he be allowed to shield it from confiscation, by alleging that he had intended to remove from the country of the enemy to his own, then neutral, and therefore, that, as a neutral, the trade was lawful? If war exist between the country of his residence and his native country, and his property be seized by the former, or by the latter, shall he be heard to say in the former case, that he was a domiciled subject of the country of the captor, and in the latter, that he was a native subject of the country of that captor also, because he had declared an intention to resume his native character; and thus to parry the belligerent rights of both? It is to guard against such inconsistencies, and against the frauds which such pretensions, if tolerated, would sanction, that the rule above mentioned has been adopted.

Upon what sound principle can a distinction be framed between the case of a neutral, and the subject of one belligerent domiciled in the country of the other at the breaking out of the war? The property of each, found engaged in the commerce of their adopted country, belonged to them, before the war, in their character of subjects of that country, so long as they continued to retain their domicile; and when a state of war takes place between that country and any other, by which the two nations and all their subjects become enemies to each other, it follows that the property, which was once the property of a friend, belongs now, in reference to that property, to an enemy. This doctrine of the common-law and prize courts of England is founded, like that mentioned under the first head, upon national law; and it is believed to be strongly supported by reason and justice. It is laid down by Grotius, p. 563, "that all the subjects of the enemy who are such from a permanent cause, that is to say, settled in the country, are liable to the law of reprisals, whether they be natives or foreigners; but not so if they are only trading or sojourning for a little time." And why, it may be confidently asked, should not the prop-

erty of such subjects be exposed to the law of reprisals and of war, so long as the owner retains his acquired domicil, or, in the words of Grotius, continues a permanent residence in the country of the enemy? They were before, and continue after the war, bound, by such residence, to the society of which they are members, subject to the laws of the state, and owing a qualified allegiance thereto; they are obliged to defend it, (with an exception in favor of such a subject, in relation to his native country) in return for the protection it affords them, and the privileges which the laws bestow upon them as subjects. The property of such persons, equally with that of the native subjects in their totality, is to be considered as the goods of the nation, in regard to other states. It belongs, in some sort, to the state, from the right which she has over the goods of its citizens, which make a part of the sum total of its riches, and augment its power. Vatt. 147, and also B. 1, c. 14, § 182. In reprisals, continues the same author, we seize on the property of the subject, just as we would that of the sovereign; everything that belongs to the nation is subject to reprisals, wherever it can be seized, with the exception of a deposit entrusted to the public faith. B. 2, c. 18, § 344.

Now if a permanent residence constitutes the person a subject of the country where he is settled, so long as he continues to reside there, and subjects his property to the law of reprisals, as a part of the property of the nation, it would seem difficult to maintain that the same consequences would not follow in the case of an open and public war, whether between the adopted and native countries of persons so domiciled, or between the former and any other nation. If, then, nothing but an actual removal, or a bona fide beginning to remove, can change a national character acquired by domicil, and, if, at the time of the inception of the voyage, as well as at the time of capture, the property belonged to such domiciled person in his character of a subject, what is there that does, or ought to exempt it from capture by the privateers of his native country, if, at the time of capture, he continues to reside in the country of the adverse belligerent? It is contended that a native or naturalized subject of one country, who is surprised in the country where he was domiciled by a declaration of war, ought to have time to make his election to continue there, or to remove to the country to which he owes a permanent allegiance; and that, until such election is made, his property ought to be protected from capture by the cruisers of the latter. This doctrine is believed to be as unfounded in reason and justice, as it clearly is in law. In the first place, it is founded upon a presumption that the person will certainly remove, before it can possibly be known whether he may elect to do so or not. It is said that this presumption ought to be made, because, upon receiving information of the war, it will be his duty to return home. This position is denied. It is his duty to commit no acts of hostility against his native country, and to return to her assistance when required to do so; nor will any

just nation, regarding the mild principles of the law of nations, require him to take arms against his native country, or refuse her permission to him to withdraw whenever he wishes to do so, unless under peculiar circumstances, which, by such removal at a critical period, might endanger the public safety. The conventional law of nations is in conformity with these principles. It is not uncommon to stipulate in treaties that the subjects of each shall be allowed to remove with their property, or to remain unmolested. Such a stipulation does not coerce those subjects either to remove or to remain. They are left free to choose for themselves; and when they have made their election, they claim the right of enjoying it under the treaty. But until the election is made, their former character continues unchanged.

Until this election is made, if his property found upon the high seas, engaged in the commerce of his adopted country, should be permitted, by the cruizers of the other belligerent, to pass free, under the notion that he may elect to remove, upon notice of the war, and should arrive safe, what is to be done in case the owner of it should afterwards elect to remain where he is? or, if captured and brought immediately to adjudication, it must, upon this doctrine, be acquitted until the election to remain is made known. In short, the point contended for would apply the doctrine of relation to cases where the party claiming the benefit of it may gain all, and can lose nothing. If he, after the capture, should find it his interest to remain where he is domiciled, his property embarked before his election was made, is safe; and if he finds it best to return, it is safe of course. It is safe whether he goes or stays. This doctrine, producing such contradictory consequences, is not only unsupported by any authority, but it would violate principles long and well established in the prize courts of England, and which ought not, without strong reasons which may render them inapplicable to this country, to be disregarded by this court. The rule there is that the character of property, during war, cannot be changed in transitu, by any act of the party, subsequent to the capture. The rule indeed goes farther, as to the correctness of which in its greatest extension, no opinion need now be given; but it may safely be affirmed that this change cannot and ought not to be effected by an election of the owner and shipper of it made subsequent to the capture, and, more especially, after a knowledge of the capture is obtained by the owner. Observe the consequences which would result from it. The capture is made and known. The owner is allowed to deliberate whether it is his interest to remain a subject of his adopted, or of his native country. If the capture be made by the former, then he elects to be a subject of that country; if by the latter, then a subject of that. Can such a privileged situation be tolerated by either belligerent? Can any system of law be correct, which places an individual who adheres to one belligerent, and, to the period of his election to remove, contributes to encrease her wealth, in so anomalous a situation as to be clothed with the privileges of a neu-

tral, as to both belligerents? This notion about a temporary state of neutrality impressed upon a subject of one of the belligerents, and the consequent exemption of his property from capture by either, until he has had notice of the war and made his election, is altogether a novel theory, and seems, from the course of the argument, to owe its origin to a supposed hardship to which the contrary doctrine exposes him. But if the reasoning employed on this subject be correct, no such hardship can exist. For if, before the election is made, his property on the ocean is liable to capture by the cruisers of his native and deserted country, it is not only free from capture by those of his adopted country, but it is under its protection. The privilege is supposed to be equal to the disadvantage, and is therefore just. The double privilege claimed seems too unreasonable to be granted.

It will be observed, that in the foregoing opinion respecting the nature and consequences of domicile, very few cases have been referred to. It was thought best not to interrupt the chain of argument, by stopping to examine cases; but faithfully to present the essential principles to be extracted from those which were cited at the bar, or which have otherwise come under the view of the court, and which applied to the subject. With what success this has been executed, is not for me to decide. But there are two or three cases which seem to be so applicable, and at the same time so conclusive on the great points of this question, that it may not be improper briefly to notice them. In support of the general principles, that the national character of the owner at the time of capture, must decide his right to claim, and that a subject is condemned by it, even in the courts of his native country, without time being allowed to him to elect to remove, the following cases may be referred to. In *The Boedes Lust*, 5 Rob. 247, it was decided that the property of a resident of Demarara, shipped before hostilities of any kind had occurred between Holland and Great Britain, but which was captured under an embargo declared by England upon Dutch property, as preparatory to war which ensued soon after the seizure, was, by the retroactive effect of the war applied to property so seized, to be considered as the property of an enemy taken in war. In this case, Sir W. Scott lays it down, that, where property is taken in a state of hostility, the universal practice has ever been to hold it subject to condemnation, although the claimants may have become friends and subjects prior to the adjudication. This case is somewhat stronger than the present, in the circumstances that in that, the state of hostility, alleged to have existed at the time of capture was made out by considering the subsequent declaration of war as relating back to the time of seizure under the embargo, by which reference it was decided to be a hostile embargo, and of course tantamount to an actual state of war. But this case also proves, not only that the hostile character of the property at the time of capture establishes the legality of it, but that no future circumstance changing the hostile character of the claimant to that of a friend or subject, can entitle

him to restitution. Whether the claimant, in this case, was a neutral or a British subject, does not appear. But if the former, it will not, it is presumed, be contended that he is, upon the principles of national law, less to be favored in the courts of the belligerent, than a subject of that nation domiciled in the country of the adverse belligerent.

Whitehill's Case, however, referred to frequently in Rob. Reports, comes fully up to the present, because he was a British subject, who had settled but a few days in the hostile country, but before he knew or could have known of the declaration of war; yet, as he went there with an intention to settle, this, connected with his residence, short as it was, fixed his national character, and identified him with the enemy of the country he had so recently quitted. The want of notice, and of an opportunity to extricate himself from a situation to which he had so recently and so innocently exposed himself, could not prevail to protect his property against the belligerent rights of his own country, and to save it from confiscation. There are many other strong cases upon these points, which I forbear to notice particularly, from an unwillingness to swell this opinion already too long. \* \* \*

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THIRTY HOGSHEADS OF SUGAR (BENTZON, Claimant) v.  
BOYLE, et al.

(Supreme Court of the United States, 1815. 9 Cranch, 191, 3 L. Ed. 701.)

MARSHALL, C. J., delivered the opinion of the court as follows:<sup>18</sup>

The island of Santa Cruz, belonging to the kingdom of Denmark, was subdued during the late war, by the arms of his Britannic Majesty. Adrien Benjamin Bentzon, an officer of the Danish government, and a proprietor of land therein, withdrew from the island on its surrender, and has since resided in Denmark. The property of the inhabitants being secured to them, he still retained his estate in the island under the management of an agent, who shipped thirty hogsheads of sugar, the produce of that estate, on board a British ship, to a commercial house in London, on account and risk of the said A. B. Bentzon. On her passage she was captured by the American privateer, the Comet, and brought into Baltimore, where the vessel and cargo were libelled as enemy property. A claim for these sugars was put in by Bentzon; but they were condemned with the rest of the cargo; and the sentence was affirmed in the circuit court. The claimant then appealed to this court.

Some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But, for this doubt there can be no foundation. Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror,

<sup>18</sup> The statement of facts is omitted.

so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark.

Must the produce of a plantation in that island, shipped by the proprietor himself, who is a Dane residing in Denmark, be considered as British, and therefore enemy property? In arguing this question, the counsel for the claimants has made two points: 1. That this case does not come within the rule applicable to shipments from an enemy country, even as laid down in the British courts of admiralty. 2. That the rule has not been rightly laid down in those courts and consequently will not be adopted in this.

1. Does the rule laid down in the British courts of admiralty embrace this case?

It appears to the court that the case of the *Phoenix*, 5 C. Rob. 20, is precisely in point. In that case a vessel was captured in a voyage from Surinam to Holland, and a part of the cargo was claimed by persons residing in Germany, then a neutral country, as the produce of their estates in Surinam. The counsel for the captors considered the law of the case as entirely settled. The counsel for the claimants did not controvert this position. They admitted it; but endeavoured to extricate their case from the general principle by giving it the protection of the treaty of Amiens. In pronouncing his opinion, Sir William Scott lays down the general rule thus: "Certainly nothing can be more decided and fixed, as the principle of this court and of the Supreme Court upon very solemn argument, than that the possession of the soil does impress upon the owner the character of the country, as far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be. This has been so repeatedly decided, both in this and the superior court, that it is no longer open to discussion. No question can be made on the point of law, at this day."

Afterwards, in the case of *The Vrow Anna Catharina*, 5 C. Rob. 167, Sir William Scott lays down the rule, and states its reason. "It cannot be doubted," he says, "that there are transactions so radically and fundamentally national as to impress the national character, independent of peace or war, and the local residence of the parties. The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation as a holder of the soil, and is to be taken as a part of that country, in that particular transaction, independent of his own personal residence and occupation."

This rule laid down with so much precision, does not, it is contended, embrace Mr. Bentzon's claim, because he has not "incorporated himself with the permanent interests of the nation." He acquired the property while Santa Cruz was a Danish colony, and he withdrew from the island when it became British. This distinction does not ap-

pear to the court to be a sound one. The identification of the national character of the owner with that of the soil, in the particular transaction, is not placed on the dispositions with which he acquires the soil, or on his general character. The acquisition of land in Santa Cruz binds him, so far as respects that land, to the fate of Santa Cruz, whatever its destiny may be. While that island belonged to Denmark, the produce of the soil, while unsold, was, according to this rule, Danish property, whatever might be the general character of the particular proprietor. When the island became British, the soil and its produce, while that produce remained unsold, were British. The general commercial or political character of Mr. Bentzen could not, according to this rule, affect this particular transaction. Although incorporated, so far as respects his general character, with the permanent interests of Denmark, he was incorporated so far as respected his plantation in Santa Cruz, with the permanent interests of Santa Cruz, which was at that time British; and though as a Dane, he was at war with Great Britain, and an enemy, yet, as a proprietor of land in Santa Cruz, he was no enemy; he could ship his produce to Great Britain in perfect safety.

The case is certainly within the rule as laid down in the British courts. The next inquiry is, how far will that rule be adopted in this country? The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice; but, as these principles will be differently understood by different nations under different circumstances, we consider them as being in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.

Without taking a comparative view of the justice or fairness of the rules established in the British courts, and of those established in the courts of other nations, there are circumstances not to be excluded from consideration, which give to those rules a claim to our attention, that we cannot entirely disregard. The United States having, at one time, formed a component part of the British Empire, their prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances and was not varied by the power which was capable of changing it.

It will not be advanced, in consequence of this former relation between the two countries, that any obvious misconstruction of public law made by the British courts, will be considered as forming a rule for the American courts, or that any recent rule of the British courts



is entitled to more respect than the recent rules of other countries. But a case professing to be decided on ancient principles will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations.

The rule laid down in the *Phoenix* is said to be a recent rule, because a case solemnly decided before the Lords Commissioners in 1783, is quoted in the margin as its authority. But that case is not suggested to have been determined contrary to former practice or former opinions. Nor do we perceive any reason for supposing it to be contrary to the rule of other nations in a similar case. The opinion that ownership of the soil does, in some degree, connect the owner with the property, so far as respects that soil, is an opinion which certainly prevails very extensively. It is not an unreasonable opinion. Personal property may follow the person anywhere; and its character, if found on the ocean, may depend on the domicil of the owner. But land is fixed. Wherever the owner may reside, that land is hostile or friendly according to the condition of the country in which it is placed. It is no extravagant perversion of principle, nor is it a violent offense to the course of human opinion to say that the proprietor, so far as respects his interest in this land, partakes of its character; and that the produce, while the owner remains unchanged, is subject to the same disabilities. In condemning the sugars of *Mr. Bentzon* as enemy property, this court is of opinion that there was no error, and the sentence is affirmed with costs.

Sentence affirmed.

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### THE PRIZE CASES.

(Supreme Court of the United States, 1862. 2 Black, 635, 17 L. Ed. 459.)

Mr. Justice GRIER<sup>19</sup> \* \* \* II. We come now to the consideration of the second question. What is included in the term "enemies' property"? Is the property of all persons residing within the territory of the States now in rebellion, captured on the high seas, to be treated as "enemies' property," whether the owner be in arms against the government or not?

The right of one belligerent not only to coerce the other by direct force, but also to cripple his resources by the seizure or destruction of his property, is a necessary result of a state of war. Money and wealth, the products of agriculture and commerce, are said to be the sinews of war, and as necessary in its conduct as numbers and physical force. Hence it is, that the laws of war recognize the right of a belligerent to cut these sinews of the power of the enemy, by capturing his property on the high seas.

<sup>19</sup> The statement of facts and part of the opinion are omitted.

The appellants contend that the term "enemy" is properly applicable to those only who are subjects or citizens of a foreign state at war with our own. They quote from the pages of the common law, which say, "that persons who wage war against the king may be of two kinds, subjects or citizens. The former are not proper enemies, but rebels and traitors; the latter are those that come properly under the name of enemies."

They insist, moreover, that the President himself, in his proclamation, admits that great numbers of the persons residing within the territories in possession of the insurgent government, are loyal in their feelings, and forced by compulsion and the violence of the rebellious and revolutionary party and its "de facto government" to submit to their laws and assist in their scheme of revolution; that the acts of the usurping government cannot legally sever the bond of their allegiance; they have, therefore, a co-relative right to claim the protection of the government for their persons and property, and to be treated as loyal citizens, till legally convicted of having renounced their allegiance and made war against the government by treasonably resisting its laws.

They contend, also, that insurrection is the act of individuals and not of a government or sovereignty; that the individuals engaged are subjects of law. That confiscation of their property can be effected only under a municipal law. That by the law of the land such confiscation cannot take place without the conviction of the owner of some offence, and finally that the secession ordinances are nullities and ineffectual to release any citizen from his allegiance to the national government, and consequently that the Constitution and laws of the United States are still operative over persons in all the states for punishment as well as protection.

This argument rests on the assumption of two propositions, each of which is without foundation on the established law of nations. It assumes that where a civil war exists, the party belligerent claiming to be sovereign, cannot, for some unknown reason, exercise the rights of belligerents, although the revolutionary party may. Being sovereign, he can exercise only sovereign rights over the other party. The insurgent may be killed on the battle-field or by the executioner; his property on land may be confiscated under the municipal law; but the commerce on the ocean, which supplies the rebels with means to support the war, cannot be made the subject of capture under the laws of war, because it is "unconstitutional!!" Now, it is a proposition never doubted, that the belligerent party who claims to be sovereign, may exercise both belligerent and sovereign rights. See 4 Cr. 272. Treating the other party as a belligerent and using only the milder modes of coercion which the law of nations has introduced to mitigate the rigors of war, cannot be a subject of complaint by the party to whom it is accorded as a grace or granted as a necessity. We have shown that a civil war such as that now waged between the Northern and

Southern States is properly conducted according to the humane regulations of public law as regards capture on the ocean.

Under the very peculiar Constitution of this government, although the citizens owe supreme allegiance to the federal government, they owe also a qualified allegiance to the state in which they are domiciled. Their persons and property are subject to its laws. Hence, in organizing this rebellion, they have acted as states claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the federal government. Several of these states have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign state. Their right to do so is now being decided by wager of battle. The ports and territory of each of these states are held in hostility to the general government. It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force—south of this line is enemies' territory, because it is claimed and held in possession by an organized, hostile and belligerent power.

All persons residing within this territory whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their government, and are none the less enemies because they are traitors. But in defining the meaning of the term "enemies' property," we will be led into error if we refer to Fleta and Lord Coke for their definition of the word "enemy." It is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law.

Whether property be liable to capture as "enemies' property" does not in any manner depend on the personal allegiance of the owner. "It is the illegal traffic that stamps it as 'enemies' property." It is of no consequence whether it belongs to an ally or a citizen. 8 Cr. 384. The owner, *pro hac vice*, is an enemy." 3 Wash. C. C. R. 183. The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicil of the owner, and much more so if he reside and trade within their territory. \* \* \* 20

<sup>20</sup> In his *Digest of the Law of England with reference to the Conflict of Laws* (1896; 2d Ed. 1908) A. V. Dicey, for many years Vinerian Professor of English in the University of Oxford, discusses commercial domicile in time of war (Appendix, note 7, 740-745). After saying that "in most cases at any rate" trading residence or commercial domicile is the test of enemy character, not nationality or allegiance, Mr. Dicey thus states the English and American law on this question:

"Every person domiciled in a state engaged in hostilities with our own, whether he is a born subject of that state or not, is to be regarded as an alien enemy (1 Arnould, *Marine Insurance* [3d Ed.] p. 121; [7th Ed.] § 90; *The Indian Chief*, 3 C. Rob. 12, 22 [1801]); and, speaking generally, a person domiciled in a neutral country is to be regarded as for commercial purposes

## LE HARDY.

(French Prize Court, 13 Fructidor, Year IX [August 30, 1801]. 1 Pistoye et Duverdy, 321 [1855]).

The neutral vessel *Le Hardy*, laden for the account of Coste Lanfreda, a citizen of Ragusa, consul of Ragusa to Messina, was arrested by *La Voltigeante*. At that time France was at war with the king of the Two Sicilies; the point at issue is to know whether or not Coste Lanfreda, citizen and consul of a neutral nation, should be considered as an enemy or as a neutral.

Extract of conclusions of the government commissioner:

Two questions are to be solved: The first, which you have your-

a neutral, even though he be in fact a British subject, or a subject of a state at war with England (The *Danous*, 4 C. Rob. 255, note [1802]; 1 Duer, The Law and Practice of Marine Insurance [1845] 494, 495, 520). "The position is a clear one, that if a person goes into a foreign country, and engages in trade there, he is, by the law of nations, to be considered a merchant of that country, and a subject for all civil purposes, whether that country be hostile or neutral; and he cannot be permitted to retain the privileges of a neutral character during his residence and occupation in an enemy's country." 1 Kent's Commentaries on American Law (12th Ed. 1873) p. 75. A person's character, in short, as a friend or enemy, is in time of war to be determined by what is termed his commercial domicile. Persons who are commercially domiciled in a neutral country are, as far as belligerents are concerned, neutrals; whilst, on the other hand, persons commercially domiciled in a hostile country are, whatever their nationality or allegiance, to be considered enemies, for 'persons resident in a country carrying on trade, by which both they and the country were benefited, were to be considered as the subjects of that country, and were considered so by the law of nations, at least so far as by that law to subject their property to capture by a country at war with that in which they lived.' *Tabbs v. Bendelack*, 4 Esp. 108, 108 (1802) per Lord Kenyon. \* \* \*

A civil domicile, according to Mr. Dicey, is such a permanent residence as to make that country a person's home; and a commercial domicile is a residence in a country for the purpose of trade. In the case of civil domicile, residence is only prima facie evidence; whereas, in a commercial domicile, the presumption arising from residence can only be overcome by proving affirmatively that the person has "the intention of not continuing to reside in such country." The intention to abandon a civil domicile is only changed by "complete abandonment in fact of the country where a person is domiciled (In *Goods of Raffanel*, 82 L. J. P. & M. 203 [1863]); whereas, "a commercial domicile in time of war can, it would seem, be changed, under some circumstances, by the intention to change it, accompanied by steps taken for the purpose of effecting a change." Domicile once acquired cannot, it is believed, be changed in war to the detriment of the country whereof the person was a subject or citizen.

Mr. Justice Story was of this opinion, saying in *The Dos Hermanos*, 2 Wheat. 76, 98, 4 L. Ed. 189 (1817): "There is certainly much reason to doubt" that an American citizen could not "flagrante bello, acquire a neutral character, so as to separate himself from that of his native country."

Mr. Justice Story's opinion seems to be shared by Mr. Dicey, who says:

"Thus, according to American decisions at least, an American citizen (and the same principle would perhaps be applied by English courts to British subjects) cannot, by emigration from his own country during the existence of hostilities, acquire such a foreign domicile as to protect his trade during the war against the belligerent claims either of his own country or of a hostile power. 1 Duer, The Law and Practice of Marine Insurance, p. 521; The *Dos Hermanos*, 2 Wheaton, 76, 4 L. Ed. 189 (1817)."

selves submitted to the Minister of Foreign Affairs, is thus set forth: "Is merchandise belonging to an individual of neutral origin, but having a domicil and a commercial establishment in an enemy country, subject to confiscation as having taken on an enemy character?"

The second question consists in knowing "whether or not the status of consul of a neutral power, within the territory of a state at war, reserves to the said consul and to the commercial transactions in which he is engaged, an absolute character of neutrality which should cause his property to be respected by belligerent nations, even in a case where the status of a native of a neutral country is not sufficient for a simple citizen thereof to enjoy fully the benefit of such neutrality, when he is inhabiting and domiciled in enemy territory?"

With the letter of the minister at hand, and guided by publicists who have written upon this subject, I shall proceed to examine these two questions as succinctly as possible.

Residence in a foreign country, if one agrees with the principles set forth by the Minister of Foreign Affairs, does not prevent an individual from belonging to the country of his birth. To cease to belong to his native country, it is necessary that he voluntarily choose to do so, and that he himself be adopted regularly by a new country. Without such renunciation on his part of his old country, without such adoption on the part of the one he prefers, he remains what he was originally, friend of the friends and enemy of the enemies of his native country; and when this country is neutral, he too remains neutral and should enjoy both for his person and for his property all the advantages of neutrality.

"For his property and for his person" because the former shares the fate of the latter; because when the words "enemy" and "neutral" are used in speaking of things, it is clear that these words are but figurative expressions, according to which the qualification of the thing possessed is conveyed from the one who possesses it. Now, if this qualification of the thing possessed depends on the status of him who possesses it, as a necessary consequence, that thing should be treated as neutral and its owner, even though inhabiting an enemy country, should be respected as a real subject or citizen of a neutral power or nation. This assertion results from still another principle, namely that war is not a relation of man to man, nor of societies to individuals, but rather of societies between themselves; now, in other terms, a State can have no enemies but other States and not men. \* \* \*

THE COURT, having heard the report of the citizen Lacoste, member of the court:

Because of the fact that it appears, principally from the documents, that there has existed no serious difficulty regarding the regularity of the documents relative to the ship, which was removed immediately after the decision of the commercial court; that, as regards the cargo, Coste Lanfreda, the proprietor, exercising at Messina the functions of consul of Ragusa, proved before the court of appeals that he was

a native of Ragusa, thus permitting us to pass over the vague assertion of the captain to the effect that he believed him to be a subject of Naples; that there was no double destination stated, and that even if there had been, of the two ports indicated one was neutral and the other allied, so there was no reasonable ground for suspicion; that the law of the 29th Nivose, Year VI, concerning merchandise of English manufacture only, could not be applied to the Two Sicilies, which had not been occupied by the troops of Great Britain by right of conquest; that, therefore, to decide the status of the cargo of the vessel *Le Hardy*, it suffices to examine into whether or not it can be considered as enemy, on the grounds that Coste Lanfreda, native and consul of Ragusa, resided in this capacity and conducted business at Messina, a country then at war with the French Republic; that this question of public law is easily decided in the negative, attention being paid to the fact that residence in a foreign country does not prevent an individual from belonging to the country wherein he was born; that, for him to cease to belong to his native country it is necessary for him voluntarily to choose a new country, and that he be regularly adopted by it; that without such renunciation on his part of his old country, without this necessary adoption, he remains what he was originally, friend of the friends and enemy of the enemies of his native country; that, when his native country is neutral, he remains neutral himself, and should enjoy for his person, as for his property, all the advantages of neutrality because such property has not by itself neutral or hostile character, but always assumes that of its owner; that besides, war being not a relation of man to man, or of societies to individuals, but rather of states among themselves, one can not be forced to take part therein who has not shown an express intention of uniting with the belligerent power, the territory of which he inhabits; that the inconveniences and abuses resulting from a contrary system, however grave they may be, are more than balanced by the advantage drawn by the commercial world from the protection and the favor accorded by the belligerents to neutral commerce, whatever side it takes; that while enemy natives, although established in a neutral country and there conducting business under the protection of the enemy flag, do not lose their enemy character, it would be at the same time disloyal and unreasonable, following the occurrence and variable chances of war, to assimilate neutral natives to enemies; solely because they reside and conduct business in an enemy country; that the publicists of those remote times when force took more or less the place of right, were able to state contrary facts and to profess opposed principles; but that the successive progressive steps of civilization, the want, universally felt, of the growth and liberty of commercial relations between peoples, by bringing out more sane ideas, have caused to prevail the more liberal ideas proclaimed by the government today as typical of its policy and as a gage of its love of humanity; that in setting forth these considerations in the present case, we see that an

owner of neutral origin, by his residence in a country momentarily become hostile, and by his commercial speculations, could not lose the advantages of his neutrality, with all the more reason because exercising there the function of consul of the country of his origin, he has not ceased to belong to it in fact or in law, and, in any case, neither his person nor his commerce, which are inseparable, could be considered as enemy;

Decides that the prize taken by the French privateer *La Voltigeante*, of the Ragusan ship *Le Hardy*, is void and illegal, and withdraws in favor of the owners all claims both to the ship and to the cargo.<sup>21</sup>

### THE OCEAN.

(High Court of Admiralty, 1804. 5 C. Rob. 90.)

This was a case of a claim given on behalf of Mr. F—, a British-born subject, who had been settled as a merchant in Flushing, but who, on the appearance of approaching hostilities, had taken means to remove himself, and return to England. The affidavit of the claimant stated, that in the month of July, 1803, he actually effected his escape, and returned to this country; that he had actually dissolved his partnership; and that he had continued to reside in Holland after the war, only under the detention so unwarrantably applied to all Englishmen resident in the country of the enemy at the breaking out of hostilities.

Sir W. SCOTT. This claim relates to the situation of British subjects settled in foreign states in time of amity, and taking early measures to withdraw themselves on the breaking out of war. The affidavit of claim states, that this gentleman had been settled as a partner in a house of trade in Holland, but that he had made arrangements for the dissolution of the partnership, and was only prevented from removing personally, by the violent detention of all British subjects, who happened to be within the territories of the enemy at the breaking out of the war. It would, I think, under these circumstances, be going farther than the principle of law requires, to conclude this person, by his former occupation, and by his present constrained residence in France, so as not to admit him to have taken himself out of the effect of

<sup>21</sup> "It is to be noted that the French Commissions of Prize have remained faithful to the principle proclaimed 13 Fructidor, year IX [1801]. There is a decision of 27 Pluviose, year X [1802], and if there were no decisions in the War of 1854-56, a number of decisions were rendered in the War of 1870-1871, which established the doctrine of nationality." Ernest Nys, *Le Droit International, Les Principes, Les Théories, Les Faits*. v. 8, pp. 78, 79 (1912).

In the case of *The Venezuela*, *Journal Officiel*, March 14, 1919, p. 2719, the French Prize Council condemned ten packages sent by parcels post seized aboard a French steamer in the port of Saint Nazaire, on the ground that they were addressed to two German houses domiciled in Mexico—thus applying the French theory of domicile in preference to the Anglo-American theory.

supervening hostilities, by the means which he had used for his removal. On sufficient proof being made of the property, I shall be disposed to hold him entitled to restitution.<sup>22</sup>

### THE WILLIAM BAGALEY.

(Supreme Court of the United States, 1866. 5 Wall. 377, 18 L. Ed. 583.)

Mr. Justice CLIFFORD delivered the opinion of the court.<sup>23</sup>

The steamer and cargo were captured as prize of war on the 18th day of July, 1863, and, having been duly libelled and prosecuted as such in the District Court, on the 17th day of August following, they were both condemned as forfeited to the United States. \* \* \*

1. Captors contend that the steamer and cargo were both rightfully condemned as enemy property, and also for breach of blockade. Appellant denies the entire proposition as respects his interest in the captured property, and insists that the one-sixth of the same belonging to him cannot properly be condemned on either ground, because he was never domiciled in the rebellious States, and because he never employed the property, either actually or constructively, in any illegal trade with the enemy, or in any attempt to break the blockade. \* \* \*

3. Proclamation of blockade was made by the President on the nineteenth day of April, 1861, and on the thirteenth day of July, in the same year, Congress passed a law authorizing the President to inter-

<sup>22</sup> So, in *The Doornbaag*, restitution was decreed to A. B., removing from Holland, of a ship and parts of the cargo allotted to him on the dissolution of the partnership, for the purpose of his removal. The situation of British subjects wishing to remove from the country of the enemy on the event of a war, but prevented by the sudden interruption of hostilities from taking measures for removing sufficiently early to enable them to obtain restitution, forms not unfrequently a case of considerable hardship in the Prize Court. In such cases it would be advisable for persons so situated, on their actual removal, to make application to government for a special pass, rather than to hazard valuable property, to the effect of a mere previous intention to remove, dubious as that intention may frequently appear under the circumstances that prevent it from being carried into execution. [Reporter's note.]

In the case of *The Flamenco*, 1 British and Colonial Prize Cas. 509 (1915), it was held, as stated in the headnote, that:

"An enemy subject who has acquired a trade domicile in a neutral country loses that domicile if, on the outbreak of war, he leaves the neutral country for another neutral country, in the absence of evidence that his departure is merely temporary."

See *The Lutzow* (No. 5) 3 British and Colonial Prize Cas. 37, 45 (1917), in which the Privy Council cited leading cases, and stated, per Sir Arthur Chanell, that:

"On the outbreak of war the appellants were entitled to save themselves from being treated by Great Britain and her allies as an enemy in respect of their German branch by promptly ceasing to carry on trade in Germany, and if, for the purpose of doing so, they removed from Germany by sea any property which they then had in Germany, it would during its transit for that purpose be free from seizure and condemnation as enemy property."

<sup>23</sup> The statement of facts is omitted.

SCOTT INT.LAW



dict, by proclamation, all trade and intercourse between the inhabitants of the states in insurrection and the rest of the United States.<sup>24</sup>

Provision of the sixth section of the act is that, after fifteen days from the issuing of such proclamation, "any ship or vessel belonging in whole or part to any citizen or inhabitant" of a state or part of a state, whose inhabitants shall be so declared to be in insurrection, if found at sea or in the port of any loyal state, may be forfeited. Reference is made to those provisions, as showing that our citizens were duly notified that Congress as well as the President had recognized the undeniable fact that civil war existed between the constitutional government and the Confederate States; and that seasonable notice was given to all whose interests could be affected, and that ample opportunity and every facility were extended to them, which could properly be granted, to enable them to withdraw their effects from the states in rebellion, or to dispose of such interests as in the nature of things could not be removed.

Open war had existed between the belligerents for more than two years before the capture in this case was made, and yet there is not the slightest evidence in the record that the appellant ever attempted or manifested any desire to withdraw his effects in the partnership or to dispose of his interest in the steamer. Effect of the war was to dissolve the partnership, and the history of that period furnishes plenary evidence that ample time was afforded to every loyal citizen desiring to improve it, to withdraw all such effects and dispose of all such interests. "Partnership with a foreigner," says Maclachlan, "is dissolved by the same event which makes him an alien enemy;" and Judge Story says, "that there is in such cases an utter incompatibility created by operation of law between the partners as to their respective rights, duties, and obligations, both public and private, and therefore that a dissolution must necessarily result therefrom, independent of the will or acts of the parties."<sup>25</sup>

Executory contracts with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are ipso facto dissolved by the declaration of war, which operates to that end and for that purpose with a force equivalent to that of an act of Congress.<sup>26</sup>

Duty of a citizen when war breaks out, if it be a foreign war, and he is abroad, is to return without delay; and if it be a civil war, and he is a resident in the rebellious section, he should leave it as soon as practicable and adhere to the regular established government. Domicile in the law of prize becomes an important consideration, because every person is to be considered in such proceedings as belonging to

<sup>24</sup> 12 Stat. at Large, 1258, 257.

<sup>25</sup> Maclachlan on Shipping, 475; Story on Partnership, § 816; *Griswold v. Waddington*, 15 Johns. (N. Y.) 57 (1818); *Id.*, 16 Johns. (N. Y.) 438 (1819).

<sup>26</sup> *Exposito v. Bowden*, 7 Ellis & Bl. 763 (1857).

that country where he has his domicile, whatever may be his native or adopted country.<sup>27</sup>

4. Personal property, except such as is the produce of the hostile soil, follows as a general rule the rights of the proprietor; but if it is suffered to remain in the hostile country after war breaks out, it becomes impressed with the national character of the belligerent where it is situated. Promptitude is therefore justly required of citizens resident in the enemy country, or having personal property there, in changing their domicile, severing those business relations, or disposing of their effects, as matter of duty to their own government, and as tending to weaken the enemy. Presumption of the law of nations is against one who lingers in the enemy's country, and if he continue there for much length of time, without satisfactory explanations, he is liable to be considered as remorant, or guilty of culpable delay, and an enemy.<sup>28</sup>

Ships purchased from an enemy by such persons, though claimed to be neutral, are for the same reasons liable to condemnation, unless the delay of the purchaser in changing his domicile is fully and satisfactorily explained. Omission of the appellant to dispose of his interest in the steamer, and his failure to withdraw his effects from the rebellious state, are attempted to be explained and justified, because the same were, as alleged in the petition, confiscated during the rebellion under the authority of the rebel government. More than a year however had elapsed after the proclamation of blockade was issued before any such pretended confiscation took place. Members of a commercial firm domiciled in the enemy country, whether citizens or neutrals, after having been guilty of such delay in disposing of their interests or in withdrawing their effects, cannot, when the property so domiciled and so suffered to remain, is captured as prize of war, turn round and defeat the rights of the captors by proving that their own domicile was that of a friend, or that they had no connection with the illegal voyage.

Property suffered so to remain has impressed upon it the character of enemy property, and may be condemned as such or for breach of blockade. Prize courts usually apply these rules where the partnership effects of citizens or neutrals is suffered to remain in the enemy country, under the control and management of the other partners who are enemies. \* \* \*

Giving full effect to the admissions in this case, the appellant shows no just ground for the reversal of the decree made by the District Court. \* \* \*

Decree of the District Court affirmed.<sup>29</sup>

<sup>27</sup> *The Vigilantia*, 1 C. Rob. 1 (1798); *The Venus*, 8 Cranch, 288, 3 L. Ed. 553 (1814); 3 Phillimore's International Law, 128.

<sup>28</sup> *MacLachlan on Shipping*, 480; *The Ocean*, 5 Rob. 91 (1804); *The Venus*, 8 Cranch, 278, 3 L. Ed. 553 (1814).

<sup>29</sup> In *The Joseph*, 1 Gall. 545, 13 Fed. Cas. 1126, 1128, No. 7,533 (1813), Mr.

Justice Story had said at circuit: "It has been further argued, that a declaration of war is, in effect, a command to the citizens of the belligerent country abroad at the time, to return home, and that the law allows a reasonable time and way to effect it. I am not aware of any principle of public law, which obliges every absent citizen to return to his country, on the breaking out of a war; nor has any authority been produced which countenances the position. It may be admitted, that the sovereign power of the country has a right to require the services of all its citizens, in time of war, and for this purpose may recall them home under penalties for disobedience. But until the sovereign power has promulgated such command, the citizens of the country have a perfect right to pursue their ordinary business and trade in and with all other countries, except that of the enemy. Upon any other supposition, all foreign commerce would, during war, be suspended; for if it were the duty of absent citizens to return, it would, upon the same principle, be the duty of those at home to remain there. As to citizens in the hostile country, the declaration of war imports a suspension of all further commerce with such country, and obliges them to return, unless they would be involved in all the consequences of the hostile character. If they wish to return, they must do it in a manner, which does not violate the laws; and their property cannot be removed with safety from the enemy country, unless under the sanction of their own government. But even if the position were generally true, that is contended for, the law would never deem that a reasonable mode of conveying property home, which involved it in a noxious trade with the public enemy. That can never be held to be a reasonable mode of returning a ship to the United States, which involves her in a traffic forbidden by the laws. However, I am well satisfied, that the position cannot be maintained in any extent adequate to the purpose, for which it has been introduced."

The doctrine laid down in the principal case appears to have met with the approval of the Supreme Court:

"Brinkley, in his answer, claims to have gone within the insurrectionary lines as a private citizen and upon private business. \* \* \* He was, therefore, in the very fullest legal sense, an enemy of the government during his stay within the military lines of the rebellion, liable to be treated as such both as to his person and property. His remaining there was in plain violation of law and in disregard of duty. In *The William Bagaley*, 5 Wall. 377, 18 L. Ed. 583 (1866), we said that 'it was the duty of a citizen when war breaks out, if it be a foreign war and he is abroad, to return without delay; and if it be a civil war, and he is a resident in the rebellious section, he should leave it as soon as practicable, and adhere to the regular established government.'" Per Mr. Justice Harlan in *Gates v. Goodloe*, 101 U. S. 612, 617, 25 L. Ed. 895 (1879).

"The liability of the property is irrespective of the status domicilii, guilt or innocence of the owner. If it come from enemy territory, it bears the impress of enemy property. If it belong to a loyal citizen of the country of the captors, it is nevertheless as much liable to condemnation as if owned by a citizen or subject of the hostile country or by the hostile government itself. The only qualification of these rules is, that where, upon the breaking out of hostilities, or as soon after as possible, the owner escapes with such property as he can take with him, or in good faith thus early removes his property, with the view of putting it beyond the dominion of the hostile power, the property in such cases is exempt from the liability which would otherwise attend it. Such, with this limitation, is the settled law of this and of all other prize courts." Per Mr. Justice Swayne in *The Gray Jacket*, 5 Wall. 342, 369, 370, 18 L. Ed. 646 (1866).

## CHAPTER IX

## OCCUPATION; CONQUEST; MARTIAL LAW

## THE SANTA ANNA.

(High Court of Admiralty, 1809. 1 Edwards, 180.)

This was the case of a Spanish ship and cargo, which was captured 21st August, 1809, by the private ship of war John Bull, on a voyage from Montrico to Cadiz; with an ostensible destination to St. Andero.

On the part of the captors it was contended—That the parties on whose behalf the claim was given, were resident in that part of Spain which was under the dominion of the French, and, consequently, that they had not a *persona standi* in the British Court of Admiralty.

\* \* \*

Sir WILLIAM SCOTT. I think it is clearly the intention of the government of this country, publicly expressed, that all Spanish property should be treated with the utmost possible tenderness. The order in council of the 4th July, 1808, declares that "all hostilities against Spain, on the part of his Majesty, shall immediately cease"; here, then, is a total extinction of hostilities proclaimed, without any exception or limitation whatever. In the third and fourth articles of the same order it is provided, "that all ships and vessels belonging to Spain shall have free admission into the ports of his Majesty's dominions, as before the present hostilities; and that all ships and vessels belonging to Spain, which shall be met with by any of his Majesty's ships and cruisers, shall be treated in the same manner as the ships of states in amity with his Majesty." Here, again, is no restrictive distinction of particular parts of Spain, but peace and amity are proclaimed generally with that country, in exactly the same terms as would have been employed in a definitive treaty. Under these public declarations of the state, establishing this general peace and amity, I do not know that it would be in the power of this court to condemn Spanish property, though belonging to persons resident in those parts of Spain which are, at the present moment, under French control, except under such circumstances as would justify the confiscation of neutral property. The order in council appears to be framed under the impression, that the general disposition of the inhabitants is friendly to this country, and that this disposition is only overruled by the effect of French force in particular districts. In the cases of the property of such persons taken, the court would, I think, be at most inclined to suspend its judgment for the present, under the authority of this general declaration, and wait till some more precise rule was framed by proper authority, or till

length of time and duration of French possession furnished a rule that might apply to such cases, though not specifically distinguished in the terms of the order.

In the present case, I see no sufficient reason for an unfavorable hesitation of judgment. The vessel is, I think, proved to be going to Cadiz, the port of our allies, with a useful cargo on board, a cargo of military stores; there is nothing to contradict this destination, excepting a single document, a paper of mere form, granted by the constituted authorities, as they are called, at Montrico, in which a destination to St. Andero, then in French possession, is held out. It is impossible to attach much weight to that, because such a paper must have been accepted on board any vessel sailing from the port which this ship had quitted, as a cargo of such a description would not have been licensed to depart for Cadiz by those who alone had the authority to grant passports. All the witnesses depose to the destination to Cadiz; the letters on board are addressed to persons there, and the fact that this vessel stood towards the British privateer for protection, the moment her character was ascertained, strengthens the presumption. The evidence, therefore, of a destination to Cadiz, strongly preponderates; and, taking the fact to be so, what is this case, but that of subjects of a country with which a general amity had been proclaimed, serving the common cause of the allied countries, by carrying military stores to one of the strongholds occupied on behalf of that cause, from a port happening to be subject to the prevalence of French arms in its immediate neighborhood. Be the residence of the parties what it may, (for it does not very distinctly appear,) I can have no hesitation in restoring property so employed to persons manifesting such dispositions.

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DONALDSON v. THOMPSON.

(Court of King's Bench, 1808. 1 Campbell's N. P. Rep. 429.)

This was an action on a policy of insurance on the American ship Maryland Mary, at and from Gibraltar to a market, with leave to call and land goods at two or more ports in the Mediterranean.

The ship having landed some goods at Malta, proceeded from thence on the 17th of May, 1807, with the rest of her cargo for Smyrna, but was the same day captured by a Russian privateer, and being afterwards carried into Corfu, was there condemned as lawful prize.

\* \* \*

The condition of Corfu, in July, 1807, was described by a gentleman who had acted there as English consul. He stated, that at that time, there was a Russian garrison in Corfu, and the Russians had about 6,000 men in the different islands of the republic; that they had made Corfu a military station for four or five years, and that they continued in possession of it till the peace of Tilsit, when they deliv-

ered it up to Bonaparte; but that, previously to that event, the flag of the Ionian Republic flew from the forts in the island, there was a port admiral appointed by the Ionian Republic, a consul from the Sublime Porte resided at Corfu, and the witness was recognised as English consul by the prince and senate of the Ionian Republic, who continued in their functions till the republican government was dissolved by the French.

LORD ELLENBOROUGH.<sup>1</sup> \* \* \* Under these circumstances, the Russians must be considered as visitors in Corfu, and not as sovereigns. While a government subsists as this did, we cannot look to the degree in which it might be overawed by a foreign force. \* \* \*

Verdict for the plaintiff.

In the ensuing term, Park applied to the court to set aside this verdict. \* \* \* A rule nisi was reluctantly granted; but, cause being shewn, it was discharged.

LORD ELLENBOROUGH. It is impossible to say that the government of the Ionian Republic was superseded, at a time when its institutions subsisted, and its supremacy was recognised. How, then, was Corfu a co-belligerent? Only because it endured a hostile aggression. Will any one contend that a government which is obliged to yield in any quarter to a superior force, becomes a co-belligerent with the power to which it yields? \* \* \*

### THE GERASIMO.

(Privy Council, 1857. 11 Moore, P. C. 83.)

A ship under Wallachian colors, with a cargo of corn belonging to owners residing at Galatz, in Moldavia, was seized for breach of the Black Sea blockade, when coming out of the Sulina mouth of the Danube, then in a state of blockade. At the time of the shipment of the cargo the Russians held possession of Moldavia and Wallachia, but such holding was with the express intention of not changing the national character, or incorporating that country with Russia. From the decree of condemnation in the High Court of Admiralty an appeal was taken to the Privy Council.<sup>2</sup>

The Right Hon. T. PEMBERTON LEIGH.<sup>3</sup> \* \* \*

Upon the present appeal the first question is, whether the owners of the cargo, in regard to this claim, are to be considered as alien enemies; and for this purpose it will be necessary to examine carefully both the principles of law which are to govern the case, and the nature of the possession which the Russians held of Moldavia at the time of this shipment.

<sup>1</sup> The statement of facts is abridged and parts of the opinions are omitted.

<sup>2</sup> Short statement substituted for that of the report.

<sup>3</sup> Only part of the opinion of the learned judge is given.

Upon the general principles of law applicable to this subject there can be no dispute. The national character of a trader is to be decided for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of the trade, as a subject of the power under whose dominion he carries it on, and, of course, as an enemy of those with whom that power is at war. Nothing can be more just than this principle; but the whole foundation of it is, that the country in which the merchant trades is enemy's country.

Now the question is, what are the circumstances necessary to convert friendly or neutral territory into enemy's territory? For this purpose, is it sufficient that the territory in question should be occupied by a hostile force, and subjected, during its occupation, to the control of the hostile power, so far as such power may think fit to exercise control; or is it necessary that, either by cession or conquest, or some other means, it should, either permanently or temporarily, be incorporated with, and form part of, the dominions of the invader at the time when the question of national character arises?

It appears to their lordships that the first proposition cannot be maintained. It is impossible for any judge, however able and learned, to have always present to his mind all the nice distinctions by which general rules are restricted; and their lordships are inclined to think that if the authorities which were cited and so ably commented upon at this bar had been laid before the judge of the court below, he would, perhaps, have qualified in some degree the doctrine attributed to him in the judgment to which we have referred.

With respect to the meaning of the term "dominions of the enemy," and what is necessary to constitute dominion, Lord Stowell has in several cases expressed his opinion. In the case of *The Fama*, 5 Rob. 115, he lays it down that in order to complete the right of property, there must be both right to the thing and possession of it; both *jus ad rem* and *jus in re*. "This," he observes, "is the general law of property, and applies, I conceive, no less to the right of territory than to other rights. Even in newly discovered countries, when a title is meant to be established for the first time, some act of possession is usually done and proclaimed as a notification of the fact. In transfer, surely, when the former rights of others are to be superseded and extinguished, it cannot be less necessary that such a change should be indicated by some public acts, that all who are deeply interested in the event, as the inhabitants of such settlements, may be informed under whose dominion and under what laws they are to live."

The importance of this doctrine will appear when the facts with respect to the occupation of the principalities come to be examined. That the national character of a place is not changed by the mere cir-

cumstance that it is in the possession and under the control of a hostile force, is a principle held to be of such importance that it was acted upon by the Lords of Appeal in 1808, in the *St. Domingo* cases of *The Dart* and *Happy Couple*, when the rule operated with extreme hardship.

In the case of *The Manilla*, 1 Edw. 3, Lord Stowell gives the following account of those decisions: "Several parts of it (the island of *St. Domingo*) had been in the actual possession of insurgent negroes, who had detached them, as far as actual occupancy could do, from the mother country of France and its authority, and maintained, within those parts, at least, an independent government of their own. And although this new power had not been directly and formally recognized by any express treaty, the British government had shown a favorable disposition towards it on the ground of its common opposition to France, and seemed to tolerate an intercourse that carried with it a pacific and even friendly complexion. It was contended, therefore, that *St. Domingo* could not be considered as a colony of the enemy. The Court of Appeal, however, decided, though after long deliberation, and with much expressed reluctance, that nothing had been declared or done by the British government that could authorize a British tribunal to consider this island generally, or parts of it (notwithstanding a power hostile to France had established itself within it, to that degree of force, and with that kind of allowance from some other states), as being other than still a colony, or parts of a colony, of the enemy. There can be no doubt that the strict principle of that decision was correct."

On the other hand, when places in a friendly country have been seized by, and are in possession of the enemy, the same doctrine has been held. While Spain was in the occupation of France, and at war with Great Britain, the Spanish insurrection broke out, and the British government issued a proclamation that all hostilities against Spain should immediately cease. Great part of Spain, however, was still occupied by the French troops, and amongst others, the port of *St. Andero*. A ship called the *Santa Anna* was captured on a voyage, as it was alleged, to *St. Andero*, and Lord Stowell, 1 Edw. 182, observed: "Under these public declarations of the state, establishing this general peace and amity, I do not know that it would be in the power of the court to condemn Spanish property, though belonging to persons resident in those parts of Spain which are at the present moment under French control, except under such circumstances as would justify the confiscation of neutral property."

The same principle has been acted upon in the courts of common law. In the case of *Donaldson v. Thompson*, 1 Campb. 429, the Russian troops were in possession of *Corfu* and the other *Ionian Islands*, though the form of a republic was preserved, and it was contended that the islands must be considered as substantially part of the territory of the Russian Empire, if the Russian power was there dominant, and the supreme authority was in the Russian commander; or, if not,



that the republic must be considered as a co-belligerent with Russia against the Porte, since the emperor of Russia derived the same advantages, in a military point of view, from this occupation of the islands as if he had seized it hostilely, or the Ionian Republic had been his ally in the war he was carrying on. Both these propositions, however, were repudiated by Lord Ellenborough; and afterwards, on a motion to set aside the verdict by the Court of King's Bench, Lord Ellenborough observed: "Will any one contend that a government which is obliged to yield in any quarter to a superior force becomes a co-belligerent with the power to which it yields? It may as well be contended that neutral and belligerent mean the same thing." The same doctrine was afterwards laid down by the Court of King's Bench, in *Hagedorn v. Bell*, 1 Mau. & Sel. 450, in the case of a trade carried on with Hamburg, which had been for several years, and at the time was in the military occupation of the French.

The distinction between hostile occupation and possession clothed with a legal right by cession or conquest, or confirmed by length of time, is recognized by Lord Stowell in the case of *The Bolletta*, 1 Edw. 171. A question there arose whether certain property belonging to merchants at Zante, which had been captured by a British privateer, was to be considered as French or as Russian property; that question depending upon the national character of Zante at the time of the capture. Lord Stowell observes (page 173): "On the part of the crown it has been contended that the possession taken by the French was of a forcible and temporary nature, and that such a possession does not change the national character of the country until it is confirmed by a formal cession, or by long lapse of time. That may be true, when possession has been taken by force of arms and by violence; but this is not an occupation of that nature. France and Russia had settled their differences by the treaty of Tilsit, and the two countries being at peace with each other, it must be understood to have been a voluntary surrender of the territory on the part of Russia." On this ground he held the territory to have become French territory, remarking in a subsequent passage of his judgment that this was a cession by treaty, and not a hostile occupation by force of arms, liable to be lost again the next day.

These authorities, with the other cases cited at the bar, seem to establish the proposition, that the mere possession of a territory by an enemy's force does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies. \* \* \*

The ground now suggested is that the *Gerasimo* was guilty of a breach of blockade in coming out of the Danube when the mouths of that river were in a state of notified blockade. It is singular that if this were the ground of capture, no notice whatever of the blockade should have been contained in the affidavit originally prepared for Cap-

tain Powell to swear when the seizure was made, and the facts recent; that notice of it should be introduced for the first time in the affidavit made by him on the 30th of August, 1855; and that even in that late affidavit it is not stated that breach of blockade was the cause of seizure. There is no doubt, however, that breach of blockade, whether it was the cause of seizure or not, may be used as ground of condemnation, if the circumstances of the case bring it within the law.

What, then, were the circumstances? In the summer of 1854, the Russian forces in the Turkish territories were straitened for provisions. The allied fleets desired to prevent the importation of provisions up the Danube, and with that view the two admirals in command of the English and French fleets issued a proclamation, dated the 2d of June, 1854, in which they declared, to all whom it might concern, that they had established an effective blockade of the Danube, in order to stop all transport of provisions to the Russian armies; they declared that this blockade included all those mouths of the Danube which communicate with the Black Sea, and they apprized all vessels of every nation that they will not be able to enter the river till further orders (*qu'ils ne pourront entrer dans ce fleuve jusqu'à nouvel ordre*).

On the 26th of June, the Russians forbade all export of cereals after the 2d of July. Any exportation of cereals, therefore, was in furtherance of the objects of the allies, and to the prejudice of the Russians. Could a Moldavian merchant imagine, if he had heard of this blockade, that he was to be liable to capture by the allies for exporting provisions, when the whole purpose of the blockade was declared to be to prevent their import?

But, by the rules of law, a ship which has entered a blockaded port before the blockade, is entitled to come out again; and if she has a cargo taken on board before notice of the blockade, she is entitled to bring it out. The blockade of a port is *prima facie* notice of the existence of the blockade to all who are within it, because the inhabitants who see the blockading ships off their coast cannot be well ignorant of the blockade. But this was no blockade of the port of Galatz, but a blockade of the mouths of the Danube, Galatz lying on its banks up the river, at a distance of 150 miles from its mouth.

In this case the ship had entered the river before the blockade; the cargo was taken on board on the 30th of June; and the ship must have sailed on or before the 2d of July; otherwise she would have been detained by the Russians. If she had no notice of the blockade, she was, on that general ground, entitled to bring out her cargo; if she had notice, she never could suppose that, according to the notification, she could be liable to capture; but if the case had been open to any suspicion, though, in fact, there is none, no weight could be given to such suspicion, when the claimant has been deprived, by the wrongful act of the captors, of the opportunity of affording the explanations which the rules of law were intended to secure to him.

Of the law applicable to the case, as it appears to their lordships, **they** cannot express their opinion better than in the language used by **the** learned judge of the court below, in the beginning of his judgment **on** the hearing before him. He says: "On the part of the claimants, **a** very long argument was addressed to the court, impugning the conduct of the captors, and charging them with having improperly brought **the** vessel to Constantinople. It has been further stated that there being no means of examining witnesses at Constantinople, great unnecessary delay had occurred, and that the captors were responsible for such delay and all the consequences. The court is not disposed to deny the truth and justice of the principle contended for; on the contrary, I am clearly of the opinion, that if a delay in bringing to adjudication, and the non-examination of witnesses, arose, though it may be almost impossible for the government of the belligerent nation to prevent such occurrence, still that neutrals ought to be indemnified if injustice has been done them. The captors in the first instance, though they may be perfectly blameless, are responsible to the neutrals, and they must look to their own government for redress, if they have been compelled to make good any injury sustained by neutrals, in consequence of their fulfilling the commands which they dare not disobey. In many cases the captains of some of her Majesty's cruisers may have a discretion to release at once, but this may not be so in case of a blockade, when special orders may have been given to capture and detain."

In this statement of the principles of law, their lordships cordially concur. What claim the captor, Captain Powell, may have upon her Majesty's government, it is not their duty to judge, nor have they any means of forming an opinion.<sup>4</sup> But as regards the claimants, his conduct appears to be without any excuse, and their lordships have no hesitation in advising restitution of the cargo, with cost and damages against the captors. \* \* \*

#### WADEER v. THE EAST INDIA CO.

(Rolls Court, 1860. 7 Jurist, N. S., 350.)

R. Palmer, Q. C. Schomberg, and Leith, for the plaintiff.

The notes were not part of the jura regalia, but belonged to the plaintiff as private property. The right of the conqueror to confiscate the property of the conquered did not extend to debts secured by the

<sup>4</sup> A commander of a ship of war of the United States, in obeying his instructions from the President of the United States, acts at his peril. If these instructions are not strictly warranted by law, he is answerable in damages to any persons injured by their execution. *Little et al. v. Barreme et al.*, 2 Cranch. 170, 2 L. Ed. 243 (1804) per Marshall, C. J. This case is distinguished in *Garland v. Davis*, 4 How. 131, 149, 11 L. Ed. 907 (1846), where it is held that public agents are not liable on contracts made for principals where no misfeasance is shown.

conquering power, and these notes were secured by the public faith of the India government. "In reprisals, we seize on the property of the subject just as we would on that of the state or sovereign. Everything that belongs to the nation is subject to reprisals whenever it can be seized, provided it be not a deposit intrusted to the public faith." Vattel, book 2, c. 18, § 344; Wolff v. Oxholm, 6 Mau. & S. 92. The fact that these notes were taken, as to one, to the rajah, his executors and administrators, and as to the other, in the name of a stranger, shewed that they were private and not public property. The mere declaration of war, and the possession of the person of the prisoner, did not amount to a confiscation of his private property; and the indorsement made by one of the defendants' agents on the packet containing one of the notes recognised the continued right of the ex-rajah. Wheaton's Inter. Law, part 4, c. 1, p. 371; 3 Phillim. Inter. Law, 682. The plaintiff's right to sue was not barred by lapse of time, for the regulations provided that the time within which a person might sue was twelve years from the acquisition of a right, unless by reason of minority, or other good and sufficient cause, he was precluded from obtaining redress. The plaintiff until 1852 was a prisoner, and the Court would give a liberal construction to the regulations. Dyce Sombre v. The East India Company, 10 Moo. P. C. 232; Troup v. The East India Company, 7 Moo. Ind. App. Cas. 104; Williams v. Jones, 13 East, 439. They cited also McLeod v. The Bank of Bengal, 5 Moo. P. C. 1; The Bank of Bengal v. Fagan, Id. 27; Gosain v. Gosain, 6 Moo. P. C. 53; M'Naghten's Principles of Hindoo Law, 22, 33; and Stat. 21 Jac. I, c. 16, § 7.

The Attorney General (Sir R. Bethell), Lloyd, Q. C., Forsyth, Q. C., and Melvill, for the Secretary of State for India. This suit was instituted by a dethroned prince, while a prisoner of war, against his captor, a sovereign government, in his own courts, to recover property which had been confiscated by that sovereign power; but it was a principle of law that acts done by a sovereign power could not be complained of in the courts of that sovereign, and its acts could not be examined by the court. It was true that the defendants filled a double character, but the notes which the plaintiff sought to recover were securities for a loan raised for political purposes, and the revenues of the state were charged with the payment, but they were no evidence of a private debt distinct from that of a political debt. The notes did not constitute a private debt; and no jurist had ever supposed that the private property of a conquered sovereign was to be respected. The words written upon the envelope which contained one of the notes merely stated the contents; they acknowledged no right, and did not affect the property. They cited The Secretary of State for India v. Kamachee Boye Sahaba, 7 Moo. Ind. App. Cas. 476; The Nabob of the Carnatic v. The East India Company, 1 Ves. Jun. 371, 3 Bro. C. C. 292; Elphinstone v. Bedreechund, 1 Knapp's P. C. 316; The Advocate General of Bombay v. Amerchund, Id. 329, note; 3 Phillim. Inter.

**Law**, 721; *The Attorney General v. Weedon*, Parker, 207; *Barclay v. Russell*, 3 Ves. 424; *Spanenburg v. Bannatyne*, 1 B. & P. 163; 1 Hargr. *Collatanea Juridica*, 129; *The Mayor of Lyons v. The East India Company*, 1 Moo. P. C. 175; *The Duke of Brunswick v. The King of Hanover*, 6 Beav. 1, 57, 2 H. L. C. 1; and 3 Mill's *British India*, 345.

R. Palmer, in reply.

**Dec. 8.**—Sir J. ROMILLY, M. R.<sup>5</sup> This is a suit instituted by the *ex*-Rajah of Coorg against the East India Company to recover two promissory notes, together with the interest secured upon them. One of them is a note to secure the sum of 653,940 Madras rupees, with interest at £6. per cent., and the other to secure 203,900 sicca rupees, with interest at £4. per cent. The circumstances connected with the origin of these notes were these: Rajah Veer, the Rajah of Coorg, had advanced money to the East India government, in respect of which he was made a creditor, holding the notes of the government, issued under the authority and by the sanction of the government. \* \* \* At the beginning of the year 1834 the plaintiff was Rajah of Coorg, and was a creditor of the East India Company for the amounts secured by both of these notes, both of which were then in his possession or power; and whether his possession of or title to them was attributable to his royal character as Rajah of Coorg, or to his private character, is a matter of material importance in the determination of this question, to which I shall presently address myself.

Early in the year 1834 differences arose between the East India government and the plaintiff; the government made war against the plaintiff, and in April, 1834, Coorg was taken; the territories of the rajah were annexed to the British territory in India; the plaintiff himself was made a prisoner, and his property was divided as booty of war. The property, however, which was divided, did not include either of the notes, as appears from an inventory of such booty which was made out and proved in the cause. The *ex*-rajah practically remained a prisoner during the remainder of his life, although he was permitted to visit this country in 1852, and in 1854 this bill was filed. The defence is, that this court has no jurisdiction to entertain the question; that this is a case of the property of a captive prince taken by a hostile power in war, and while in the exercise of its political power, and in its character of a sovereign power. If this be a correct description, such a transaction undoubtedly is not cognisable by any court of justice. The East India Company obtained possession of the two notes in the following manner: The note for 203,900 sicca rupees had been left by the plaintiff in the hands of Mr. Cassamajer, the resident at Mysore, of which Coorg was a dependency; and in January, 1836, Captain Chalmers, the superintendent of Mysore, took possession of this note, giving a receipt for it to the resident at Mysore. It was

<sup>5</sup> The statement of facts and parts of the opinion are omitted.

then sealed up in a cover, which was fastened by the official seal of the commissioner of the Mysore government, and it was placed in his treasury, where it has since remained, and no interest has been paid upon it since 1834. The other note was in 1834 in the hands of Messrs. Binney & Co. as the agents of the plaintiff, and after some correspondence, and considerable delay, it was in 1840 delivered up to the defendants on giving an indemnity to Messrs. Binney & Co., and by the defendants it was deposited in the government treasury, and no interest has been paid upon it since 1834. I think that the acts proved establish that these notes were taken possession of by and on the part of the defendants. \* \* \*

The principal difficulty that I have felt in this case has arisen from the double character filled by the defendants the East India Company. They were both a company of merchants trading to the East Indies, and a sovereign power, and, in so far as the Rajah of Coorg was concerned, a sovereign state, wholly independent, and at war with him. From hence it follows that the acts done by the defendants are frequently of an ambiguous character, and that it becomes extremely difficult to ascertain whether any particular act is to be attributed to the exercise of the political power of a sovereign state, or to a company of merchants trading to the East Indies. If this case can be fairly represented to be an instance of a foreign power taking prisoner an enemy, by means whereof, and while so holding him, obtaining possession of documents which establish his right to recover his debt due from another to him in his private capacity, then I am clear that the plaintiff is entitled to relief, and that the circumstance, that the defendants constitute both the conquering power and the debtor, does not in any respect vary the question. But if the notes were the property of the plaintiff in his character of rajah, and if they were taken possession of by the defendants in the exercise of their sovereign and political power, then I am equally clear that this court cannot interfere. On the first point, the evidence satisfies me that these notes belonged to the plaintiff in his character of Rajah of Coorg, and not in any private character apart from such office. \* \* \* Now, these circumstances, in my opinion, amount to a taking possession of the notes on the part of the defendants in the exercise of their sovereign and political power. It is clear that, in this act of taking possession of the notes, it was in no mercantile character that they could have taken or retained them; and if this is so, as in my opinion it is, then the authorities to which I have been referred, and which I have carefully examined, from Vattel and various other sources, particularly those in the Duke of Newcastle's answer to the Prussian Government on the seizure of the Silesian debt due to British subjects, do not apply to this case, but it falls within the rule laid down, and the cases cited, in the case of *The Secretary of State for India v. Kamachee Boye Sahaba*, 7 Moo. Ind. App. Cas. 476.

I am of opinion that the taking possession of the notes by the East

India government were acts done in the exercise of their sovereign power, and that those acts are not subject to the control of this court. I must, therefore, direct the bill to be dismissed, but I shall do so without costs.

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WADE v. BARNWELL.

(Superior Court of South Carolina, Charleston District, 1799. 2 Bay, 229.)

Case on a special verdict found at Beaufort. This verdict stated, substantially, that sundry negroes therein named, which formerly belonged to a Mr. Knox, a British subject in Georgia, had been confiscated during the Revolutionary War, and sold; but that some time in the year 1778, when the British repossessed themselves of Georgia, and overrun that country, Knox, the original owner of the negroes, regained possession of them, and when at the close of the war, the British finally evacuated that state, took them off with him to Jamaica, where he kept them several years, and then sent them into South Carolina for sale, when the defendant John Barnwell, became the purchaser: whereupon Wade, who claimed under the sale by virtue of the confiscation act in Georgia, commenced his action of trover for recovery of them, as being his property. The verdict then submitted the question to the court, whether from the foregoing circumstances, the property of the negroes in question was in Wade, who claimed under the act of the state of Georgia or in the defendant, Barnwell, who held under the original proprietor?

Mr. Holmes, for the plaintiff, insisted that the property of an enemy found in the state of Georgia during the war, after the Declaration of Independence, by the *jus belli* became liable to seizure and confiscation; and that the supreme authority of the state had by an act declared the same to be confiscated, and directed a sale for the use and benefit of the state, at which sale, Mr. Wade, or those under whom he claimed, were bona fide purchasers. A higher title than this, he said, could not well be submitted to the consideration of a court of justice.

Mr. Desaussure, on the part of the defendant, argued that the contest between Great Britain and America was at first a dispute between two great parties of the same empire, contending for rights and privileges on one hand, and for the supreme and uncontrolled power and authority of the mother country on the other. That in such a contest, the right of property remained in a great measure undecided, till the dispute was ended and a treaty made, confirming the rights to each of the great parties so engaged; and this ought to have been the true policy both of Great Britain and America. But admitting that the same rules which governed foreign nations at war, were applicable to this country after the declaration of independence, it is evident that on the retaking of Georgia by the British, all the property taken or ac-

quired by the Americans from the other party, and retaken and repossessed again by the original owners, *flagrante bello*, reverted absolutely and unconditionally, in the original proprietors or owners, by the *jus postliminium*, a well-known and acknowledged part of the law of nations, which is paramount to all municipal regulations. Vattel, c. 14, § 204; Gro. book 3, c. 9. By this law, things taken by the enemy, and regained by the former owner, are restored to their original state and condition, as fully and completely, as if they had never been taken. Upon these principles, then, he contended, that upon the repossession of the state of Georgia by the British, in the year 1778, after the Americans had been nearly all driven out of the country, Mr. Knox being then a British subject, and regaining possession of his negroes, acquired an absolute right to them, and his title was as fully confirmed to him as if they had never gone out of his possession. That the act of Georgia, and sale during the heat of the contest, and before the treaty of peace, did not alter that part of the law of nations, which gave Mr. Knox this right of repossessing himself of his property wherever he could find it within the limits of Georgia, after the British got possession of the country. It was a risk which the purchaser ran, and he must now take the consequences of it, or apply to the Legislature of Georgia for redress.

The judges, after duly considering the circumstances of the case submitted to them by this special verdict, were unanimously of opinion, that the judgment should be rendered up for the defendant John Barnwell. The *jus postliminium*, upon which this case turns, and by virtue of which, things taken by an enemy are to be restored to their former state or owners, when a country comes again under the power of the nation to which it formerly belonged, is a very important branch of the law of nations, and is founded on the obligation which every sovereign or state is under, to protect the persons and goods of its subjects or citizens against an enemy; should any fortunate event bring it again under such sovereign power, he is bound to restore them to their former state, and to give back the effects to the owners to whom they originally belonged, and to settle every thing as they were before they fell into the enemies hands. Hence it is, therefore, that a private individual acquires a right to every thing which belonged to him before they were taken by an enemy, as soon as a country comes again under the power or dominion of the sovereign to whom he is a subject, or owes allegiance. Gro. book 3, c. 9; Vattel, lib. 3, c. 14. This postliminary right is of very ancient origin, and seems to have been respected by all nations, from the days of the ancient Greeks and Romans, down to the present day. It would ill become a young people, therefore, just taking their rank and station among the nations of the world, to disregard so important a principle of the national law. And however we may be disposed to respect the acts and proceedings of our sister states, as municipal regulations, yet whenever they come in



contact with, or in opposition to, the governing code of nations, we are bound to say they must give way.

Let judgment be entered for defendant.

Present, GRIMKE, WATIES and BAY.<sup>6</sup>

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### UNITED STATES v. RICE.

(Supreme Court of the United States, 1819. 4 Wheat. 246, 4 L. Ed. 562.)

STORY, Justice, delivered the opinion of the court.<sup>7</sup>

The single question arising on the pleadings in this case is, whether goods imported into Castine, during its occupation by the enemy, are liable to the duties imposed by the revenue laws upon goods imported into the United States. It appears, by the pleadings, that on the first day of September, 1814, Castine was captured by the enemy, and remained in his exclusive possession, under the command and control of his military and naval forces, until after the ratification of the treaty of peace, in February, 1815. During this period, the British government exercised all civil and military authority over the place; and established a custom-house, and admitted goods to be imported, according to regulations prescribed by itself, and among others, admitted the goods upon which duties are now demanded. These goods remained at Castine until after it was evacuated by the enemy, and upon the reestablishment of the American government, the collector of the customs, claiming a right to American duties on the goods, took the bond in question from the defendant, for the security of them.

Under these circumstances, we are all of opinion, that the claim for duties cannot be sustained. By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the in-

\* "These United States by their inferior courts have decided that when a conquered territory is repossessed by its former sovereign, private individuals acquire a right to all property that belonged to them before it was taken by the conqueror. *Wade v. Barnewell*, 2 Bay (S. C.) Rep. 229 (1799)." 3 Phillimore's Commentaries on International Law (1885) 875.

"And generally the English Privy Council has decided, that a country reconquered from an enemy reverts to the same state that it was in before its conquest. The British inhabitants of a part of the French dominions which was conquered by the Dutch, and afterwards re-conquered by the French, ought therefore, the Privy Council decided, to have had, after the re-conquest of that part, the same protection that they were entitled to under a Treaty of Commerce of 1786; and this Tribunal awarded them compensation in respect of losses after the re-conquest, incurred by sequestration of their property in contravention of that Treaty by the French Government. *Gumbe's Case*, 2 Knapp's Privy Council Rep., 869 (1834)." Id. 859.

<sup>7</sup> The statement of facts is omitted.

habitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them; for where there is no protection, or allegiance, or sovereignty, there can be no claim to obedience. Castine was therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants were subject to such duties only as the British government chose to require. Such goods were in no correct sense imported into the United States. The subsequent evacuation by the enemy, and resumption of authority by the United States, did not, and could not, change the character of the previous transactions.

The doctrines respecting the *jus postliminii* are wholly inapplicable to the case. The goods were liable to American duties, when imported, or not at all. That they were not so liable at the time of importation, is clear from what has been already stated; and when, upon the return of peace, the jurisdiction of the United States was reassumed, they were in the same predicament as they would have been if Castine had been a foreign territory ceded by treaty to the United States, and the goods had been previously imported there. In the latter case, there would be no pretence to say that American duties could be demanded; and, upon principles of public or municipal law, the cases are not distinguishable. The authorities cited at the bar would, if there were any doubt, be decisive of the question. But we think it too clear to require any aid from authority.

Judgment affirmed with costs.\*

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FLEMING et al. v. PAGE, Collector.

(Supreme Court of the United States, 1850. 9 How. 608, 13 L. Ed. 276.)

For the material portion of *Fleming v. Page*, see *New Orleans v. New York Steamship Company*, post, p. 714.

\* In *United States v. Hayward*, 2 Gall. 485, Fed. Cas. No. 15,336 (1815), Mr. Justice Story held that Castine was to be considered a "foreign port," with reference to the nonimportation acts.

## NEW ORLEANS v. NEW YORK STEAMSHIP CO.

(Supreme Court of the United States, 1874. 20 Wall. 387, 22 L. Ed. 854.)

Appeal from the Circuit Court for the District of Louisiana; the case being thus: -

On the 1st of May, 1862, the army of the United States captured the city of New Orleans. It was held by military occupation until the 18th of March, 1866, when its government was handed over to the proper city authorities. The condition of things which subsisted before the rebellion, was then restored. During the military occupation it was governed by a mayor, a board of finance, and a board of street landings, appointed by the commanding general of the department. On the 8th of June, 1865, Hugh Kennedy was thus appointed mayor. On the 8th of July, 1865, as such mayor, pursuant to a resolution signed by the chairman of the board of finance, and by the chairman of the board of street landings, both boards having been appointed in the same manner as himself, Kennedy executed to the appellees a lease of certain water-front property therein described. The lease made the following provisions:

The city granted to the company the right to inclose and occupy for their exclusive use the demised premises for the term of ten years. The company was at its own expense to build a new wharf in front of the landing, as designated, with new bulk-heads to retain the levee earthworks throughout the whole extent of the front assigned to them, they furnishing the requisite labor and materials; to keep the structure in complete order and repair until the termination of the lease, and then to deliver it to the city authorities in that condition, natural wear and tear only excepted. \* \* \*

The lease was not to be transferred without the city's consent, and, in case of default by the company to fulfil its engagements, the city had the right to annul it. At the expiration of the lease all the improvements made by the company were to become the property of the city. The company agreed to pay an annual rent of \$8,000, in monthly installments, for which it gave its promissory notes, one hundred and twenty in number.

The company expended more than \$65,000 in making the improvements specified in the lease, and duly paid its notes as they matured down to the 11th of April, 1866, including the one then due. On the 18th of that month the city surveyor, aided by a number of laborers, acting under an order of the city council, approved by the mayor, destroyed the fence or inclosure erected by the company. It had cost them \$7,000. The company filed a bill and supplemental bill whereby they prayed for an injunction and damages. The notes for rent given by the company and then unpaid were delivered by the military authorities to the proper city authorities when the government of the city was

transferred to the mayor and council. Those unpaid when this litigation was begun were held by the city then and for several months afterwards. They were tendered to the company by a supplemental answer in this case and deposited in court, where they still remained. The note last paid matured and was paid before the inclosure was destroyed. The city had not tendered back the money so paid, nor had it disclaimed the validity of the payment, nor had it tendered back the amount or any part of it, expended by the company in making the improvements, nor made any offer touching the subject. \* \* \*

The following facts were agreed on by the parties: "From the execution of the lease to the 18th of April, 1866, the company had been in peaceable possession of the demised premises, and had performed all its obligations under the lease. No notice was given by the city of the intended demolition of the inclosure, and it was done early in the morning. Under its charter of 1856 the city had, before the war, leased portions of its wharves to individuals and companies, and had, in one instance, farmed out the collection of levee dues upon all the wharves by sections. The damages resulting from the destruction of the company's buildings, etc., and the necessary employment, in consequence of this destruction, of additional watchmen, amounted to \$8,000."

At the hearing the court decreed \* \* \* that the city should be enjoined from interfering with the possession and enjoyment of the demised premises by the company during the life of the lease, and that the company should recover from the city \$8,000 for damages, and that the city should pay the costs of the suit. It was from this decree that the present appeal was taken. \* \* \*

Mr. Justice SWAYNE (having stated the case) delivered the opinion of the court.<sup>13</sup>

The questions presented for our consideration are questions of law. The facts are undisputed. Our remarks will be confined to the several objections to the decree taken by the counsel for the appellant. \* \* \*

It has been strenuously insisted that the lease was made by Kennedy without authority, was, therefore, void, ab initio, and, if this was not so, that its efficacy, upon the principle of the *jus post liminium*, wholly ceased when the government of the city was surrendered by the military authorities of the United States to the mayor and council elected under the city charter.

Although the city of New Orleans was conquered and taken possession of in a civil war waged on the part of the United States to put down an insurrection and restore the supremacy of the national government in the Confederate States, that government had the same power and rights in territory held by conquest as if the territory had

<sup>13</sup> Part of the statement of facts and part of the opinion are omitted.

belonged to a foreign country and had been subjugated in a foreign war.<sup>13</sup> In such cases the conquering power has a right to displace the pre-existing authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. These principles have the sanction of all publicists who have considered the subject.

They have been repeatedly recognized and applied by this court.<sup>14</sup> In the case last cited the President had, by proclamation, established in New Orleans a provisional court for the state of Louisiana, and defined its jurisdiction. This court held the proclamation a rightful exercise of the power of the executive, the court valid, and its decrees binding upon the parties brought before it. In such cases the laws of war take the place of the Constitution and laws of the United States as applied in time of peace. It follows as a corollary from these propositions that the appointment of Kennedy as mayor and of the boards of finance and of street landings was valid, and that they were clothed with the powers and duties which pertained to their respective positions.

It can hardly be doubted that to contract for the use of a portion of the water-front of the city during the continuance of the military possession of the United States was within the scope of their authority. But, conceding this to be so, it is insisted that when the military jurisdiction terminated the lease fell with it. We cannot take this view of the subject. The question arises whether the instrument was a fair and reasonable exercise of the authority under which it was made. A large amount of money was to be expended and was expended by the lessees. The lease was liable to be annulled if the expenditures were not made and the work done within the limited time specified. The war might last many years, or it might at any time cease and the state and city be restored to their normal condition. The improvements to be made were important to the welfare and prosperity of the city. The company had a right to use them only for a limited time. The company was to keep them in repair during the life of the lease, and at its termination they were all to become the prop-

<sup>13</sup> *The Prize Cases*, 2 Black, 636, 17 L. Ed. 459 (1862); *Mrs. Alexander's Cotton*, 2 Wall. 417, 17 L. Ed. 915 (1864); *Mauran v. Alliance Insurance Co.*, 6 Wall. 1, 18 L. Ed. 836 (1867).

<sup>14</sup> *Cross v. Harrison*, 16 How. 164, 14 L. Ed. 889 (1853); *Leitensdorfer v. Webb*, 20 How. 176, 15 L. Ed. 891 (1857); *The Grapeshot*, 9 Wall. 129, 19 L. Ed. 651 (1869).

erty of the city. In the meantime the rental of eight thousand dollars a year was to be paid.

When the military authorities retired the rent notes unpaid were all handed over to the city. The city took the place of the United States, and succeeded to all their rights under the contract.<sup>15</sup> The company became bound to the city in all respects as it had before been bound to the covenantees in the lease. The city thereafter collected one of the notes subsequently due, and it holds the fund, without an offer to return it, while conducting this litigation. It is also to be borne in mind that there has been no offer of adjustment touching the lasting and valuable improvements made by the company, nor is there any complaint that the company has failed in any particular to fulfill their contract.

We think the lease was a fair and reasonable exercise of the power vested in the military mayor and the two boards, and that the injunction awarded by the court below was properly decreed. The *jus post liminium* and the law of nuisance have no application to the case.

We do not intend to impugn the general principle that the contracts of the conqueror touching things in conquered territory lose their efficacy when his dominion ceases. We decide the case upon its own peculiar circumstances, which we think are sufficient to take it out of the rule.

We might, perhaps, well hold that the city is estopped from denying the validity of the lease by receiving payment of one of the notes, but we prefer to place our judgment upon the ground before stated.

Judgment affirmed.

Justices CLIFFORD, DAVIS, and BRADLEY did not hear the argument of this case, and did not participate in the judgment.

Mr. Justice HUNT, concurring.

I cannot assent to the proposition that the agents of the city appointed by the conquering power which captured it had authority to execute a lease of its levees and wharves continuing more than nine years after the conquering power had abdicated its conquest. If an extension of nine years may be justified, it would be difficult to repudiate an extension for ninety years, if that case should be presented. The lease under consideration was executed on the 8th day of July, 1865, to continue for the term of ten years. On the 18th of March, 1866, eight months and ten days afterwards, the military authority of the United States was withdrawn and the civil authority resumed its sway. The lease continued for that length of time during the military occupation of the city, and by its terms was to continue nine years, three months, and twenty days after the military dominion did in fact cease to exist. That the execution of this lease was an unwarranted assumption of power by the agents who made it, I quote Halleck on Interna-

<sup>15</sup> *United States v. McRae*, 8 L. R. Eq. 75 (1869).

tional Law and the Laws of War, p. 780, § 4 (1861). He uses this language:

"Sec. 4. Political laws, as a general rule, are suspended during the military occupation of a conquered territory. The political connection between the people of such territory and the state to which they belong is not entirely severed, but is interrupted or suspended so long as the occupation continues. Their lands and immovable property are, therefore, not subject to the taxes, rents, &c., usually paid to the former sovereign. These, as we have said elsewhere, belong of right to the conqueror, and he may demand and receive their payment to himself. They are a part of the spoils of war, and the people of a captured province or town can no more pay them to the former government than they can contribute funds or military munitions to assist that government to prosecute the war. To do so would be a breach of the implied conditions under which the people of a conquered territory are allowed to enjoy their private property and to pursue their ordinary occupations, and would render the offender liable to punishment. They are subject to the laws of the conqueror, and not to the orders of the displaced government. Of lands and immovable property belonging to the conquered state, the conqueror has, by the rights of war, acquired the use so long as he holds them. The fruits, rents, and profits, are therefore, his; and he may lawfully claim and receive them. Any contracts or agreements, however, which he may make with individuals farming out such property, will continue only so long as he retains control of them, and will cease on their restoration to, or recovery by, their former owner." To which he cites Heffter, *Droit International*, §§ 131-133, 186; Vattel, *Droit des Gens*, liv. 3, c. 13, § 197 et seq.; *American Ins. Co. v. Canter*, 1 Pet. 511, 542, 7 L. Ed. 242 (1828), and other authorities. See, also, *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch, 191, 3 L. Ed. 701 (1815).

The wharves and levees now in question were land and immovable property belonging to the conquered state. The fruits and rents of them were spoils of war which belonged to the conqueror so long as he held the conquered state. When the possession of the conqueror was at an end, the rights belonging to a conqueror ceased also. The spoils of war do not belong to a state of peace. \* \* \*

The armies of the revolting states were overthrown, and peace ensued. It was not, as the ancient historian said, "*solitudinem faciunt, pacem appellant*," but rest, repose, and rights restored. The state of Louisiana was again the sovereign authority in which all the administrative power of the state was vested. The City of New Orleans as a representative of the state, and, under its authority, possessed the absolute control of its municipal powers, in the same manner and to the same extent as it possessed and exercised them before the existence of the war. The displaced government resumed its sway. The conqueror's possession ceased.

The state of Louisiana and the Confederate government were public enemies, not unsuccessful revolutionists merely. The forts of the Confederate States were blockaded as those of a foreign enemy, and vessels taken in attempting to enter them were adjudged prizes of war. A prize court is in its very nature an international tribunal. Their captured soldiers were not shot as rebels, but were exchanged as prisoners of war. All intercourse between the citizens of the contending states was illegal, contracts were dissolved or suspended, their property within our states was confiscated to the public use. In short, we were at war with them. It is difficult to understand, why the postliminy doctrine is not applicable under such circumstances.

In *Fleming v. Page*, 9 How. 614, 13 L. Ed. 276 (1850), Chief Justice Taney says: "The port of Tampico, at which the goods were shipped, and the Mexican state of Tamaulipas, in which it is situated, were undoubtedly, at the time of the shipment, subject to the sovereignty and dominion of the United States. The Mexican authorities had been driven out or had submitted to our army and navy; and the country was in the exclusive and firm possession of the United States, and governed by its military authorities, acting under the order of the President. But it does not follow that it was a part of the United States, or that it ceased to be a foreign country in the sense in which these words are used in the acts of Congress. \* \* \*

While it was occupied by our troops, they were in an enemy's country and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy when he surrenders to a force which he is unable to resist. Tampico, therefore (he says), was a foreign port when this shipment was made."

This case is authority to the proposition that conquest and temporary military possession do not alter the national character of a city or port. As Tampico remained Mexican, notwithstanding its conquest by our armies, so New Orleans, so far as the *jus post liminii* is concerned, remained a part of the Southern Confederacy. \* \* \*

In my view, the agents of the city who made the lease of July 18, 1865, which we are now considering, exceeded the authority they possessed. Their authority was limited to the time of the possession and control of the lots by the military authority which appointed them. The making of the lease, however, was not an illegal act in any other sense than that the agents had exceeded their powers. The excessive acts of those agents were capable of ratification, and if ratified, were as binding upon the principal as if originally authorized.

It appears that the lessees gave their notes (one hundred and twenty notes in number) for \$666.66 each, payable monthly, for the whole amount of the rent to become due. The first nine of the notes were paid to the mayor and bureau acting under the military authority. The



Government of the city now in power was elected by the citizens according to law, in the ordinary manner, upon the resumption by the state and city of their civil powers, and was vested with the entire authority of the city in respect to wharves, levees, their management and control. Upon the principles already stated, it had power to lease the levee and wharf in question to the steamship company for the period named in the lease. Prior to the war, it had leased portions of its wharves to individuals, and had farmed out the collection of the levee dues upon the entire wharves by sections.<sup>16</sup>

It came into possession of the city government upon the election of its citizens on the 18th of March, 1866. Twenty-four days thereafter, to wit, on the 11th of April, 1866, the note for \$666.66 due three days previously, was paid to the city government. At the same time all the other notes, one hundred and eleven in number, were transferred by the military government to the new city administration. These notes were retained by the city until several months after the present action was begun; when they were tendered to the plaintiff by supplemental answer. No tender was ever made of the money, \$666.66, received by the city upon the note paid to it by the plaintiff for the rent due April 8, 1866. It now holds and enjoys, to that amount, the rent received by it under a lease which it seeks to repudiate.

The reception and holding of this rent is a clear and unqualified act of ratification, which bars the defence of a want of authority to execute the lease from which it issued. It is in violation of every principle of honesty and of sound morality, that one should retain the benefit of the act of his agent, and at the same time repudiate such act.

A ratification once made, with a knowledge of all the material circumstances, cannot be recalled. A ratification of a part of a contract ratifies the whole. One act of ratification is as complete and perfect in its effect as any number of acts of the same character.

For these reasons I am able to concur in the affirmance of the judgment.

Mr. Justice FIELD, dissenting.

I am unable to agree with the majority of the court in the judgment rendered. The power of the mayor and board of New Orleans, appointed by the commanding general upon the military occupation of that city, terminated with the cessation of hostilities; and I am of opinion that no valid alienation of any portion of the levee front and landing of the city could be made by them for any period extending beyond such occupation.

Assuming, as asserted, that the capture of New Orleans gave to the military authorities of the Union the same rights with respect to property there situated which would attend the conquest of a foreign country, the result is not different. A temporary conquest and occupation

<sup>16</sup> 1 Dillon on Municipal Corporations, §§ 48, 64, 67, 74, 181.

of a country do not change the title to immovable property, or authorize its alienation. They confer only the rights of possession and use. When the military occupation ceases, the property reverts to the original owner with the title unimpaired.

"Of lands and immovable property belonging to the state," says Halleck, "the conqueror has by the rights of war acquired the use so long as he holds them. The fruits, rents, and profits, are, therefore, his; and he may lawfully claim and receive them, but contracts or agreements, however, which he may make with individuals farming out such property, will continue only so long as he retains control of them, and will cease on their restoration to or recovery by their former owner."<sup>17</sup> Such is the language of all publicists and jurists, and there is nothing in the circumstances attending the military occupation of New Orleans by our forces which calls for any modification of the well-established rule of public law on this subject. The fact that New Orleans is a part of one of the states of the Union certainly ought not to be deemed a reason for enlarging the power of the military commander, but on the contrary would seem to be good ground for restricting it.

It appears to me to be perfectly clear that, according to settled doctrines of public law, questioned by no publicists, but everywhere recognized, the authorities of New Orleans were restored to as complete control over the levee front and landing of the city upon the cessation of the military occupation as they possessed previously, and had, in consequence, a perfect right to remove all obstacles to the public use of such levees and landings.

I do not see any ground for the application of the doctrine of ratification in the case. The civil authorities of the city were restored to power in March, 1866, and in April following they asserted their right to remove the obstructions to the levees created by the steamship company, and took steps to enforce it. In this proceeding they repudiated instead of ratifying the action of their military predecessors. The one hundred and eleven unpaid notes of the company received by their predecessors have been deposited in court subject to the company's order, and the failure to restore or tender the proceeds of one note, amounting to six hundred and sixty-six dollars, previously paid, may be justified or explained, on grounds consistent with the repudiation of the lease. Ratification of unauthorized acts of public agents, or persons assuming to be public agents, can only be inferred from conduct indicating an intention to adopt the acts and inconsistent with any other purpose. The alienation by sale or lease of any portion of the public levees and landings of the city after the restoration of its civil authorities could only be made, if at all, by ordinance or resolution of its common council, and it may be doubted whether there could be a ratification

<sup>17</sup> On International Law, c. 32, § 4.

of an unauthorized alienation, attempted by their predecessors, by any proceeding less direct and formal.

I am of opinion, therefore, that the decree of the court below should be reversed, and the bill be dismissed.<sup>18</sup>

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MacLEOD v. UNITED STATES.

(Supreme Court of the United States, 1913. 229 U. S. 416, 33 Sup. Ct. 955, 57 L. Ed. 1200.)

The appellant, William Stewart MacLeod, surviving partner of MacLeod & Co., brought suit in the Court of Claims to recover from the United States the amount of certain duties paid by the firm under protest upon a cargo of rice imported into the Island of Cebu at the city

<sup>18</sup> In 1898 the United States intervened on behalf of the Cubans, in their war of independence against Spain, and from 1898 to 1902 the American army occupied the island.

"It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it will upon the termination of such occupancy, advise any government established in the island to assume the same obligations." Article XVI, Treaty with Spain, 30 Stat. 1754, 1761.

"That no property, franchises, or concessions of any kind whatever shall be granted by United States, or by any military or other authority whatever, in the Island of Cuba during the occupation thereof by the United States." Act of March 3, 1899, 30 Stat. 1065, 1074.

The French courts of justice have been called upon to pass on questions more or less related to those discussed in the principal case.

In *Villasseque's Case*, Cour de Cassation, Ortolan, *Diplomatie de la Mer*, (2d Ed., 1853) vol. 1, 324 note (1818), it was decided that a crime committed by a French citizen in Spanish territory, occupied and administered by the French army, was a crime committed in a foreign country. Cf. *Neely v. Henkel*, 180 U. S. 109, 21 Sup. Ct. 302, 45 L. Ed. 448 (1901).

In the *Case of Guerin*, Court of Appeal of Nancy, 1872, Dalloz, vol. 2, p. 185 (1872), it was held that the occupation of a department of France by the troops of the enemy does not suspend therein the civil and criminal laws of France; that these continue obligatory upon all Frenchmen so long at least as they have not been expressly and specifically abrogated by the exigencies of the war. This rule was enforced in respect to the custom laws, and even in that part of the occupied territory where the Germans collected and appropriated the duties. Dalloz, vol. 2, p. 185, notes 3, 4 (1872).

In *Mohr & Haas v. Hatzfeld*, Court of Appeals of Nancy, 1872, Dalloz, vol. 2, p. 229 (1872), it was held that the military occupation of a territory confers upon the invader the right only to the usufruct and revenues of the public domain; that the French courts will not recognize as valid the sale of old trees (during the war of 1870-71) on the public domain, which were reserved at the time of the annual cutting; that they are as inalienable as the soil of the forest itself.

Perhaps the most famous case on the general subject relates to the debts and domains of Hesse-Cassel, confiscated or alienated by Napoleon I. Hesse-Cassel was conquered by Napoleon in 1806, and remained for about a year under his immediate control, when it was annexed to the new kingdom of Westphalia, of which it remained a part until after the battle of Leipzig in 1813. It was held in the *Elector of Hesse-Cassel's Case*, that debts due the Elector were validly discharged by payment to Napoleon and receiving from him acquittance in full. 3 *Phillimore's International Law* (3d Ed.) 841 (1885); *Magoon's Military Occupation*, 262, 263 (1902).

and port of the same name, in the Philippine Islands, on January 29, 1899. The Court of Claims decided in favor of the United States and rendered judgment dismissing the petition. 45 Ct. Cl. 339. The case was then appealed to this court.

The Court of Claims made findings of fact, the substance of which is as follows:

The claimant firm, comprised of the appellant (the survivor) and two others, all citizens of Great Britain, had its head office at Manila and was engaged in doing a general mercantile business there and elsewhere in the Orient. On January 13, 1899, the claimants chartered an American steamship, the *Venus*, at Manila and cleared her in ballast for Saigon, China, whence she sailed for the port of Cebu with a cargo of rice on January 22nd, carrying the usual consular papers. Prior to that time it had been the practice of the military authorities at Manila to require importers, residing in that city and shipping rice to points in the Philippines not actually occupied by the United States forces, to present certified manifests covering their cargoes and to pay the duties thereon to the United States military collector of customs at Manila, which practice was a matter of common knowledge and discussion among the business men in that city, but there is no other evidence charging the claimants with knowledge of the fact.

The collector at Manila was informed by competitors of the claimants that the latter proposed to ship the cargo to Cebu without paying duty at Manila and that, as they complied with the requirements of the United States authorities, they would be unable to compete, under such unfair conditions, with the claimants; and the collector received confirmation of such report from the consul at Saigon on the 21st of January, and on the 23d officially notified the claimants that a certified manifest must be presented and duties paid on the cargo at the custom house at Manila. The next day one of the claimants presented in person to the collector a letter stating that there had been no secret as to the movement of the *Venus*; that she had been openly dispatched to Saigon to load a cargo of rice for the Philippines, and that the captain had instructions to secure consular papers, if ordered to Cebu, in case that port should be in the possession of the United States authorities upon his arrival, and that they presumed his papers were in order; that according to their advice Cebu was in the hands of the republican government, whose authorities would exact the payment of duties, the same in amount as under the Manila tariff; that in selling the cargo they had been required to guarantee that the duties would not exceed those under the Manila tariff; that the claimants protested against paying the duties twice, as it was through no fault of theirs that the duties went to the Cebu authorities, and that, desiring to respect the notification, they would, if instructed, request their Cebu friends to protest against the payment in Cebu because, according to the notification, the Cebu customs were under the control of the United States. At the same time the collector was informed that

a ship of the claimants was about to leave Manila for Cebu, which would arrive in time to head off the Venus (which did in fact sail from Manila that day and arrived in Cebu before the Venus); that their intention in so advising the collector was that he might take the steps he thought most expedient, but that the claimants, unless otherwise ordered by the United States, intended to carry out their contract with the purchasers of the cargo, even if required to pay double duties.

Upon the arrival of the Venus at Cebu, January 29, 1899, the native government demanded the payment of duties on the cargo and refused to allow its discharge until such payment was made. On February 4, 1899, the duties were paid and the cargo delivered to the purchasers. Upon the arrival of the Venus thereafter at Manila, with a cargo from Cebu, she was at first prevented from discharging her cargo without paying the duties involved in this case, but later was permitted to do so. Subsequently the collector refused to receive further business from the claimants until the duties in question were paid, and because of such refusal and in order to transact further business with the collector, the claimants, involuntarily and under protest, paid the duties demanded.

War was declared with Spain on April 25, 1898, and on May 1, 1898, the forces of the United States captured Manila Bay and harbor. The following order of the President was thereafter promulgated:

"Executive Mansion, July 12, 1898.

"By virtue of the authority vested in me as Commander-in-Chief of the Army and Navy of the United States of America, I do hereby order and direct that upon the occupation and possession of any ports and places in the Philippine Islands by the forces of the United States the following tariff of duties and taxes, to be levied and collected as a military contribution, and regulations for the administration thereof, shall take effect and be in force in the ports and places so occupied.

"Questions arising under said tariff and regulations shall be decided by the general in command of the United States forces in those islands.

"Necessary and authorized expenses for the administration of said tariff and regulations shall be paid from the collections thereunder.

"Accurate accounts of collections and expenditures shall be kept and rendered to the Secretary of War. William McKinley."

The protocol of August 12, 1898, provided that "the United States will occupy and hold the city, bay and harbor of Manila, pending the conclusion of a treaty of peace which shall determine the control, disposition and government of the Philippines." Manila was opened as a port of entry on August 20, 1898, and Cebu on March 14, 1899. The executive order of July 12, 1898, was not proclaimed in Cebu until February 22, 1899, or later. The treaty of peace was signed on December, 10, 1898, but ratifications were not exchanged until April 11, 1899. The Spanish forces evacuated the island of Cebu on December 25, 1898, having first appointed a provisional governor. Shortly there-

after the native inhabitants, formerly in insurrection against Spain, took possession of the island, formed a so-called republic and administered the affairs of the island until possession was surrendered to the United States on February 22, 1899, prior to which time no authorities of the United States had been in the island and the United States had not been in possession or occupation of the island, it having been up to that time in the actual physical possession of the Spanish and the people of the island. \* \* \*

Mr. Justice DAY, after making the foregoing statement, delivered the opinion of the court.<sup>19</sup>

When the Spanish fleet was destroyed at Manila, May 1, 1898, it became apparent that the government of the United States might be required to take the necessary steps to make provision for the government and control of such part of the Philippines as might come into the military occupation of the forces of the United States. The right to thus occupy an enemy's country and temporarily provide for its government has been recognized by previous action of the executive authority and sanctioned by frequent decisions of this court. The local government being destroyed, the conqueror may set up its own authority and make rules and regulations for the conduct of temporary government, and to that end may collect taxes and duties to support the military authority and carry on operations incident to the occupation. Such was the course of the government with respect to the territory acquired by conquest and afterwards ceded by the Mexican government to the United States. *Cross et al. v. Harrison*, 16 How. 164, 14 L. Ed. 889. See also, in this connection, *Fleming v. Page*, 9 How. 603, 13 L. Ed. 276; *New Orleans v. Steamship Co.*, 20 Wall. 387, 22 L. Ed. 354; *Dooley v. United States*, 182 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074; 7 *Moore's International Law Digest*, § 1143 et seq., in which the history of this government's action following the Mexican War and during and after the Spanish-American War is fully set forth; and also Taylor on International Public Law, chapter IX, Military Occupation and Administration, § 568 et seq.; and 2 *Oppenheim on International Law*, § 166 et seq.

There has been considerable discussion in the cases and in works of authoritative writers upon the subject of what constitutes an occupation which will give the right to exercise governmental authority. Such occupation is not merely invasion, but is invasion plus possession of the enemy's country for the purpose of holding it temporarily at least. 2 *Oppenheim*, § 167. What should constitute military occupation was one of the matters before the Hague Convention in 1899 respecting laws and customs of war on land, and the following articles were adopted by the nations giving adherence to that convention, among which is the United States (32 Stat. II, 1821):

<sup>19</sup> Parts of the opinion are omitted.

**"Article XLII.** Territory is considered occupied when it is actually placed under the authority of the hostile army.

**"The** occupation applies only to the territory where such authority is established, and in a position to assert itself.

**"Article XLIII.** The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

A reference to the Messages and Papers of the Presidents, to which we may refer as matters of public history, shows that the President was sensible of and disposed to conform the activities of our government to the principles of international law and practice. See 10 Messages and Papers of the Presidents, 208, executive order of the President to the Secretary of War, in which the President said (page 210):

"While it is held to be the right of a conqueror to levy contributions upon the enemy in their seaports, towns, or provinces which may be in his military possession by conquest, and to apply the proceeds to defray the expenses of the war, this right is to be exercised within such limitations that it may not savor of confiscation. As the result of military occupation the taxes and duties payable by the inhabitants to the former government become payable to the military occupant, unless he sees fit to substitute for them other rates or modes of contributions to the expenses of the government. The moneys so collected are to be used for the purpose of paying the expenses of government under the military occupation, such as the salaries of the judges and the police, and for the payment of the expenses of the army."

To the same effect, executive order of the President to the Secretary of the Treasury, in which the President said (page 211):

"I have determined to order that all ports or places in the Philippines which may be in the actual possession of our land and naval forces by conquest shall be opened, while our military occupation may continue, to the commerce of all neutral nations, as well as our own, in articles not contraband of war, upon payment of the rates of duty which may be in force at the time when the goods are imported."

And the like executive order of the President to the Secretary of the Navy (page 212).

In pursuance of this policy, the order of July 12, 1898, was framed. By its plain terms the President orders and directs the collection of tariff duties at ports in the occupation and possession of the forces of the United States. More than this would not have been consistent with the principles of international law, nor with the practice of this government in like cases. While the subsequent order of December 21, 1898, made after the signing of the treaty of peace, is referred to

in the brief of counsel for the government, it was not alluded to in the findings of fact of the Court of Claims; but we find nothing in that order indicating a change of policy in respect to the collection of duties. While [with] the signing of the treaty of peace between the United States and Spain on December 10, 1898, [it] was stated, the responsible obligations imposed upon the United States by reason thereof were recited and acknowledged and the necessity of extending the government with all possible dispatch to the whole of the ceded territory was emphasized, no disposition was shown to enlarge the number of ports and places in the Philippine Islands at which duties should be collected so as to include those not occupied by the United States, and the President said (page 220):

"All ports and places in the Philippine Islands in the actual possession of the land and naval forces of the United States will be opened to the commerce of all friendly nations. All goods and wares not prohibited for military reasons, by due announcement of the military authority, will be admitted upon payment of such duties and other charges as shall be in force at the time of their importation."

The occupation by the United States of the city, bay and harbor of Manila pending the conclusion of a treaty which should determine the control, disposition and government of the Philippines was provided for by the protocol of August 12, 1898, and the necessity of further occupation, until the exchange of ratifications by the governments of Spain and the United States, was recognized by the President in the order of December 21, 1898. We have been unable to find anything in the executive or congressional action prior to the importation of the cargo now in question having the effect to extend the executive order as to the collection of duties during the military occupation to ports and places not within the occupation and control of the United States.

The statement of the facts shows that the insurgent government was in actual possession of the custom house at Cebu, with power to enforce the collection of duties there, as it did. Such government was of the class of de facto governments described in 1 Moore's International Law Digest, § 20, as follows:

"But there is another description of government, called also by publicists a government de facto, but which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are (1) that its existence is maintained by active military power within the territories, and against the rightful authority of an established and lawful government; and (2) that while it exists it must necessarily be obeyed in civil matters by private citizens who, by acts of obedience rendered in submission to such force, do not become responsible, as wrongdoers, for those acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in

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extent and conditions. They are usually administered directly by military authority, but they may be administered, also, by civil authority, supported more or less directly by military force. *Thorington v. Smith*, 8 Wall. 1, 9, 19 L. Ed. 361."

The attitude of this government toward such de facto governments was evidenced in the *Bluefields Case*, a full account of which is given in 1 Moore's International Law Digest, p. 49 et seq. \* \* \*

A similar case appears in 1 Moore's International Digest, p. 49, in which our government was requested by Great Britain to use its good offices to prevent the exaction by the Mexican government of certain duties at Mazatlan, which had been previously paid to insurgents. \* \* \* See also *Colombian Controversy*, 6 Moore's International Law Digest, p. 995 et seq.

While differing somewhat in its circumstances, the case of *United States v. Rice*, 4 Wheat. 246, 4 L. Ed. 562, is an instructive case. \* \* \*

It is said, however, that the claimants resided and were doing business at Manila and therefore were subject to the military authority there, and the authority of a conquering power, recognized in *New Orleans v. Steamship Co.*, supra, 20 Wall. 394, 22 L. Ed. 354, to regulate trade with the enemy and in its country is cited in support of the proposition. That there is such general authority, there can be no doubt. It is, however, not without limitation, and a local commander is certainly bound by the orders of the President as commander in chief, which in this case had limited tariff collections to ports and places occupied by the United States. And such authority is subject to the laws and usages of war (*New Orleans v. Steamship Co.*, supra, 20 Wall. 394, 22 L. Ed. 354), and, we may add, to such rules as are sanctioned by established principles of international law.

A state of war as to third persons continued until the exchange of treaty ratifications (*Dooley v. United States*, 182 U. S. 222, 230, 21 Sup. Ct. 762, 45 L. Ed. 1074), and, although rice, not being contraband of war, might have been imported (7 Moore's International Law Dig. pp. 683, 684), the authority of the military commander, until the exchange of ratifications, may have included the right to control vessels sailing from Manila to trade in the enemy's country and to penalize violations of orders in that respect. But whatever the authority of the commander at Manila or those acting under his direction to control shipments by persons trading at Manila and in vessels sailing from there of American registration, such authority did not extend to the second collection of duties upon a cargo from a foreign port to a port occupied by a de facto government which had compulsorily required the payment of like duties.

It is further contended that, if the collection of duties was originally without authority, it was ratified by the Act of June 30, 1906 (34 Stat. 634, 636, c. 3912). \* \* \*

We think the Court of Claims was in error in holding the duties collectible at Manila under the circumstances related, and in adjudg-

ing that the Act of June 30, 1906, ratified the conduct of the military authorities at Manila in compelling such payment. Its judgment will therefore be reversed and the case remanded to the Court of Claims with instructions to enter judgment for the claimant.

Reversed.

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Ex parte MILLIGAN.

(Supreme Court of the United States, 1866. 4 Wall. 2, 18 L. Ed. 281.)

Mr. Justice DAVIS delivered the opinion of the court.<sup>20</sup>

On the 10th day of May, 1865, Lambdin P. Milligan presented a petition to the Circuit Court of the United States for the District of Indiana, to be discharged from an alleged unlawful imprisonment. The case made by the petition is this: Milligan is a citizen of the United States; has lived for twenty years in Indiana; and, at the time of the grievances complained of, was not, and never had been in the military or naval service of the United States. On the 5th day of October, 1864, while at home, he was arrested by order of General Alvin P. Hovey, commanding the military district of Indiana; and has ever since been kept in close confinement.

On the 21st day of October, 1864, he was brought before a military commission, convened at Indianapolis, by order of General Hovey, tried on certain charges and specifications, found guilty, and sentenced to be hanged, and the sentence ordered to be executed on Friday, the 19th day of May, 1865.

On the 2d day of January, 1865, after the proceedings of the military commission were at an end, the Circuit Court of the United States for Indiana met at Indianapolis and empanelled a grand jury, who were charged to inquire whether the laws of the United States had been violated; and, if so, to make presentments. The court adjourned on the 27th day of January, having, prior thereto, discharged from further service the grand jury, who did not find any bill of indictment or make any presentment against Milligan for any offence whatever; and, in fact, since his imprisonment, no bill of indictment has been found or presentment made against him by any grand jury of the United States.

Milligan insists that said military commission had no jurisdiction to try him upon the charges preferred, or upon any charges whatever; because he was a citizen of the United States and the state of Indiana, and had not been, since the commencement of the late rebellion, a resident of any of the states whose citizens were arrayed against the government, and that the right of trial by jury was guaranteed to him by the Constitution of the United States.

<sup>20</sup> The statement of facts and part of the opinion are omitted.

The prayer of the petition was, that under the act of Congress, approved March 3, 1863, entitled "An act relating to habeas corpus and regulating judicial proceedings in certain cases," he may be brought before the court, and either turned over to the proper civil tribunal to be proceeded against according to the law of the land or discharged from custody altogether.

With the petition were filed the order for the commission, the charges and specifications, the findings of the court, with the order of the War Department reciting that the sentence was approved by the President of the United States, and directing that it be carried into execution without delay. The petition was presented and filed in open court by the counsel for Milligan; at the same time the District Attorney of the United States for Indiana appeared, and, by the agreement of counsel, the application was submitted to the court. The opinions of the judges of the Circuit Court were opposed on three questions, which are certified to the Supreme Court: \* \* \*

3. "Whether, upon the facts stated in said petition and exhibits, the military commission mentioned therein had jurisdiction legally to try and sentence said Milligan in manner and form as in said petition and exhibits is stated?" \* \* \*

The controlling question in the case is this: Upon the facts stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it jurisdiction, legally, to try and sentence him? Milligan, not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the legal power and authority to try and punish this man? \* \* \*

It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules. \* \* \*

It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service, during the late rebellion, required that the loyal states should be placed within the limits of certain military districts and commanders appointed in them; and, it is urged, that this, in a military sense, constituted them the theatre of military operations; and, as in this case, Indiana had been and was again threatened with invasion by the enemy, the occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On her soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.

It is difficult to see how the safety of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.

It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice

was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be "mere lawless violence."

We are not without precedents in English and American history illustrating our views of this question; but it is hardly necessary to make particular reference to them.

From the first year of the reign of Edward the Third, when the Parliament of England reversed the attainder of the Earl of Lancaster, because he could have been tried by the courts of the realm, and declared, "that in time of peace no man ought to be adjudged to death for treason or any other offence without being arraigned and held to answer; and that regularly when the king's courts are open it is a time of peace in judgment of law," down to the present day, martial law, as claimed in this case, has been condemned by all respectable English jurists as contrary to the fundamental laws of the land, and subversive of the liberty of the subject.

During the present century, an instructive debate on this question occurred in Parliament, occasioned by the trial and conviction by court-martial, at Demerara, of the Rev. John Smith, a missionary to the negroes, on the alleged ground of aiding and abetting a formidable rebellion in that colony. Those eminent statesmen, Lord Brougham and Sir James Mackintosh, participated in that debate; and denounced the trial as illegal; because it did not appear that the courts of law in Demerara could not try offences, and that "when the laws can act, every other mode of punishing supposed crimes is itself an enormous crime."

So sensitive were our Revolutionary fathers on this subject, although Boston was almost in a state of siege, when General Gage issued his proclamation of martial law, they spoke of it as an "attempt to supersede the course of the common law, and instead thereof to publish and order the use of martial law." The Virginia Assembly, also, denounced a similar measure on the part of Governor Dunmore "as an assumed power, which the king himself cannot exercise; because it annuls the law of the land and introduces the most execrable of all systems, martial law."

In some parts of the country, during the War of 1812, our officers made arbitrary arrests and, by military tribunals, tried citizens who were not in the military service. These arrests and trials, when brought to the notice of the courts, were uniformly condemned as illegal. The cases of *Smith v. Shaw* and *McConnell v. Hampton* (reported in 12 Johns. [N. Y.] 257 and 234) are illustrations, which we cite, not only for the principles they determine, but on account of the distinguished jurists concerned in the decisions, one of whom for many years occupied a seat on this bench.

It is contended that *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581, decided by this court, is an authority for the claim of martial law ad-

vanced in this case. The decision is misapprehended. That case grew out of the attempt in Rhode Island to supersede the old colonial government by a revolutionary proceeding. Rhode Island, until that period, had no other form of local government than the charter granted by King Charles II, in 1663; and as that limited the right of suffrage, and did not provide for its own amendment, many citizens became dissatisfied, because the legislature would not afford the relief in their power; and without the authority of law, formed a new and independent constitution, and proceeded to assert its authority by force of arms. The old government resisted this; and as the rebellion was formidable, called out the militia to subdue it, and passed an act declaring martial law. Borden, in the military service of the old government, broke open the house of Luther, who supported the new, in order to arrest him. Luther brought suit against Borden; and the question was, whether, under the constitution and laws of the state, Borden was justified. This court held that a state "may use its military power to put down an armed insurrection too strong to be controlled by the civil authority;" and, if the legislature of Rhode Island thought the peril so great as to require the use of its military forces and the declaration of martial law, there was no ground on which this court could question its authority; and as Borden acted under military orders of the charter government, which had been recognized by the political power of the country, and was upheld by the state judiciary, he was justified in breaking into and entering Luther's house. This is the extent of the decision. There was no question in issue about the power of declaring martial law under the federal Constitution, and the court did not consider it necessary even to inquire "to what extent nor under what circumstances that power may be exercised by a state."

We do not deem it important to examine further the adjudged cases; and shall, therefore, conclude without any additional reference to authorities.

To the third question, then, on which the judges below were opposed in opinion, an answer in the negative must be returned. \* \* \* 21

<sup>21</sup> Chief Justice Chase delivered an opinion, in which Justices Wayne, Swayne, and Miller concurred, holding, first, that the writ of habeas corpus should issue; second, that Milligan should be discharged according to the prayer of the petition; third, that the military commission in Indiana did not have, under the facts stated, jurisdiction to try and sentence the plaintiff. The Chief Justice and the three Associate Justices concurring with him were of the opinion that "Congress had power, though not exercised, to authorize the military commission which was held in Indiana."

In 15 Harvard Law Review, (1902), 851 note, it is said: "The Supreme Court of the United States has said [in *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281 (1866) *supra*] that the continued sitting of the ordinary courts, and the absence of visible disorder, absolutely preclude a lawful exercise of martial law. The Judicial Committee of the Privy Council takes an opposite view. It is submitted that the latter view is preferable. Under modern conditions

**MARAIS v. THE GENERAL OFFICER COMMANDING THE  
LINES OF COMMUNICATION AND THE ATTORNEY  
GENERAL OF THE COLONY.**

Ex parte MARAIS.

(Privy Council, 1901. L. R. [1902] App. Cas. 109.)

This was a petition for special leave to appeal from the order of the Supreme Court set out in their Lordships' judgment.

It stated the petitioner's arrest on August 15, 1901, by the chief constable of the town of Paarl, about thirty-five miles from Cape Town, who had no warrant, and did not know the cause of arrest, but alleged that he was acting under instructions from the military authorities; that on August 18 he and his fellow prisoners were removed 300 miles to the town of Beaufort West, and on their arrival were detained in custody; that on September 6 he petitioned the Supreme Court in Cape Town to release him on the ground that his arrest and imprisonment were in violation of the fundamental liberties secured to the subjects of His Majesty, when it appeared from an affidavit sworn by the gaoler of Beaufort West that the petitioner was detained by an order of the military authorities dated September 8 for contravening Martial Law Regulations, par. 14, § 2, of May 1, 1901. The regulations are set out in the reasons given by their Lordships.

Buchanan, J., in refusing the application, was stated in the petition to have held that martial law had been proclaimed in the districts both of the Paarl and of Beaufort West, that the court ought not to go into the necessity for that proclamation nor accept any responsibility for the acts of the military authorities performed in pursuance of it, though if the petitioner had not been removed from the Paarl the court might have inquired into the necessity for martial law in that district, that the petitioner was held in custody by an officer acting under the military authorities, and that the court could not exercise jurisdiction over the petitioner so long as martial law lasted. In his petition the petitioner contended that he had committed no crime, otherwise that he should have been arrested and tried according to law, that the civil courts were open for his trial, that Buchanan, J., himself was announced to sit for the trial of all offenders in the district of Paarl on August 27, 1901, that his arrest, deportation, and confinement in custody by the military authorities were wholly illegal, and that he was entitled to his immediate discharge.

It cannot truly be said that the absence of visible disorder shows there is no necessity for martial law. The continued sitting of courts is too artificial a test to be serviceable. Martial law is the law of necessity. The executive must be left unhampered in time of war to deal with problems summarily and to take protective measures without waiting for the machinery of the courts."

Haldane, K. C., and Mackarness, for the petitioner, submitted that leave should be given, for the question of law involved was of substantial importance. The special feature of the case was that the district where the arrest was made was undisturbed, and that civil courts were still exercising uninterrupted jurisdiction. That being so, and it appearing that the ordinary course of law could be and was being maintained, a state of war did not exist, and martial law in that case could not be applied to civilians. Even if a state of war did exist, still the application of martial law was limited by the necessity of preserving peace and order in the district, and did not oust the jurisdiction of those civil courts which, notwithstanding the pressure of military circumstances, were still administering the law of the land. There was no necessity alleged or shewn for bringing the petitioner before a military tribunal whilst a civil court was sitting. The right of the crown to resort to such an extremity as the proclamation of martial law was limited by necessity, and, if a civil court was open, the crown had no power to try an offender by a military one. [The Lord Chancellor referred to *Sutton v. Johnston* (1786) 1 T. R. 493, 1 R. R. 257.] That case only establishes that, on grounds of public policy, a superior officer cannot be sued by an inferior for the consequences of an act done in the course of duty or discipline, even though done maliciously. And see the dictum of Lord Mansfield, C. J., to the effect that no case can occur of overpowering necessity in a well-ordered country with a regular government. Even in a remote dependency it must be extreme and imminent. \* \* \*

Dec. 18. The reasons for their Lordships' report that the petition should be refused were delivered by

THE LORD CHANCELLOR.<sup>22</sup> This was a petition by D. F. Marais for special leave to appeal against a decision of the courts in Cape Colony which had refused to release him from an arrest effected by the military forces of the crown on August 15 last. \* \* \*

From the petitioner's affidavit it appears that the ground of his arrest was stated in an affidavit by Major General Wynne, that in the opinion of the military authorities there were military reasons that the petitioner should be removed and kept in custody.

All the persons arrested were, as appeared by the warrant under which they were arrested, charged with contravening what were called "Martial Law Regulations," which regulations are set out in the petitioner's affidavit as follows:

"No. 14. Rebellion, Dealings with Enemy, etc. Notice is hereby given that from and after the 22d April, 1901, all subjects of His Majesty and all persons residing in Cape Colony who shall in districts thereof in which martial law prevails:

"(1) Be actively in arms against His Majesty, or

<sup>22</sup> Part of the opinion is omitted.



"(2) Directly incite others to take up arms against His Majesty, or

"(3) Actively aid or assist the enemy, or

"(4) Commit any overt act by which the safety of His Majesty's forces or subjects are endangered

—shall immediately on arrest be tried by a military court convened by authority of the General Commanding-in-Chief of His Majesty's Forces in South Africa, and shall on conviction be liable to the severest penalties. These penalties include death, penal servitude, imprisonment and fine.

"Any person reasonably suspected of such offence is liable to be arrested without warrant, or sent out of the district, to be hereafter dealt with by a military court."

Under these circumstances their Lordships were appealed to, to give special leave to appeal, and Mr. Haldane, on behalf of the petitioner, was fully heard on November 5 last.

The only ground susceptible of argument urged by the learned counsel was that whereas some of the courts were open it was impossible to apply the ordinary rule that where actual war is raging the civil courts have no jurisdiction to deal with military action, but where acts of war are in question the military tribunals alone are competent to deal with such questions.

The question was as fully argued before their Lordships by the learned counsel as it could have been argued if leave to appeal had been given, and their Lordships did not think it right to suggest any doubt upon the law by giving special leave to appeal where the circumstances render the law clear. They are of opinion that where actual war is raging acts done by the military authorities are not justiciable by the ordinary tribunals, and that war in this case was actually raging, even if their Lordships did not take judicial notice of it, is sufficiently evidenced by the facts disclosed by the petitioner's own petition and affidavit.

Martial law had been proclaimed over the district in which the petitioner was arrested and the district to which he was removed. The fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging. That question came before the Privy Council as long ago as the year 1830, in *Elphinstone v. Bedreechund*, 1 Knapp, P. C. 316. \* \* \*

The truth is that no doubt has ever existed that where war actually prevails the ordinary courts have no jurisdiction over the action of the military authorities. Doubtless cases of difficulty arise when the fact of a state of rebellion or insurrection is not clearly established.

It may often be a question whether a mere riot, or disturbance neither so serious nor so extensive as really to amount to a war at all, has not been treated with an excessive severity, and whether the intervention of the military force was necessary; but once let the fact of actual war be established, and there is an universal consensus of

opinion that the civil courts have no jurisdiction to call in question the propriety of the action of military authorities. \* \* \*

For these reasons their Lordships advised His Majesty to refuse leave to appeal.<sup>23</sup>

<sup>23</sup> The principal case has created much comment, and a wide difference of opinion exists as to the nature and extent of martial law.

For a discussion of martial law as applied in the *Marais Case*, see 18 *Law Quarterly Review* (1902), containing W. S. Holdsworth's article entitled "Martial Law Historically Considered," pp. 117-132; Sir H. Erle Richards' "Martial Law," pp. 133-142; Cyril Dodd's "Case of *Marais*," pp. 143-151; Sir Frederick Pollock's "What is Martial Law?" pp. 152-158.

See, also, A. V. Dicey's *Introduction to the Study of the Law of the Constitution* (8th Ed. 1915), "Martial Law in England During Time of War or Insurrection," Appendix, note X, 538-555.

## CHAPTER X

ANGARY<sup>1</sup>

## THE ZAMORA.

(Privy Council, 1916. L. R. [1916] 2 App. Cas. 77.)

The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. \* \* \*<sup>2</sup> It remains to consider the third, and perhaps the most difficult, question which arises on this appeal—the question whether the crown has, independently of Order XXIX, r. 1, any and what right to requisition vessels or goods in the custody of the Prize Court pending the decision of the court as to their condemnation or release. In arguing this question the Attorney General again laid considerable stress on the crown's prerogative, referring to the recent decision of the Court of Appeal in this country in *In re A Petition of Right*, [1915] 3 K. B. 649. There is no doubt that under certain circumstances and for certain purposes the Crown may requisition any property within the realm belonging

<sup>1</sup> In *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (1916), Professor Edwin M. Borchard thus defines "angary":

"The right of belligerents in case of necessity, for belligerent purposes, to detain, use, or even destroy neutral property not vested with enemy character is known as the right of angary, a modern development of the former *ius angariae*. The payment of indemnity is a necessary condition of such use of neutral property. The application of this rule has generally arisen through the detention, use or destruction of neutral vessels temporarily in the ports of a belligerent." pp. 266-7.

In a footnote to the above passage the learned author cites the following authorities:

"*Labuan* (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 3791; *Ophir* (U. S.) v. Mexico, April 11, 1839, Id. 3045; *Brig Splendid* (U. S.) v. Mexico, Id. 3714; *Kidder* (U. S.) v. Mexico, March 8, 1849, Opin. 519 (not in Moore); *Orr and Laubenheimer* (U. S.) v. Nicaragua, March 22, 1900, For. Rel. 1900, 824, 829; *The Moshona and the Beatrice* (U. S.) v. Great Britain, For. Rel. 1900, 529-618; *The Tabasqueno* v. U. S., For. Rel. 1907 [1908] 614 (neutral cargo is in the same position as the neutral vessel); *U. S. v. Russell*, 18 Wall. 623, 20 L. Ed. 474 (1871), implied contract in municipal law. See the celebrated case of the sinking by German troops of British vessels in the Seine, 1870, in which indemnity was paid. 61 St. Pap. 575, 600, 611, and Moore's Dig. VI, 904."

See the elaborate monograph by Erich Albrecht, entitled "*Requisitionen von neutralem Privateigentum, insbesondere von Schiffen*," *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, Supplement 1 to Volume VI (1912), English translation in "*Memorandum of Authorities on the Law of Angary*," by Theodore Henckels and Henry G. Crocker, pp. 1-57 (1919); and the admirable article by J. Eugene Harley on "*The Law of Angary*," 18 *American Journal of International Law*, 267-301 (1919). See the "*Memorandum of Authorities on the Law of Angary*" also for a collection of the views of writers, official documents, and a bibliography on the subject.

<sup>2</sup> For the facts of this case, see post, p. 1052. Only the portion of the opinion relating to the law of angary and requisition is here printed.

to its own subjects. But this right being one conferred by municipal law is not, as such, enforceable in a court which administers international law. The fact, however, that the crown possesses such a right in this country, and that somewhat similar rights are claimed by most civilized nations, may well give rise to the expectation that, at any rate in times of war, some right on the part of a belligerent power to requisition the goods of neutrals within its jurisdiction will be found to be recognized by international usage. Such usage might be expected either to sanction the right of each country to apply in this respect its own municipal law, or to recognize a similar right of international obligation.

In support of the former alternative, which is apparently accepted by Albrecht (*Zeitschrift für Völkerrecht und Bundesstaatsrecht*, VI Band, Breslau, 1912),<sup>3</sup> it may be argued that the mere fact of the property of neutrals being found within the jurisdiction of a belligerent power ought, according to international law, to render it subject to the municipal law of that jurisdiction. The argument is certainly plausible and may in certain cases and for some purposes be sound. In general, property belonging to the subject of one power is not found within territory of another power without the consent of the true owner, and this consent may well operate as a submission to the municipal law. A distinction may perhaps be drawn in this respect between property the presence of which within the jurisdiction is of a permanent nature and property the presence of which within the jurisdiction is temporary only. The goods of a foreigner carrying on business here are not in the same position as a vessel using an English port as a port of call. Even in the latter case, however, it is clear that for some purposes, as, for example, sanitary or police regulations, it would become subject to the *lex loci*. After all, no vessel is under ordinary circumstances under any compulsion to come within the jurisdiction. Different considerations arise with regard to a vessel brought within the territorial jurisdiction in exercise of a right of war. In the latter case there is no consent of the owner or of any one whose consent might impose obligations on the owner. Nevertheless, even here, the vessel might well for police and sanitary purposes become subject to the municipal law. To hold, however, that it became subject for all purposes, including the municipal right of requisition, would give rise to various anomalies.

The municipal law of one nation in respect of the right to requisition the property of its subjects differs, or may differ, from that of another nation. The circumstances under which, the purposes for which, and the conditions subject to which the right may be exercised need not be the same. The municipal law of this country does not give compensation to a subject whose land or goods are requisi-

<sup>3</sup> For an English translation of this important monograph, see "Memorandum of Authorities on the Law of Angary," by Theodore Henckels and Henry G. Crocker, pp. 1-57 (1919).

tioned by the crown. The municipal law of other nations may insist on compensation as a condition of the right. The circumstances and purposes under and for which the right can be exercised may similarly vary. It would be anomalous if the international law by which all nations are bound could only be ascertained by an inquiry into the municipal law which prevails in each. It would be a still greater anomaly if in times of war a belligerent could, by altering his municipal law in this respect, affect the rights of other nations or their subjects. The authorities point to the conclusion that international usage has in this respect developed a law of its own, and has not recognized the right of each nation to apply its own municipal law.

The right of a belligerent to requisition the goods of neutrals found within its territory or territory of which it is in military occupation, is recognized by a number of writers on international law. It is sometimes referred to as the right of angary, and is generally recognized as involving an obligation to make full compensation. There is, however, much difference of opinion as to the precise circumstances under which and the precise purposes for which it may be lawfully exercised. It was exercised by Germany during the Franco-German war of 1870 in respect of property belonging to British and Austrian subjects. The German military authorities seized certain British ships and sunk them in the Seine. They also seized certain Austrian rolling stock and utilized it for the transport of troops and munitions of war. The German government offered full compensation, and its action was not made the subject of diplomatic protest, at any rate by Great Britain. In justifying the action of the military authorities with regard to the British ships, Count von Bismarck laid stress on the fact "that a pressing danger was at hand and every other method of meeting it was wanting, so that the case was one of necessity," and he referred to Phillimore's *International Law* (3d Ed.) vol. 3, § 29. He did not rely on the municipal law of either France or Germany.

On reference to Phillimore it will be found that he limits the right to cases of "clear and overwhelming necessity." In this he agrees with De Martens, who speaks of the right existing only in cases of "extreme necessity" (*Law of Nations*, book VI, § 7), and with Gessner, who says the necessity must be real; that there must be no other means less violent "de sauver l'existence," and that neither the desire to injure the enemy nor the greatest degree of convenience to the belligerent is sufficient (*Le Droit des Neutres*, p. 154 [2d Ed., Berlin, 1876]). It is difficult to see how the acts of the German government to which reference has been made come within the limits thus laid down. It might have been convenient to Germany and hurtful to France to sink English vessels in the Seine or to utilize Austrian rolling stock for transport purposes, but clearly no extreme necessity involving actual existence had arisen. Azuni, on the other hand (*Droit Maritime de l'Europe*, vol. 1, c. III, art. 5, p. 292), thought that an exercise of the right would be justified by necessity or public utility; in

other words, that a very high degree of convenience to the belligerent Power would be sufficient. Germany must be taken to have asserted and England and Austria to have acquiesced in the latter view, which is the view taken by Bluntschli (*Droit International*, § 795 bis), and in the only British prize decision dealing with this point.

The case to which their Lordships refer is that of *The Curlew*, *The Magnet*, etc., Stewart's Vice Adm. Rep. (Nova Scotia) 312. The ships in question, with their cargoes, had been seized by the British authorities as prize in the early days of the war with the United States of America, which broke out in 1812, and had been brought into port for adjudication. The Lieutenant Governor of the province and the Admiral and Commander-in-Chief of His Majesty's ships on that station thereupon presented a petition for leave to requisition some of the ships and parts of the cargoes pending adjudication. In his judgment Dr. Croke lays it down that though as a rule the court has no power of selling or bartering vessels or goods in its custody, prior to adjudication, to any departments of His Majesty's service, nevertheless there may be cases of necessity in which the right of self-defence supersedes and dispenses with the usual modes of procedure. He held that such a case had in fact arisen, and accordingly granted the prayer of the petitioners: (1) As to certain small arms "very much and immediately needed for the defence of the province"; (2) as to certain oak timbers of which there was "great want" in His Majesty's naval yard at Halifax; and (3) as to a vessel immediately required for use as a prison ship. The appraised value of the property requisitioned was in each case ordered to be brought into court.

It should be observed that with regard to ships and goods of neutrals in the custody of the Prize Court for adjudication there are special reasons which render it reasonable that the belligerent should in a proper case have the power to requisition them. The legal property or dominion is, no doubt, still in the neutral, but ultimate condemnation will vest it in the crown, as from the date of the seizure as prize, and meanwhile all beneficial enjoyment is suspended. In cases where the ships or the goods are required for immediate use, this may well entail hardship on the party who ultimately establishes his title. To mitigate the hardship in the case of a ship a custom has arisen of releasing it to the claimant on bail, that is, on giving security for the payment of its appraised value. It may well be that in practice this was never done without the consent of the crown, but such consent would not be likely to be withheld, unless the crown itself desired to use the ship after condemnation. The twenty-fifth section of the Naval Prize Act, 1864, now confers on the judge full discretion in the matter. This being so, it is not unreasonable that the crown on its side should in a proper case have power to requisition either vessel or goods for the national safety. It must be remembered that the neutral may obtain compensation for loss suffered by reason of an improper seizure of his vessel or goods, but the crown can never ob-

tain compensation from the neutral in respect of loss occasioned by a claim to release which ultimately fails.

The power in question was asserted by the United States of America in the Civil War which broke out in 1861. In *The Memphis*, Blatchford, P. C. 202, in *The Ella Warley*, Id. 204, and in *The Stephen Hart*, Id. 387, Betts, J., allowed the War Department to requisition goods in the custody of the Prize Court and required for purposes in connection with the prosecution of the war. In the case of *The Peterhoff* (1863) Blatchford, P. C. 381, he allowed the vessel itself to be similarly requisitioned by the Navy Department. The reasons of Betts, J., as reported, are not very satisfactory, for they leave it in doubt whether he considered the right he was enforcing to be a right according to the municipal law of the United States overriding the international law, or to be a right according to the international law. But his decisions were not appealed, nor does it appear that they led to any diplomatic protest.

On March 3, 1863, after the decisions above referred to, the United States legislature passed an act (Congress, 1863, Sess. III, c. 86) whereby it was enacted (section 2) that the Secretary of the Navy or the Secretary of War should be and they or either of them were thereby authorized to take any captured vessel, any arms or munitions of war, or other material for the use of the Government, and when the same should have been taken, before being sent in for adjudication or afterwards, the department for whose use it was taken should deposit the value of the same in the treasury of the United States, subject to the order of the court in which prize proceedings might be taken, or, if no proceedings in prize should be taken, to be credited to the Navy Department and dealt with according to law.

It is impossible to suppose that the United States legislature in passing this act intended to alter or modify the principles of international law in its own interest or against the interest of neutrals. On the contrary, the act must be regarded as embodying the considered opinion of the United States authorities as to the right possessed by a belligerent to requisition vessels or goods seized as prize before adjudication. Nevertheless, their Lordships regard the passing of the act as somewhat unfortunate from the standpoint of the international lawyer. In the first place, it seems to cast some doubt upon the decisions already given by Betts, J. In the second place, it tends to weaken all subsequent decisions of the United States prize courts on the right to requisition vessels or goods, as authorities on international law, for these courts are bound by the provisions of the Act, whether it be in accordance with international law or otherwise. In the third place, their Lordships are of opinion that the provisions of the act go beyond what is justified by international usage. The right to requisition recognized by international law is not, in their opinion, an absolute right, but a right exercisable in certain circumstances and for certain

purposes only. Further, international usage requires all captures to be brought promptly into the prize court for adjudication, and the right to requisition, therefore, ought as a general rule to be exercised only when this has been done. It is for the court, and not the executive of the belligerent state, to decide whether the right claimed can be lawfully exercised in any particular case.

It appears that the British government, shortly after the act was passed, protested against the provisions of the second section. The grounds for such protest appear in Lord Russell's despatch of April 21, 1863. The first is the primary duty of the court to preserve the subject-matter of the litigation for the party who ultimately establishes his title. In stating it Lord Russell ignores, and (having regard to the provisions of the section) was probably entitled to ignore, all exceptional cases based on the right of angary. The second ground is that such a general right as asserted in the section would encourage the making of seizures, known at the time when they are made to be unwarrantable by law, merely because the property seized might be useful to the belligerent. This objection is more serious, but it derives its chief force from the fact that the right asserted in the section can be exercised before the property seized is brought into the prize court for adjudication, and, even when it has been so brought in, precludes the judge from dealing judicially with the matter. If the right accorded by international law to requisition vessels or goods in the custody of the court be exercised through the court and be confined to cases in which there is really a question to be tried, and the vessel or goods cannot, therefore, be released forthwith, the objection is obviated.

It further appears that the United States took the opinion of their own Attorney General on the matter (*Opinions of Attorneys General of the United States*, vol. 10, p. 519), and were advised that there was no warrant for the section in international law, and that it would not be advisable to put it into force in cases where controversy was likely to arise. The Attorney General did not, any more than Lord Russell, refer to exceptional cases based on the right of angary, but dealt only with the provisions of the section as a whole.

Some stress was laid in argument on the cases cited in the judgment in the Court below upon what is known as "the right of pre-emption," but in their Lordships' opinion these cases have little if any bearing on the matter now in controversy. The right of pre-emption appears to have arisen in the following manner: According to the British view of international law, naval stores were absolute contraband, and if found on a neutral vessel bound for an enemy port were lawful prize. Other countries contended that such stores were only contraband if destined for the use of the enemy government. If destined for the use of civilians they were not contraband at all. Under these circumstances the British government, by way of mitigation of the



severity of its own view, consented to a kind of compromise. Instead of condemning such stores as lawful prize, it bought them out and out from their neutral owners, and this practice, after forming the subject of many particular treaties, at last came to be recognized as fully warranted by international law. It was, however, always confined to naval stores, and a purchase pursuant to it put an end to all litigation between the crown on the one hand and the neutral owner on the other. Only in cases where the title of the neutral was in doubt and the property might turn out to be enemy property was the purchase money paid into court. It is obvious, therefore, that this "right of pre-emption" differs widely from the right to requisition the vessels or goods of neutrals, which is exercised without prejudice to, and does not conclude or otherwise affect, the question whether the vessel or goods should or should not be condemned as prize.

On the whole question their Lordships have come to the following conclusion: A belligerent power has by international law the right to requisition vessels or goods in the custody of its prize court pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations: First, the vessel or goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate release. And, thirdly, the right must be enforced by application to the prize court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable.

With regard to the first of these limitations, their Lordships are of opinion that the judge ought, as a rule, to treat the statement on oath of the proper officer of the crown to the effect that the vessel or goods which it is desired to requisition are urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security, as conclusive of the fact. This is so in the analogous case of property being requisitioned under the municipal law (see Warrington, L. J., in the case of *In re A Petition of Right* [1915] 3 K. B. 666, already cited), and there is every reason why it should be so also in the case of property requisitioned under the international law. Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.

With regard to the second limitation, it can be best illustrated by referring to the old practice. The first hearing of a case in prize was upon the ship's papers, the answers of the master and others to the standing interrogatories and such special interrogatories as might have been allowed, and any further evidence which the judge, under special circumstances, thought it reasonable to admit. If, on this hear-

ing, the judge was of opinion that the vessel or goods ought to be released forthwith, an order for release would in general be made. A further hearing was not readily granted at the instance of the crown. If, on the other hand, the judge was of opinion that the vessel or goods could not be released forthwith, a further hearing would be granted at the instance of the claimant. If the claimant did not desire a further hearing, the vessel or goods would be condemned. This practice, though obviously unsuitable in many respects to modern conditions, had the advantage of demonstrating at an early stage of the proceedings whether there was a real question to be tried, or whether there ought to be an immediate release of the vessel or goods in question. In their Lordship's opinion, the judge should, before allowing a vessel or goods to be requisitioned, satisfy himself (having regard of course to modern conditions) that there is a real case for investigation and trial, and that the circumstances are not such as would justify the immediate release of the vessel or goods. The application for leave to requisition must, under the existing practice, be an interlocutory application, and, in view of what has been said, it should be supported by evidence sufficient to satisfy the judge in this respect. In this manner Lord Russell's objection as to the encouragement of unwarranted seizures is altogether obviated.

With regard to the third limitation, it is based on the principle that the jurisdiction of the prize court commences as soon as there is a seizure in prize. If the captors do not promptly bring in the property seized for adjudication, the court will at the instance of any party aggrieved compel them so to do. From the moment of seizure the rights of all parties are governed by international law. It was suggested in argument that a vessel brought into harbour for search might, before seizure, be requisitioned under the municipal law. This point, if it ever arises, would fall to be decided by a court administering municipal law, but from the point of view of international law it would be a misfortune if the practice of bringing a vessel into harbour for the purpose of search—a practice which is justifiable because search at sea is impossible under the conditions of modern warfare—were held to give rise to rights which could not arise if the search took place at sea. \* \* \*

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### THE SPLENDID.

(Commission under the Convention between the United States and Mexico of April 11, 1839. Manuscript, Department of State.)

The brig *Splendid* was the property of Smith and Thompson, Elihu Sandford and Smith Tuttle, who were citizens of the United States, and residents of New Haven, in the state of Connecticut. That vessel, A. C. White, master, when lying in the port of Vera Cruz, was on the 3d of August, 1829, impressed and forcibly taken possession of by

the Mexican authorities, and employed until the 12th of that month, by them, in transporting troops and munitions of war, from that place to Tecoluta, for which, and for articles consumed, and taken by the soldiers, and for the hindrance and delay on her voyage, they claim the sum of two thousand five hundred dollars.

Upon due consideration of the case, the members of the board are unanimously of opinion that the Mexican government is justly indebted to Nathaniel Thompson, surviving partner of Smith & Thompson, and Elihu Sandford and Smith Tuttle, the sum of two thousand and ninety-three dollars and sixty-seven cents, for the impressment, seizure and employment of their brig as aforesaid; and do award and decide that the Mexican government shall pay to them the sum aforesaid of two thousand and ninety-three dollars and sixty-seven cents, being the fair price of the services exacted from the vessel and crew aforesaid, and the interest thereon included, at the rate of five per cent. per annum, up till this date, namely, this tenth day of March in the year eighteen hundred and forty-one.

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#### THE LABUAN.

(American and British Claims Commission under Treaty of May 8, 1871.  
4 Moore's International Arbitrations, 3791.)

Bailey and Leetham, claimants, No. 386. The claimants were the owners of the British steamship Labuan, which, on the 5th of November, 1862, was in the port of New York laden with a cargo of merchandise destined for Matamoras. On that day her master presented the manifest to the proper officer of the custom-house at New York for clearance, but such clearance was refused, and the refusal continued up to the 13th of December, 1862, on which day it was granted. The memorial alleged that this detention was by reason of instructions received by the custom-house officers from the proper authorities of the United States to detain the Labuan, in common with other vessels of great speed destined for ports in the Gulf of Mexico, to prevent the transmission of information relative to the departure or proposed departure of a military expedition fitted out by the authority of the said United States. The memorial claimed damages for the detention \$38,000, being at the rate of \$1,000 per day, the memorial alleging that on a former seizure and detention of the same vessel, from February to May, 1862, when libelled as prize, this rate of compensation for the detention had been awarded to the owners by the District Court of the United States.

On the part of the United States it was contended that the detention of the Labuan, under the circumstances alleged in the memorial, was within the legitimate and recognized powers of the United States; that it was no infringement upon the rules of international law or upon any treaty stipulations between the United States and Great Britain,

and that it gave no right of reclamation in favor of the claimants against the United States; that the right of self-protection, by temporarily refusing clearance to vessels through which information of great importance in regard to military movements is likely to reach the enemy, must be regarded as of necessity permissible to a government engaged in war; that at the time of this detention important military movements then in progress in connection with the occupation of New Orleans by the federal forces, including the dispatch of General Banks, with large reinforcements, to supersede General Butler in the command there, were in progress, and made it of the utmost importance that these movements should be carefully kept secret from the rebels; that the detention of the *Labuan* was not by any discrimination against her as a British vessel, or against British vessels as such. All vessels capable of such a rate of speed as to make their departure dangerous in this regard were detained alike; that no claim had ever been made by the British government, through the usual diplomatic channels, upon the United States for compensation; and that it could not be believed that such a claim would not have been made if Her Majesty's government had considered such a claim valid. The counsel for the United States cited, in this connection, the letter of Mr. Stuart, Her Majesty's minister at Washington, to Mr. Seward, of 1st August, 1862 (U. S. Dip. Cor. 1862, 1863, pt. 1, p. 273), upon a somewhat analogous question, in which Mr. Stuart says:

"I have been instructed to state to you that Her Majesty's government, after considering these dispatches, in connection with the law officers of the crown, are of opinion that it is competent for the United States, as a belligerent power, to protect itself within its own ports and territory by refusing clearances to vessels laden with contraband of war or other specified articles, as well as to vessels which are believed to be bound to Confederate ports; and that so long as such precautions are adopted, equally and indifferently in all cases, without reference to the nationality or origin of any particular vessel or goods, they do not afford any just ground of complaint."

The case of the detention of the *Labuan*, it was contended on the part of the United States, was governed by the same principles and justified by the same rules as the cases referred to by Mr. Stuart. The counsel referred to the decision of the commission upon the American claims against Great Britain, growing out of the prohibition of the exportation of saltpetre at Calcutta (American claims, Nos. 11, 12, 16, 18), hereinbefore reported, and in which such prohibition was held by the commission not to involve a violation either of international law or of treaty stipulation, and urged that the principles which would sustain the validity of such prohibition must also include such a case as the detention of the *Labuan*.

The counsel for the claimant maintained that the detention of the *Labuan* was in effect a deprivation of the owners' of the use of their property for the time of the detention for the public benefit; that it

**was** in effect a taking of private property for public use, always justified by the necessity of the state, but likewise always involving the obligation of compensation. He cited 3 Phillimore, 42, and Dana's Wheaton, 152, note.

The commission unanimously made an award in favor of the claimant for \$37,392. \* \* \*

## CHAPTER XI

CAPTURE AT SEA; EXEMPTION FROM CAPTURE;  
RECAPTURE; RESCUE<sup>1</sup>

## THE OSTSEE.

(Privy Council, 1855. 9 Moore, P. C. 150.)

The Right Hon. T. PEMBERTON LEIGH (March 29, 1855).<sup>2</sup> On the 1st of June, 1854, the ship Ostsee sailing under the Mecklenburg flag, on her voyage from Cronstadt to Elsinore, was seized by Her Majesty's ship Alban, under the command of Captain Otter, and sent to London for adjudication as prize.

Upon the ship's papers and the examination of the master, the mate, and another of the crew, on the usual interrogatories, there appeared to be no ground for condemnation; and with the consent of the captors, on the 19th of August, 1854, an interlocutory decree was pronounced, by which the ship and cargo were restored to the claimants, but without costs and damages. From so much of the decree as refuses costs and damages to the claimants, the present appeal is brought.

It is agreed on all hands, that the restitution of a ship and cargo may be attended, according to the circumstances of the case, with any one of the following consequences:

First. The claimants may be ordered to pay to the captors their costs and expenses; or,

Second. The restitution may be, as in this case, simple restitution, without costs or expenses, or damages to either party; or,

Third. The captors may be ordered to pay costs and damages to the claimants.

These provisions may seem well adapted to meet the various circumstances, not ultimately affording ground of condemnation, under which captures may take place.

A ship may, by her own misconduct, have occasioned her capture, and in such a case it is very reasonable that she should indemnify the captors against the expenses which her misconduct has occasioned. Or she may be involved, with little or no fault on her part, in such suspicion as to make it the right, or even the duty, of a belligerent to seize her. There may be no fault either in the captor or the captured or both may be in fault; and in such cases there may be *damnum absque injuria*, and no ground for anything but simple restitution. Or

<sup>1</sup> On recapture and rescue, see the remarkable case of *The Aglena*, decided by the Belgian Prize Court in 1920, *Moniteur Belge*, January 17, 1920, p. 404, English translation, 16 *American Journal of International Law*, p. 117 (1922).

<sup>2</sup> The statement of facts and parts of the opinion are omitted.

there may be a third case, where not only the ship is in no fault, but she is not by any act of her own, voluntary or involuntary, open to any fair ground of suspicion. In such a case a belligerent may seize at his peril, and take the chance of something appearing on investigation to justify the capture; but, if he fails in such a case, it seems very fit that he should pay the costs and damages which he has occasioned.

The appellants insist that the circumstances of this case bring it within the last of these rules. The general principles applicable to this point are stated with great clearness in a document of the very highest authority, the Report made to King Geo. II, in 1753, by the then judge of the Admiralty Court (Sir J. Lee) and the law officers of the crown, one of whom was Mr. Murray (afterwards Lord Mansfield), and they are laid down in these terms (Pratt's Story, p. 4):

"The law of nations allows, according to the different degrees of misbehaviour, or suspicion arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received by the claimant, in case of acquittal and restitution. On the other hand, if a seizure is made without probable cause, the captor is adjudged to pay costs and damages."

This passage (with others) is cited by Lord Stowell (then Sir William Scott), and Sir John Nicholl, in their letter to the American minister, in 1794, as containing an accurate statement of the law of maritime capture. These rules have been recognised and acted upon by all the chief maritime powers. \* \* \*

The result of these authorities is, that in order to exempt a captor from costs and damages in case of restitution, there must have been some circumstances connected with the ship or cargo affording reasonable ground for belief that one or both, or some part of the cargo, might prove, upon further inquiry, to be lawful prize.

What shall amount to probable cause, so as to justify a capture, cannot be defined by any exact terms. The question was discussed before Mr. Justice Story, in the case of *The George*, 1 Mason, 24, Fed. Cas. No. 5,328, when it was contended that, in order to exempt captors from costs and damages, the case against the ship at the time of seizure must be such as *prima facie* to warrant condemnation, or at all events, that a restoration by a court of prize, without further proof, is conclusive evidence of a defect of probable cause. Mr. Justice Story expresses his dissent from these propositions, in which we agree with him; and he then expresses himself in these terms (page 26): "If, therefore, there be a reasonable suspicion of illegal traffic, or a reasonable doubt as to the proprietary interest, the national character, or the legality of the conduct, of the parties, it is proper to submit the cause for adjudication before the proper prize tribunal; and the captors will be justified, although the court should acquit without the formality of ordering further proof." In this case there was abundant ground for suspicion, and the demand of damages was rejected.

Neither in the texts, nor in the decided cases to which we have

thus referred, do we find it stated that, in order to subject captors to condemnation in costs and damages, vexatious conduct on their part must be proved (except as some degree of vexation is necessarily implied in the detention of a vessel without reasonable cause, after she has been searched), or that honest mistake, though occasioned by the act of the government of which they are subjects, can relieve them from their liability to make good to a foreigner and neutral (and with this case alone we are dealing) the damage which, by their conduct he has sustained.

Nor is it easy to perceive upon what grounds of reason or justice such excuses could rest. If costs and damages were inflicted as a punishment on captors, honest intention would be a consideration of the greatest weight, but the principle upon which they are awarded is that of affording compensation to a party who has been injured. Vexatious conduct on the part of the captors has, in some cases, been aluded to as removing all reluctance on the part of the judge to award costs and damages as in *The Nemesis*, Edwards' Rep. 50; or as forming a ground for what are termed vindictive damages; or for subjecting the captors to costs and damages; or depriving them of their expenses, when, but for such conduct, they might have been entitled to their expenses against the claimants, as in the cases of *The Speculation*, 2 Rob. 293, *The Washington*, 6 Rob. 275, and several others; but no case was cited to us at the bar, nor have we been able to find any, in which willful misconduct on the part of the captors has been stated to be a necessary ingredient in an ordinary condemnation in costs and damages.

So as to error occasioned by the proceedings of their own government. The captors act as the agents of the state of which they are citizens, and which must ultimately be responsible for their acts. Prize courts afford the remedy as between the individuals, which otherwise must be sought by the government of the claimants, against the government of the captors; but the mode of proceeding cannot affect the right to redress, and, if the state could not urge its own mistakes as a justification of its own wrong, neither, it would seem, should individual citizens be permitted to do so.

The law of nations upon these points appears to us to be settled by the decisions both in the American and European courts. In the case of *The Charming Betsy*, in 1804, 2 Cranch, 64, 2 L. Ed. 208, the captain of an American ship of war had seized in America a vessel which was held upon the evidence to have become Danish property. The court was of opinion that the orders issued by the American government were such as might well have misled the captor; but it was decided (the judgment being delivered by a most eminent lawyer, Chief Justice Marshall) that the claimants were entitled to costs and damages against the captors (though not vindictive damages which had been awarded in the court below), and that the officer, if he had acted in



obedience to orders, or had been misled by his government, must be indemnified by the state. Precisely the same doctrine, though without reference to this decision, was laid down some years afterwards by Lord Stowell, in the case of *The Actæon*, 2 Dod. 51. \* \* \* The same decision, on the same grounds, was pronounced by the same learned judge immediately afterwards, in the case of *The Rufus*, 2 Dod. 55.

It is needless to refer to all the other cases which were cited at the bar; but there is one large class which so strongly illustrates the principle, that it may be proper to advert to it. We allude to what are called the Cape Nicola Mole cases. In the early part of the last war a number of French and Dutch vessels and cargoes were captured by British ships, and sent in for adjudication to the Court of Admiralty of St. Domingo. Several of the ships and cargoes were condemned, and the proceeds of the captures distributed in the years 1797 and 1798. It was afterwards discovered that although the court of St. Domingo was properly constituted as a civil court of admiralty, and His Majesty's instructions had been addressed to it as a prize court, yet, by mistake, no warrant had been issued to give it a prize jurisdiction against France or Holland, although there had been a prize warrant against Spain.

Some time afterwards some of the owners of the captured property, having discovered this error, the effect of which was that the court had no jurisdiction, instituted proceedings in the High Court of Admiralty, calling upon the captors to proceed to adjudication. These proceedings were instituted nearly two years after the sentence, when the property had been distributed, the crews dispersed, the papers probably lost or destroyed, and when it was scarcely possible that the truth of the cases could be made to appear on the part of the captors. In one of these cases, *The Huldah*, 3 Rob. 235, Lord Stowell, in 1801, overruled the protest of the captors against the proceedings; and in 1804, in determining a question upon the registrar's report (*The Driver*, 5 Rob. 145), he speaks of it as "one of that unfortunate class of cases in which this court has felt itself under the necessity of decreeing restitution with costs and damages."

In all these cases where restitution was ordered, we believe that, on reference to the registrar's books, it will be found that the captors were condemned in the costs of the proceedings in the court at Cape Nicola Mole. Surely, if the absence of misconduct on the part of the captors, if honest error, occasioned by the blunders of the government, or the consideration of hardship upon individual officers acting in discharge of their duties, could in any case afford a protection against the claims of a neutral, such protection would have been afforded by the circumstances of these cases. Yet the captors were held liable by the Court of Admiralty, and were afterwards, we understand, indemnified at the expense of the public.

To apply, then, these rules to the facts of the case: \* \* \* We take it for granted, therefore, that it was for a supposed breach of blockade in sailing from Cronstadt that she was seized, and this is the only ground upon which the case was rested on the argument before us. Now, in order to justify a condemnation for breach of blockade, three things must be proved: 1st, the existence of an actual blockade; 2dly, the knowledge of the party; 3dly, some act of violation, either by going in or coming out with a cargo laden after the commencement of the blockade. *The Betsy*, 1 Rob. 93.

The instructions to Her Majesty's commanders upon this subject for the present war are, that if any vessel shall be found coming out of any blockaded port, which she shall have previously entered in breach of such blockade, or if she shall have any goods on board laden after knowledge of the blockade, such ship and goods shall be seized, and sent in for adjudication. Article X. Now, when this ship was seized, was there any reasonable ground for suspicion that she was liable to seizure under these instructions?

It appeared distinctly upon her papers, as the facts upon inquiry turn out to be, that on the 25th of March, 1854, before the declaration of war against Russia, this ship was on her voyage from Leith to Cronstadt; that she was on that day chartered for a voyage with a cargo of wheat, from Cronstadt to England, or countries in alliance or amity with England, according to orders which she might receive at Elsinore; that on the 10th of May, the shipment of her cargo had been completed; and that by the 16th she had complied with all the formalities required to enable her to leave Cronstadt; and that when she was taken she was on her direct course from that port to Elsinore.

Cronstadt was not blockaded at the time when she entered that port, nor at the time when she took her cargo on board, nor at the time when she left Cronstadt, nor even at the time when she was captured, nor for more than three weeks afterwards, and no blockade of Cronstadt had been proclaimed, either by the British government or by the Admiral.

It is said that the Admiral had, on the 16th of April, in Kioge Bay, proclaimed an intention of blockading all Russian ports, and that certain ports in the Gulf of Finland were actually blockaded on the 28th of May, and perhaps, at an earlier period, but there was not the slightest ground for suspecting that this ship had left any other port than Cronstadt, or had any intention of entering any other Russian port. What colour of reason, then, could there be for seizing, under such circumstances, this vessel, which did not fall under any one of the conditions which are required by the instructions to concur in order to justify sending in the ship for adjudication? \* \* \*

Again, as to the discretion to be exercised by the court. When the application of a rule depends on the absence or existence of misconduct in both or either of the litigants, the greater or less degree of that mis-

**conduct**, the existence or absence of suspicion attaching to a particular **ship** or cargo, the greater or less degree of it, and the causes to which **it is**, in whole or in part, to be attributed, it is obvious that there must necessarily be a very large discretion left, to the judge, for scarcely any two cases can in all such respects be precisely the same. But when once, **in the opinion of the judge with whom the decision rests**, a particular **case** is brought clearly within a particular rule, it should seem that his discretion is at an end. It is not a question merely of costs of suit, but of reparation for a wrong, which, when an accidental loss has afterwards occurred, may extend to the whole value of the ship and cargo.

Nor, if we were at liberty to relax settled rules upon our own notions of justice and policy, are we quite prepared to say that we should do so in this instance? The law which we are to lay down cannot be confined to the British navy; the rule must be applied to captors of all nations. No country can be permitted to establish an exceptional rule in its own favour, or in favour of particular classes of its own subjects. On the law of nations, foreign decisions are entitled to the same weight as those of the country in which the tribunal sits. America has adopted almost all of her principles of prize law from the decisions of English courts; and whatever may have been the case in former times, no authorities are now cited in English courts, in cases to which they are applicable, with greater respect than of those of the distinguished jurists of France and America. Whatever is held in England to justify or excuse an officer of the British navy will be held by the tribunals of every country, both on this and on the other side of the Atlantic, to justify or excuse the captors of their own nation.

By the usage of all countries, captors have a great interest in increasing the number of prizes. The temptation to send in ships for adjudication is sufficiently strong. Is it too much to say, that where no ground of suspicion can be shown, and all that the captor can allege is, that he did wrong under a mistake, he should make good in temperate damages the injury which he has occasioned? Ought a captor to be permitted to say to the captured: "True, nothing suspicious appeared in your case at the time of seizure, but, upon further inquiry, something might have been discovered. I had a right to take my chance; you have nothing to complain of. I subjected you to no unnecessary inconvenience. Go about your business, and be thankful for your escape"?

We cannot think that this would be deemed a satisfactory answer to a British neutral seized by a foreign belligerent. Upon the whole, therefore, after the most anxious consideration, having sought in vain for any circumstances which could afford in this case a probable cause for capture, we cannot hold the captors exempted from all responsibility, though the damage will, in all probability, prove to be but small. The amount must be referred to the registrar in the usual way; but we

shall advert to some circumstances which ought to be attended to in making the computation. \* \* \*

We shall recommend that the claimants have their costs in the court below, but that no costs should be given of this appeal. \* \* \*

### THE SIMLA.

(Admiralty, 1915. 1 British and Colonial Prize Cas. 281.)

Cause for the condemnation of goods sent by parcel post. The subject-matter of this claim was a number of parcels of miscellaneous goods, consisting of elephant tusks, leopard and snake skins, and curios, sent by parcel post by German colonists in German East Africa, addressed to various persons resident in Germany. The goods were shipped on the German mail steamer Emir, which was captured by a British warship after the outbreak of war between Great Britain and Germany, and was taken into Gibraltar, where she was condemned. The goods in question, of which there were thirty-one packages, were reshipped in the British steamship Simla, and were seized on January

\* In speaking of the suspicion which may justify seizure, although it fails to justify condemnation by a court of prize, Lord Sumner, on behalf of the Privy Council, in *The Falk and Other Ships*, L. R. [1921] 1 App. Cas. 787, 792, 793, said:

"The authorities may be referred to briefly. The foundation of the right, variously expressed in different cases, may be said to be the existence of reasonable suspicion, it may be of illegitimate traffic, it may be of enemy character, it may be of illegal action or service or what not, but there must be such suspicion as warrants inquiry into the facts and adjudication upon them by a properly constituted Court. See the judgment of Story, J., in *The George*, 1 Mason 24, Fed. Cas. No. 5328 (1815), quoted with approval in *The Ostsee*, 9 Moore, P. C. 150 (1855). Even slight grounds of suspicion may suffice. In *The Elizabeth*, 1 Acton, 10 (1809), the reason given by the Lords of Appeal for condemning the captors in costs was that there appeared to be scarcely any ground for detaining the vessel. The Judicial Committee's judgment in *The Baron Stjernblad*, 34 The Times L. R. 106, A. C. 1918, 173 (1917), develops the matter. In a case where it has become apparent by statistical evidence or otherwise that a considerable proportion of the collective imports into a neighbouring neutral country of a particular commodity, which is in its nature contraband, does in fact proceed by a continuous transit into the enemy territory, any particular importer of such goods belongs to a class of importers some of whom at any rate must be obviously engaged in contraband trade. Suspicion then attaches to all, and the question is one of the existence of reasonable suspicion, not of the possession of proof attaching that suspicion to a particular member of the class. The suspicion for example attaches to the particular goods by reason of the circumstance connected with the class of goods generally that it is in its nature contraband. Those who seize on the grounds of reasonable suspicion are entitled to the benefit of such evidence as other officers of the crown may possess as to ulterior destination, and are not limited by the information, or the lack of it, to be found in the ship's papers themselves. Neither at the actual time of seizure nor in the conduct of the proceedings is the officer responsible called upon to constitute himself judge or justified in doing so. The decision, if grounds for seizure existed, must in general rest with the court, and the court is also peculiarly the tribunal to determine any questions of suggested delay in the proceedings. The judgment in *The Ostsee* is the standard authority on all these matters."

27, 1915, by the collector of customs in the port of London, after the arrival of the *Simla* in the Thames.

Harold Murphy, for the Procurator General. Article 1 of the Eleventh Hague Convention, which provides that "the postal correspondence, whether of neutrals or of belligerents, and whether its character is official or private, found at sea in a ship, whether neutral or enemy, is inviolable," does not apply to parcels sent by parcels post. Herr Kriege, the German delegate at the Conference, who proposed this particular regulation, explained that "postal correspondence" was not intended to include parcels. See Westlake's *International Law*, vol. 2 (2d Ed.) p. 185, and Oppenheim's *International Law*, vol. 2 (2d Ed.) p. 237.

[Sir SAMUEL EVANS (THE PRESIDENT). There is no one here to suggest that these goods are inviolable?]

No; there has been no communication at all, and no appearance has been entered.

Sir SAMUEL EVANS (THE PRESIDENT). Very well. There is no appearance, and I order that the goods be condemned.<sup>4</sup>

#### GLOVER v. THE WILLIAM.

(Massachusetts Court of Admiralty, 1776. 7 Dane Abr. c. 227, § 12, p. 649.)

This case shews that the Americans considered Boston a place besieged, by the laws of nations, March 7, 1776, and therefore libelled and condemned vessels carrying supplies to British troops in Boston accordingly, as was done in this case; yet Boston was besieged by land only.<sup>5</sup>

<sup>4</sup> In *The Noordam* (No. 2) L. R. [1920] App. Cas. 904 (1920), the Privy Council decided that bearer bonds and coupons shipped by letter mail were not postal correspondence, so as to be exempt from seizure under Hague Convention No. XI.

<sup>5</sup> "The attention of Americans was first drawn to the law of nations through the question of prize. In November, 1775, Massachusetts passed an act regulating marque and reprisal and established a prize court. During the year following the Supreme Court of Massachusetts decided that by March 7, 1776, Boston was a place besieged according to the law of nations, and upon that ground decided questions arising out of the seizure of vessels captured while carrying supplies to the British troops in Boston." Jesse S. Reeves, "The Influence of the Law of Nature upon International Law in the United States," 3 *American Journal of International Law*, 547, 555 (1909).

The act was introduced by Elbridge Gerry, later Vice President of the United States, and of which his biographer says:

"The law, \* \* \* is the first actual avowal of offensive hostility against the mother country, which is to be found in the annals of the revolution. It is not the less worthy of consideration as the first effort to establish an American naval armament." James T. Austin, *The Life of Elbridge Gerry*, vol. 1, p. 94 (1828). The text of the act in question is found in Appendix A, to this volume, pp. 505-512.

## CLEVELAND v. WALVART.

(Superior Court of Massachusetts, Essex, 1778. 7 Dane Abr. c. 227, § 14, p. 649.)

In this action the court decided, that goods shipped in an enemy's country are to be deemed enemy's goods until the contrary is proved. So goods found in an enemy's ship are to be deemed enemy's goods till the contrary is shewn. So where a consignment is to foreigners, it ought to appear in the bills of lading that the property is at their risk, otherwise it is at the risk of the shipper, and therefore must be viewed as his property. And in this case of *Cleveland v. Walvart*, the libel charged: 1. That the cargo was British property. 2. That the vessel was loaded with British goods of British Manufacture, by British merchants, and at a British port, and by them freighted, insured, and risked bound to Spain and Naples, at a time of open war between Great Britain and the United States, which the captain well knew. 3. That the captain refused to be searched and attempted to cover the property. 4. That he threw papers overboard. 5. That the vessel was carrying supplies to the fleets and armies of Great Britain. This ship was claimed as neutral Dutch property, and the cargo as Italian. The ship's papers were produced in court. And the court further decided, that it was the duty of the libellants to prove clearly the goods were enemy's property; and that when the goods are found in an enemy's ship there ought to be allowed no damages for capture and detention that the freight must be settled and paid to the neutral according to the terms of the charter party generally; that a ship being once an enemy's property is to be deemed his till the contrary is made to appear, and especially when loaded at his port; that if a consignment of goods be to order, and nothing more is expressed, it is to be understood the order of the shipper. The cargo was condemned. The authorities cited were, *Lee on Captures*, 83, 84, 89, 141, 142, 143, 201, 202, 203, 204, 205, 206, 173, 174, 190, 194, 241; *Lex Mer.* p. 1, 41, 42; *Vattel*, b. 3, c. 7. And all these eight points decided have been confirmed by many modern authorities. See *Rob. Reports*; *Chitty's Law of Nations*, etc.

## LITTLE et al. v. BARREME et al.

(Supreme Court of the United States, 1804. 2 Cranch, 170, 2 L. Ed. 243.)

In the District Court of Massachusetts, the vessel and cargo were ordered to be restored, without damages or costs. \* \* \* From this decree, the claimants appealed to the Circuit Court, where it was reversed and \$8,504 damages were given. \* \* \* The damages being assessed by assessors appointed by the court, a final sentence was pronounced, from which the captors appealed to this court. \* \* \*

MARSHALL, C. J.,<sup>\*</sup> now delivered the opinion of the court.

The Flying Fish, a Danish vessel, having on board Danish and neutral property, was captured on the 2d of December 1799, on a voyage from Jeremie to St. Thomas, by the United States frigate Boston, commanded by Captain Little, and brought into the port of Boston, where she was libelled as an American vessel that had violated the non-intercourse law. The judge before whom the cause was tried, directed a restoration of the vessel and cargo, as neutral property, but refused to award damages for the capture and detention, because, in his opinion, there was probable cause to suspect the vessel to be American. On an appeal to the circuit court, this sentence was reversed, because the Flying Fish was on a voyage from, not to, a French port, and was, therefore, had she even been an American vessel, not liable to capture on the high seas.

During the hostilities between the United States and France, an act for the suspension of all intercourse between the two nations was annually passed. That under which the Flying Fish was condemned, declared every vessel owned, hired or employed, wholly or in part, by an American, which should be employed in any traffic or commerce with or for any person resident within the jurisdiction, or under the authority, of the French republic, to be forfeited, together with her cargo; the one-half to accrue to the United States, and the other to any person or persons, citizens of the United States, who will inform and prosecute for the same. The 5th section of this act authorizes the President of the United States to instruct the commanders of armed vessels "to stop and examine any ship or vessel of the United States, on the high seas, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor of the act, and if upon examination, it should appear, that such ship or vessel is bound, or sailing to, any port or place within the territory of the French republic or her dependencies, it is rendered lawful to seize such vessel, and send her into the United States for adjudication.

It is by no means clear, that the President of the United States, whose high duty it is to "take care that the laws be faithfully executed," and who is commander-in-chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited, by being engaged in this illicit commerce. But when it is observed, that the general clause of the first section of the act, which declares that "such vessels may be seized, and may be prosecuted in any district or circuit court which shall be holden within or for the district where the seizure shall be made," obviously contemplates a

<sup>\*</sup> The statement of facts is abridged.

seizure within the United States; and that the fifth section gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound, or sailing to, a French port, the legislature seem to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a French port. Of consequence, however strong the circumstances might be, which induced Captain Little to suspect the Flying Fish to be an American vessel, they could not excuse the detention of her, since he would not have been authorized to detain her, had she been really American.

It was so obvious, that if only vessels sailing to a French port could be seized on the high seas, that the law would be very often evaded, that this act of Congress appears to have received a different construction from the executive of the United States; a construction much better calculated to give it effect. A copy of this act was transmitted by the secretary of the navy, to the captains of the armed vessels, who were ordered to consider the 5th section as a part of their instructions. The same letter contained the following clause:

"A proper discharge of the important duties enjoined on you, arising out of this act, will require the exercise of a sound and an impartial judgment. You are not only to do all that in you lies, to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France or her dependencies, where the vessels are apparently as well as really American, and protected by American papers only, but you are to be vigilant that vessels or cargoes, really American, but covered by Danish or other foreign papers, and bound to or from French ports, do not escape you."

These orders, given by the executive, under the construction of the act of congress made by the department to which its execution was assigned, enjoin the seizure of American vessels sailing from a French port. Is the officer who obeys them liable for damages sustained by this misconstruction of the act, or will his orders excuse him? If his instructions afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him: if they excuse an act, not otherwise excusable, it would then be necessary to inquire, whether this is a case in which the probable cause which existed to induce a suspicion that the vessel was American, would excuse the captor from damages when the vessel appeared in fact to be neutral?

I confess, the first bias of my mind was very strong in favor of the opinion, that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think, that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to

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me strongly to imply the principle, that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which, in general, requires that he should obey them. I was strongly inclined to think, that where, in consequence of orders from the legitimate authority, a vessel is seized, with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, nor legalize an act which, without those instructions, would have been a plain trespass.

It becomes, therefore, unnecessary to inquire whether the probable cause afforded by the conduct of the *Flying Fish* to suspect her of being an American, would excuse Captain Little from damages for having seized and sent her into port? since, had she been an American, the seizure would have been unlawful. Captain Little, then, must be answerable in damages to the owner of this neutral vessel, and as the account taken by order of the circuit court is not objectionable on its face, and has not been excepted to by counsel before the proper tribunal, this court can receive no objection to it.

There appears, then, to be no error in the judgment of the circuit court, and it must be affirmed with costs.<sup>7</sup>

<sup>7</sup> In *Hooper, Adm'r, v. United States*, 22 Ct. Cl. 408, 439 (1887), Davis, J., said:

"The distinction must not be forgotten between a legal and justifiable seizure and an illegal and unjustifiable condemnation. The seizure of a vessel may be successfully defended upon grounds which would not support a subsequent condemnation, and 'prize courts deny damages when there was probable cause for the seizure, and are often justified in awarding to the captors their costs and expenses,' even when the vessel and cargo are decided not good prize and are returned to their owners. *The Thompson*, 3 Wall. 155, 18 L. Ed. 55 (1865); *Jecker v. Montgomery*, 13 How. 498, 14 L. Ed. 240 (1851); *Murray v. The Charming Betsey*, 2 Cranch, 64, 2 L. Ed. 208 (1804)."

The "Instructions for the Navy of the United States Governing Maritime Warfare," issued in June, 1917, thus deal with the question of the responsibility raised in the case of *The Flying Fish*, supra:

"78. An officer making a capture is held by the courts of the United States to be personally liable in damages unless the capture made by him is for probable cause.

"79. Probable cause is defined by the Supreme Court of the United States as follows: 'Probable cause exists where there are circumstances sufficient to warrant suspicion, though it may turn out that the facts are not sufficient to warrant condemnation. And whether they are or not can not be determined unless the customary proceedings of prize are instituted and enforced. Per Chief Justice Fuller, in *The Olinde Rodrigues*, 174 U. S. 510, 19 Sup. Ct. 851, 43 L. Ed. 1065 (1899). \* \* \* The term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation; and in all cases of seizure has a fixed and well-known meaning. It imports a seizure made under circumstances which warrant suspicion. Per Chief Justice Marshall in *Locke v. U. S.*, 7 Cranch, 339, 3 L. Ed. 364 (1813).'"

## THE PANAMA.

(Supreme Court of the United States, 1899. 176 U. S. 535, 20 Sup. Ct. 480, 44 L. Ed. 577.)

Mr. Justice GRAY delivered the opinion of the court.\* \* \* \*

The recent war with Spain, as declared by the Act of Congress of April 25, 1898, c. 189, and recognized in the President's proclamation of April 26, 1898, existed on and after April 21, 1898. 30 Stat. 364, 1770. This proclamation declared among the rules on which the war would be conducted, the following:

"4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: Provided, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any despatch of or to the Spanish government." \* \* \*

"6. The right of search is to be exercised with strict regard for the rights of neutrals, and the voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade."

It has been decided by this court, in the recent case of *The Buena Ventura*, 175 U. S. 384, 20 Sup. Ct. 148, 44 L. Ed. 206, that a Spanish merchant vessel, which had sailed before April 21, 1898, from a port of the United States on a voyage to a foreign port not having on board any officer in the military or naval service of Spain, nor any article contraband of war, nor any despatch of or to the Spanish government, was protected by the fourth clause of the President's proclamation of April 26, 1898, from condemnation while on that voyage; but that her capture, before that proclamation was issued, was with probable cause; and that she should therefore be ordered to be restored to her owner, but without damages or costs. That case would be decisive of this one, but for the mails and the arms carried by the *Panama*, and the contract with the Spanish government under which the arms were put on board.

It was argued in behalf of the claimant that, independently of her being a merchant vessel, she was exempt from capture by reason of her being a mail steamship and actually carrying mail of the United States.

There are instances in modern times, in which two nations, by convention between themselves, have made special agreements concerning

\* Parts of the opinion are omitted.

mail ships. But international agreements for the immunity of the mail ships of the contracting parties in case of war between them have never, we believe, gone farther than to provide, as in the postal convention between the United States and Great Britain in 1848, in that between Great Britain and France in 1833, and in other similar conventions, that the mail packets of the two nations shall continue their navigation, without impediment or molestation, until a notification from one of the governments to the other that the service is to be discontinued; in which case they shall be permitted to return freely, and under special protection, to their respective ports. And the writers on international law concur in affirming that no provision for the immunity of mail ships from capture has as yet been adopted by such a general consent of civilized nations as to constitute a rule of international law. 9 Stat. 969; Wheaton (8th Ed.) pp. 659-661, Dana's note; Calvo (5th Ed.) §§ 2378, 2809; De Boeck, §§ 207, 208. De Boeck, in section 208, after observing that, in the case of mail packets between belligerent countries, it seems difficult to go farther than in the convention of 1833, above mentioned, proceeds to discuss the case of mail packets between a belligerent and a neutral country, as follows: "It goes without saying that each belligerent may stop the departure of its own mail packets. But can either intercept enemy mail packets? There can be no question of intercepting neutral packets, because communications between neutrals and belligerents are lawful, in principle, saving the restrictions relating to blockade, to contraband of war, and the like; the right of search furnishes belligerents with a sufficient means of control. But there is no doubt that it is possible, according to existing practice, to intercept and seize the enemy's mail packets."

\* \* \*

Without an express order of the government, a merchant vessel is not privileged from search or seizure by the fact that it has a government mail on board. The *Peterhoff*, 5 Wall. 28, 61, 18 L. Ed. 564. The mere fact, therefore, that the *Panama* was a mail steamship, or that she carried mail of the United States on this voyage, does not afford any ground for exempting her from capture.

The remaining question in the case is whether the *Panama* came within the class of vessels described in the fourth clause of the President's proclamation of April 26, 1898, as "Spanish merchant vessels," and as not "Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage) or any other article prohibited or contraband of war, or any dispatch of or to the Spanish government."

On the part of the claimant, it was argued that the arms which the *Panama* carried, under the requirements of her mail contract and for the protection of the mails, are not to be regarded as contraband or munitions of war, within the sense of this clause; that "contraband,"

as therein referred to, means contraband cargo, not contraband portion of the ship's permanent equipment; and that, if the furnishings of a ship could be regarded as contraband, every ship would have contraband on board.

On the other hand, it was contended, in support of the condemnation, that the arms which the Panama carried, belonging to her owner, were contraband of war, and rendered her liable to capture; and that by reason of her being so armed, and of the provisions of her mail contract with the Spanish government, requiring her armament, and recognizing the right of that government, in case of a suspension of the mail service by war, to take possession of her for warlike purposes, she cannot be considered as a merchant vessel, within the meaning of the proclamation, but must be treated like any regular vessel of the Spanish navy under similar circumstances. \* \* \*

The Panama was a steamship of 1,432 tons register, carrying a crew of 71 men all told, owned by a Spanish corporation, sailing under the Spanish flag, having a commission as a royal mail ship from the government of Spain, and plying from and to New York and Havana and various Mexican ports, with general cargoes, passengers and mails. At the time of her capture, she was on a voyage from New York to Havana, and had on board two breech-loading Hontoria guns of nine centimetre bore, one mounted on each side of the ship, one Maxim rapid-firing gun on the bridge, twenty Remington rifles and ten Mauser rifles, with ammunition for all the guns and rifles, and thirty or forty cutlasses. The guns had been put on board three years before, and the small arms and ammunition had been on board a year or more. Her whole armament had been put on board by the company in compliance with its mail contract with the Spanish government (made more than eleven years before, and still in force), which specifically required every mail steamship of the company to "take on board, for her own defence," such an armament, with the exception of the Maxim gun and the Mauser rifles. That contract contains many provisions looking to the use of the company's steamships by the Spanish government as vessels of war. Among other things, it requires that each vessel shall have the capacity to carry 500 enlisted men; that that government, upon inspection of her plans as prepared for commercial and postal purposes, may order her deck and sides to be strengthened so as to support additional artillery; and that in case of the suspension of the mail service by a naval war, or by hostilities in any of the seas or ports visited by the company's vessels, the government may take possession of them with their equipment and supplies, at a valuation to be made by a commission; and shall, at the termination of the war, return them to the company, paying five per cent on the valuation while it has them in its service, as well as an indemnity for any diminution in their value. The Panama was not a neutral vessel; but she was enemy property, and as such, even if she carried no arms (either

as part of her equipment, or as cargo), would be liable to capture, unless protected by the President's proclamation.

It may be assumed that a primary object of her armament, and, in time of peace, its only object, was for purposes of defence. But that armament was not of itself inconsiderable, as appears, not only from the undisputed facts of the case, but from the action of the District Court, upon the application of the commodore commanding at the port where the court was held, and on the recommendation of the prize commissioners, directing her arms and ammunition to be delivered to the commodore for the use of the Navy Department. And the contract of her owner with the Spanish government, pursuant to which the armament had been put on board, expressly provided that, in case of war, that government might take possession of the vessel with her equipment, increase her armament, and use her as a war vessel; and, in these and other provisions, evidently contemplated her use for hostile purposes in time of war. She was, then, enemy property, bound for an enemy port, carrying an armament susceptible of use for hostile purposes, and herself liable, upon arrival in that port, to be appropriated by the enemy to such purposes.

The intent of the fourth clause of the President's proclamation was to exempt for a time from capture peaceful commercial vessels; not to assist the enemy in obtaining weapons of war. This clause exempts "Spanish merchant vessels" only; and expressly declares that it shall not apply to "Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage) or any other article prohibited or contraband of war, or any despatch of or to the Spanish government."

Upon full consideration of this case, this court is of opinion that the proclamation, expressly declaring that the exemption shall not apply to any Spanish vessel having on board any article prohibited or contraband of war, or a single military or naval officer, or even a despatch, of the enemy, cannot reasonably be construed as including, in the description of "Spanish merchant vessel," which are to be temporarily exempt from capture, a Spanish vessel owned by a subject of the enemy; having an armament fit for hostile use; intended in the event of war, to be used as a war vessel; destined to a port of the enemy; and liable, on arriving there, to be taken possession of by the enemy, and employed as an auxiliary cruiser of the enemy's navy, in the war with this country.

The result is, that the Panama was lawfully captured and condemned, and that the decree of the District Court must be affirmed.

Mr. Justice PECKHAM dissented.\*

\* By the Declaration of Paris of 1856, parties to that instrument and powers which have since adhered to it renounced the right to issue to private vessels letters of marque and reprisal, by which such vessels were authorized to carry on hostilities at sea. Merchantmen, however, can render service in war, especially if they are planned and built in such a way that they could be con-

### THE MARQUIS DE SOMERUELES.

(Court of Vice Admiralty of Halifax, 1813. *Stewart's Vice Admiralty Reports*, Nova Scotia, 1803-1814, 432.)

The petition was supported by the Solicitor General, and opposed, though not strenuously, by the King's Advocate, the captors not consenting to the restitution of the property.

DR. CROKE,<sup>10</sup> This petition is of a different kind from what usually engages the attention of the court. It prays, that certain paintings and prints, which were captured on board the American vessel called the Marquis de Somerueles, may be restored to the petitioner on behalf of a scientific establishment at Philadelphia. The ground of the petition is contained in a letter annexed to it, which states: "That in

verted to a warlike use. To meet the requirements of the Declaration of Paris they would need to be taken over by the government converting them, placed under the command of officers in the naval service of that country, subjected to naval discipline, and entered in the list of public vessels. The act of conversion should be notified to the belligerent, in order that the converted vessel should possess the rights of a war vessel, and to neutrals in order that it should be treated by them as a man of war.

Convention VII of the Second Hague Conference of 1907 (Appendix, post, p. 1150) deals with these subjects. Unfortunately the parties to the convention were not able to agree upon the place of conversion. It was universally admitted that a merchantman might be converted within the jurisdiction of the state seeking to convert it. It was maintained by some of the states, particularly Germany, and denied by others, particularly Great Britain, that conversion could take place upon the high seas. The United States was not a party to this Convention.

The question has arisen whether a merchantman which has been converted may be reconverted. Germany insisted at the Second Hague Peace Conference of 1907 that reconversion should not be permitted during the war, but this contention was not adopted. In 1915, after the battle of Falkland, Great Britain reconverted certain auxiliary vessels, and wished to have them enter Chilean jurisdiction in their reconverted quality of merchantmen. Under these conditions the British Minister to Chile laid the facts before the government of that country on February 4, 1915, and requested its opinion as to the status of these vessels. Chile replied in a note dated March 15, 1915, that reconverted auxiliaries would be accorded the privileges of merchantmen upon the following five conditions:

"1. That the auxiliary cruiser shall not have violated Chilean neutrality;

"2. That the reconversion shall be effected in the ports or waters within the jurisdiction of the country to which the vessel belongs or in the ports of its allies;

"3. That this reconversion shall be effective, that is to say, that the vessel shall not show, either in its crew or in its fittings, that it can lend assistance directly to the armed fleet of its country in the capacity of an auxiliary cruiser, such as it formerly was;

"4. That the government of the country to which the vessel belongs shall communicate to all the interested nations, and especially to neutrals, the names of the auxiliary cruisers which shall have lost this character and assumed the character of merchant vessels; and

"5. That the same government shall bind itself by the pledge that the said vessels shall not in future be destined for the service of the armed fleet in the character of auxiliary cruisers." Alejandro Alvarez, *La Grande Guerre Européenne et la Neutralité du Chili*, Paris, 1915, p. 253.

<sup>10</sup> Parts of opinion omitted.

the Somerueles, from Italy, was taken a case belonging to the Academy of Arts in that city, containing twenty-one paintings and fifty-two prints; that they were presented to the Academy by Mr. Joseph Allen Smith, who has already given most objects of the statuary, paintings, and prints which they possess; indeed this is the remnant of what he collected for the purpose of assisting in its formation. The value we know not, but in this country, and in an infant establishment, every accession is important. The Academy is now preparing an application for them, which will be handed with an accompanying letter from Anthony St. John Baker, late Secretary of Mr. Foster, who has examined into the circumstances—knowing that even war does not leave science and art unprotected, and that Britons have often considered themselves at peace with these, we are not without hopes of seeing them."

Heaven forbid, that such an application to the generosity of Great Britain should ever be ineffectual. The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favour and protection. They are considered not as the peculium of this or of that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species. \* \* \*

In thus favouring an institution of this kind, besides contributing to the maintenance of such a reciprocal exchange of civilities with our enemy as is consistent with the state of hostilities, we shall perhaps at the same time promote most effectually our own best interests. There is a natural connexion between all the arts and sciences, as well material, as intellectual. It is impossible for a nation to improve in the polite arts without a corresponding amelioration in the practical science of human nature. It is a school-boy quotation, but not the less true for being trite, that

*"Ingenuas didicisse fideliter artes  
Emollit mores; nec sinit esse feros."*

This observation is founded in nature, for what is usually called taste is only good sense applied to the polished ornaments of life; and correct ideas in morality are the same good sense directed to human actions. All absurdities, and deviations from rectitude, are nothing more than a bad taste influencing human conduct. The public standard of morals will therefore always rise with the advancement of the polite arts. Minds, accustomed to the contemplation of picturesque excellence, cannot fail of being disgusted with any departure from the sublimer form of moral beauty.

In the United States, such improvements are not improbable, or perhaps very remote, and cannot fail of being advantageous to both countries. They have shewn themselves not incapable of producing

genius in these departments. The very eminent artist who now presides, with so much credit to the country, and so much benefit to the students, in the Royal Academy of Great Britain, owes his birth and earlier education to that country. The time may shortly come when in an advanced state of the arts, to which this very institution, which is now before the court as a petitioner, may contribute its share, new Wests may arise to revive the school of Raffaele in the wilds of America.<sup>11</sup> \* \* \* When such an improved state of society shall take place, there can be no doubt but that the two nations of brethren, on the opposite shores of the Atlantic, will be united in the indissoluble bonds of friendship, as well by inclination as by a common interest; they will cultivate in unison the advantages of an enlightened commerce; they will labour together in the furtherance of the useful arts, and will experience no other enmity than a liberal rivalry in every elegant and manly accomplishment.

Not to disappoint the expectations which have been entertained of the liberality of this country, and to give every encouragement to an infant society, whose views and objects are so laudable and beneficial, with real sensations of pleasure, and the sincerest wishes for its success and prosperity, in conformity to the law of nations, as practiced by all civilized countries, I decree the restitution of the property which has been thus claimed.

#### THE BERLIN.

(High Court of Justice, Admiralty Division, 1914. L. R. 1914, Prob. Div. 265.)

On August 4, 1914, war was declared between Great Britain and Germany, and on the following day, about 11:30 a. m., H. M. S. Princess Royal captured, some hundred miles from the nearest coast (Great Britain) and some 500 miles from her home port (Emden), the Berlin, a German drift fishing sailing cutter (W. Heine, master), of 110 metric tons, owned by the Emden Herring Fishing Company. She carried a crew of fifteen hands, and had on board 350 empty barrels, 100 barrels of salt, 50 barrels of cured herrings, 15 barrels of ship's stores, and two drift nets. It appeared from her log that he had been on a fishing voyage in the North Sea, and from a confidential report submitted to the President and made by the commander of the cruiser, the court gathered that, owing to the exigencies of the service, after capturing the vessel in about the locality mentioned above, he had

<sup>11</sup> The "very eminent artist" referred to was none other than Benjamin West. Born in the wilds of Pennsylvania, then a colony, in 1738, he died in London, in 1820, as President of the Royal Academy. Largely self-taught, he settled in London in 1763, and succeeded Sir Joshua Reynolds as President of the Royal Academy in 1792, which position he held during the balance of his life. His place in art rests securely upon an American subject, his "Death of Wolfe," which was exhibited in 1771.



given the Berlin into the charge of the steamship Ailsa, and by that vessel she was brought, on the early morning of August 6, into Wick Harbour, where the chief officer of customs took possession, retaining her as prize captured at sea, and, on behalf of the crown, application was now made for the condemnation and sale of the vessel and her cargo.

Sir SAMUEL EVANS, PRESIDENT.<sup>12</sup> \* \* \* The question now remains whether this vessel, the Berlin, is immune from capture as a coast fishing vessel. The history of the varying practices in this and other countries of exempting from capture in war vessels engaged in coast fishing up to the year 1899 has been given in the Supreme Court of the United States of America in the case of *The Paquete Habana* and *The Lola*, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320. The judgment of the court was delivered by Gray, J. It is full of research, learning, and historical interest. As such an elaborate and complete résumé is available in that judgment, it would be a work of supererogation for me to attempt to perform a similar task. The conclusions stated by Gray, J., and which form the judgment of the majority of the Supreme Court, were as follows:

"This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war. The exemption, of course, does not apply to coast fishermen or their vessels if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way. Nor has the exemption been extended to ships or vessels employed on the high seas in taking whales or seals, or cod, or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce. This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter."

Since the date when that judgment was pronounced the matter has been dealt with by Japan in its Prize Regulations, and in some of its prize court decisions, and it forms also the subject of an article in one of the Hague Conventions of 1907. Article 35 of the Japanese Regu-

<sup>12</sup> Part of the opinion is omitted.

lations governing captures at sea, which came into force on March 15, 1904, provides as follows:

"All enemy vessels shall be captured. Vessels belonging to one of the following categories, however, shall be exempted from capture if it is clear that they are employed solely for the industry or undertaking for which they are intended:

"(1) Vessels employed for coast fishery.

"(2) Vessels making voyages for scientific, philanthropic, or religious purposes.

"(3) Lighthouse vessels and tenders.

"(4) Vessels employed for exchange of prisoners."

In the case of *The Michael*, Russian and Japanese Prize Cases (1913), vol. 2, p. 80, heard in the Japanese Prize Court in 1905, which related to what was alleged to be a deep-sea fishing vessel, it was claimed that: "The vessel, though a deep-sea fishing vessel, was not engaged in traffic forbidden in time of war, nor was she carrying contraband of war, and consequently being harmless should be released, in accordance with the intention which underlies the exemption from capture of small coastal fishing boats." Upon this the decision of the court ran as follows: "The claimants also argued that the vessel should be released in accordance with the intention underlying the exemption from capture of small coastal fishing boats; but the usage of international law by which small coastal fishing boats are not captured arises mainly from the desire not to inflict distress upon poor people who are not connected with the war, and the principle cannot be extended to a vessel like the *Michael*, which was the property of a company and engaged in deep-sea fishing."

The point was not raised in the Higher Prize (Appeal) Court. Similarly, in the case of *The Alexander*, Id., p. 86, the same court pronounced as follows: "It is also argued by the claimants that the vessel should be released in accordance with the intention underlying the exemption from capture of small coastal fishing vessels, but the usage of international law by which small coastal fishing vessels are not captured arises mainly from the desire not to inflict distress on poor people who are not connected with the war, and clearly cannot be extended to a vessel like the *Alexander*, the property of a company, and, moreover, engaged in deep-sea fishing."

Upon appeal one of the grounds of appeal was: "Again, the reasoning in the decision appealed from, that as the exemption from capture of small coastal fishing vessels chiefly arose from a desire not to inflict distress upon poor people unconnected with the war, it could not therefore be extended to a vessel like the *Alexander*, which was engaged in deep-sea fishing, shows that the claimants' point had not been understood. What the claimants desired was that the Imperial Prize Court should in the light of recent developments in international law, not adhere to old usages, but create new precedents."

Upon which the court adjudged in somewhat quaint fashion as follows: "The appellants also desired that a new precedent should be established in the light of recent developments of international law by the exemption from capture of a vessel which, as in the present case, was engaged in deep-sea fishing. \* \* \* The appellants' request that a new precedent should be created by the exemption from capture of a deep-sea fishing vessel is nothing more than the simple expression of their hopes, and this ground of the appeal is therefore also devoid of substance."

I do not propose to make any pronouncement in the case now before the court as to whether the German Empire or its citizens have in the circumstances of this war the right to claim the benefit of the Hague Conventions. But in order to shew how the doctrine with which I am now dealing has been treated by the nations with the progress of years and events, I refer to article 3 of the Hague Convention, XI, 1907, which is as follows:

"Vessels employed exclusively in coast fisheries, or small boats employed in local trade, are exempt from capture, together with their appliances, rigging and cargo. This exemption ceases as soon as they take any part whatever in hostilities. The contracting Powers bind themselves not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance."

In this country I do not think any decided and reported case has treated the immunity of such vessels as a part or rule of the law of nations. Vide *The Young Jacob and Johanna*, 1 C. Rob. 20, and *The Liesbet van den Toll* (1804) 5 C. Rob. 283. But after the lapse of a century I am of opinion that it has become a sufficiently settled doctrine and practice of the law of nations that fishing vessels plying their industry near or about the coast (not necessarily in territorial waters), in and by which the hardy people who man them gain their livelihood, are not properly subjects of capture in war so long as they confine themselves to the peaceful work which the industry properly involves.

The foundation of the doctrine is stated by Hall<sup>18</sup> as follows: "It is indisputable that coasting fishery is the sole means of livelihood of a very large number of families as inoffensive as cultivators of the soil or mechanics, and that the seizure of boats, while inflicting extreme hardships on their owners, is as a measure of general application wholly ineffective against the hostile state."

The rule is formulated by Westlake (*International Law*, Part II, War, p. 133) in these terms:

"Coast Fisheries.—Immunity from capture on the ground of their being enemies or enemy property, but not from capture and condem-

<sup>18</sup> *International Law* (6th Ed.) p. 446.

## THE PANAMA.

(Supreme Court of the United States, 1899. 176 U. S. 535, 20 Sup. Ct. 480, 44 L. Ed. 577.)

Mr. Justice GRAY delivered the opinion of the court.\* \* \* \*

The recent war with Spain, as declared by the Act of Congress of April 25, 1898, c. 189, and recognized in the President's proclamation of April 26, 1898, existed on and after April 21, 1898. 30 Stat. 364, 1770. This proclamation declared among the rules on which the war would be conducted, the following:

"4. Spanish merchant vessels, in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: Provided, that nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any despatch of or to the Spanish government." \* \* \*

"6. The right of search is to be exercised with strict regard for the rights of neutrals, and the voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade."

It has been decided by this court, in the recent case of *The Buena Ventura*, 175 U. S. 384, 20 Sup. Ct. 148, 44 L. Ed. 206, that a Spanish merchant vessel, which had sailed before April 21, 1898, from a port of the United States on a voyage to a foreign port not having on board any officer in the military or naval service of Spain, nor any article contraband of war, nor any despatch of or to the Spanish government, was protected by the fourth clause of the President's proclamation of April 26, 1898, from condemnation while on that voyage; but that her capture, before that proclamation was issued, was with probable cause; and that she should therefore be ordered to be restored to her owner, but without damages or costs. That case would be decisive of this one, but for the mails and the arms carried by the *Panama*, and the contract with the Spanish government under which the arms were put on board.

It was argued in behalf of the claimant that, independently of her being a merchant vessel, she was exempt from capture by reason of her being a mail steamship and actually carrying mail of the United States.

There are instances in modern times, in which two nations, by convention between themselves, have made special agreements concerning

\* Parts of the opinion are omitted.

mail ships. But international agreements for the immunity of the mail ships of the contracting parties in case of war between them have never, we believe, gone farther than to provide, as in the postal convention between the United States and Great Britain in 1848, in that between Great Britain and France in 1833, and in other similar conventions, that the mail packets of the two nations shall continue their navigation, without impediment or molestation, until a notification from one of the governments to the other that the service is to be discontinued; in which case they shall be permitted to return freely, and under special protection, to their respective ports. And the writers on international law concur in affirming that no provision for the immunity of mail ships from capture has as yet been adopted by such a general consent of civilized nations as to constitute a rule of international law. 9 Stat. 969; Wheaton (8th Ed.) pp. 659-661, Dana's note; Calvo (5th Ed.) §§ 2378, 2809; De Boeck, §§ 207, 208. De Boeck, in section 208, after observing that, in the case of mail packets between belligerent countries, it seems difficult to go farther than in the convention of 1833, above mentioned, proceeds to discuss the case of mail packets between a belligerent and a neutral country, as follows: "It goes without saying that each belligerent may stop the departure of its own mail packets. But can either intercept enemy mail packets? There can be no question of intercepting neutral packets, because communications between neutrals and belligerents are lawful, in principle, saving the restrictions relating to blockade, to contraband of war, and the like; the right of search furnishes belligerents with a sufficient means of control. But there is no doubt that it is possible, according to existing practice, to intercept and seize the enemy's mail packets."

\* \* \*

Without an express order of the government, a merchant vessel is not privileged from search or seizure by the fact that it has a government mail on board. *The Peterhoff*, 5 Wall. 28, 61, 18 L. Ed. 564. The mere fact, therefore, that the *Panama* was a mail steamship, or that she carried mail of the United States on this voyage, does not afford any ground for exempting her from capture.

The remaining question in the case is whether the *Panama* came within the class of vessels described in the fourth clause of the President's proclamation of April 26, 1898, as "Spanish merchant vessels," and as not "Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage) or any other article prohibited or contraband of war, or any dispatch of or to the Spanish government."

On the part of the claimant, it was argued that the arms which the *Panama* carried, under the requirements of her mail contract and for the protection of the mails, are not to be regarded as contraband or munitions of war, within the sense of this clause; that "contraband,"

granted under the condition that there is no intermeddling (immiscer) in the war operation. In order to avoid all difficulties the Power whose ship in question bears the colours must refrain from involving her in any war service." The favour granted to the said ship bestows upon her a sort of neutralization which must last until the end of (all) hostilities, and which must prevent her from having her destination altered."

Now, as to the construction which has to be placed on the foregoing language, I entirely agree with the Attorney General's rendering, and will adopt the words which he used in argument. The word "neutralization" here means that the ship is placed entirely outside the pale of any warlike operations, and must in consequence keep herself entirely apart from any service in connection with the war or that may have any effect on the war.

It was contended on behalf of the owners that the intention to intern the refugees at Tientsin was a philanthropic mission, and the recent decision of Mr. Justice Gompertz in *The Hanametal*, 1 B. & C. P. C. 347 (1914), a neutral vessel, was relied upon; that the carrying of refugees was not intermeddling with warlike operations, and so was not a breach of neutrality law. I think that there is no real analogy between the reasoning adopted in that case and the present. There is a fundamental difference, as the Attorney General contends, between the "Neutralization" of an enemy ship within the meaning of the official report on the Convention and the neutrality of a non-belligerent ship. There are many things which the latter may be able to do which in some measure may affect the war without rendering herself liable for a breach of neutrality, and in such case it must be demonstrated to the court by the captor that some unneutral service has been performed. This onus, I understand, is what the Crown failed to discharge in the case of *The Hanametal*, 1 B. & C., P. C. 347 (1914).

The fact that a neutral ship may carry refugees without being liable to capture does not imply the same power in an enemy ship, although given *une sorte de neutralisation* for the purpose of the "philanthropic mission" in question. To construe "philanthropic mission" as suggested might lead to serious consequences which clearly could not have been contemplated by the article, and it might enable an enemy vessel to escape to a neutral port under any similar professed act of philanthropy. If it were intended to cover such an act as the conveyance of non-combatants under such conditions to a neutral port, the Convention would not have left it in such vague and indefinite language; and some such system as safe conducts furnished in advance would presumably have been contemplated, as, I understand, has often been the custom in the case of expeditions dispatched for the purposes of science or religion, and in the case of cartel ships.

I may add that, assuming the blockade had existed at Tsingtau (which, I understand, in fact did not exist until August 27), no rule of law exists which obliges a besieging force to allow all non-combatants,

or only women, children, the aged, the sick and wounded, or subjects of neutral powers, to leave the besieged locality unmolested. Although such permission is sometimes granted, it is in most cases refused, because the fact that non-combatants are besieged together with combatants, and that they have to endure the same hardships, may, and very often does, exercise pressure upon the authorities to surrender. See Oppenheim's International Law, vol. 2, p. 193. This being the case, if the Convention ever contemplated such a "philanthropic mission," which in the case of a blockaded port would come directly in conflict with the custom I have stated, it would have provided for it in express and unequivocal language.

The decision I give is that the vessel was properly seized as a prize of war, and that she is subject to condemnation. There will be a decree of condemnation, the crown to receive such costs as have been occasioned by the claim.<sup>15</sup>

### THE AMELIA.

(United States District Court, E. D. Pennsylvania, 1861. 1 *Cadwalader's Cases*, 541 [1907].)

Claim of Mitchell King, of Charleston, South Carolina, for two cases of books marked "The University of North Carolina, Chapel Hill, North Carolina, care of Mitchell King, Esq., Charleston, South Carolina, Nos. 1 and 2," received and filed on the 14th instant, with the written consent of the district attorney of the United States. And the affidavit of John Penington, taken on the 16th instant, and this day filed, being read by consent, and the letter of the said claimant therein mentioned being put in evidence, and it appearing to the court that

<sup>15</sup> In the case of *Comte de Smet de Naeyer* (1916) *Entscheidungen des Oberprisengerichts in Berlin* [1918], 209, a training ship was held not to be exempt from capture for the reason stated in the following decision of the court:

"Nor can it finally be admitted that, as assumed by the lower instance, school ships belong to those ships that, according to article 4 of the Eleventh Convention of the Second Hague Conference are entrusted with scientific missions. As to whether this article 4, according to its purport, is to be interpreted rather in a wide than in a restricted sense, as the judge of first instance believes, need not here be discussed, because its text is clear and requires no special interpretation. It is evident that a school ship is not intended for scientific purposes. To be sure, for the thorough training of a ship officer and ship captain, a certain scientific basis is necessary, and it can not be gainsaid that at naval schools, instruction is imparted in scientific subjects, mathematics, astronomy. It may even be admitted that not research alone, but that also instruction is the object of science. But the latter only in so far as science as such is taught as a distinct and definite science as a whole, in all its branches, and in so far as it is of value for the preparation of scholars or as a preliminary study for one or the other of the learned professions. Seaman-ship is not a scholarly, but a practical profession. The naval school is not a school for the sciences, but a professional school. It can no more be said of such a school than of a mining school in which also a theoretical and, therefore, scientific basis is laid, that it concerns itself with scientific problems."

other parts of the said letter than are extracted in the said affidavit should be considered in forming an opinion as to the sufficiency of the authority conferred upon Mr. Penington to receive the said two cases of books, the said letter is filed of record. And the said claim having been considered upon the above mentioned papers, and upon the documents on board of the captured vessel.

CADWALADER, J.<sup>16</sup> Though this claimant, as the resident of a hostile district, would not be entitled to restitution of the subject of a commercial adventure in books, the purpose of the shipment in question gives to it a different character. The United States, in prosecuting hostilities for the restoration of their constitutional authority, are compelled incidentally to confiscate property captured at sea, of which the proceeds would otherwise increase the wealth of that district. But the United States are not at war with literature in that part of their territory. The case of the pictures of the Philadelphia Academy of Fine Arts, liberated by a British Colonial Prize Court in the war of 1812, the prior proceeding in France mentioned in the report of that case, and the French and other decisions upon cases of fishing vessels, are precedents for the decree which I am about to pronounce. Without any such precedents, I would have had no difficulty in liberating these books.

Whereupon it is ordered, adjudged and decreed that the said two cases of books be liberated from the custody of the marshal and delivered to the said John Penington. \* \* \*<sup>17</sup>

### THE OREL.

(Sasebo Prize Court, 1905. 2 Hurst & Bray's Russian and Japanese Prize Cas. 354 [1913].)

The hospital ship Orel is condemned.

#### Facts and Reasons.

The Orel, the hospital ship in this case, is a steamer belonging to the Russian volunteer fleet, and was formerly engaged in the carriage of passengers and cargo under the Russian merchant flag, with Odessa as her usual home port. After the outbreak of the Russo-Japanese

<sup>16</sup> Part of the opinion is omitted.

<sup>17</sup> In *The Paquete Habana*, 175 U. S., 677, 709, 20 Sup. Ct. 290, 44 L. Ed. 820 (1900), Mr. Justice Gray, delivering the opinion of the court, referred to *The Marquis de Somerueles*, and *The Amella*, supra, as authority for the following statement:

"By the practice of all civilized nations, vessels employed only for the purposes of discovery or science are considered as exempt from the contingencies of war, and therefore not subject to capture. It has been usual for the government sending out such an expedition to give notice to other powers; but it is not essential. 1 Kent, Com. 91, note; Halleck, c. 20, § 22; Calvo, § 2376; Hall, § 138."



war, she was chartered by the Russian Red Cross Society, for use as a hospital ship, on May 29, 1904. The Russian government requested the Japanese government through the French Minister in Japan that the exemptions stipulated in articles 1 to 5 of the Hague Convention No. 3, of July 29, 1899, for the adaption to maritime warfare of the principles of the Geneva Convention of August 22, 1864, should be allowed to the Orel. As the above request was agreed to by the Japanese government, she was equipped as a hospital ship at Toulon, and having obtained the certificate of the chief naval expert, the superintendent of the Forges et Chantiers at La Seyne, France, and the commission of the Russian government, she was attached to the Second Russian Pacific Squadron and joined it at Tangier, in French territory in Africa. In the course of her eastward voyage with the squadron, she followed and overtook the Malaya, a steamer attached to the fleet, on November 21, 1904, by order of the commander-in-chief, and communicated to her an order that she should keep within signal distance. On May 21, 1905, she received on board, by order of the commander-in-chief, Alex. Stewart, master of the British steamship Oldhamia,<sup>18</sup> which had been captured by the Oleg, a warship belonging to the squadron, and three others, with the object of carrying them to Vladivostock, although they were in good health. She was also instructed at Capetown or in its neighbourhood by a staff officer of the squadron to purchase 10,000 feet of conducting wire (2 millimetres in diameter) and 1,000 feet of conducting wire (1 millimetre in diameter), both well insulated. Moreover, when the Russian second and third Squadrons were proceeding towards the Straits of Tsushima in two or three columns, the Orel and the other hospital ship, the Kostroma, took up positions on either side of the leading warships of the squadrons, forming a triangle with the foremost men-of-war. She was ordered to stop by the Japanese man-of-war Sado Maru when 10 nautical miles west of Okino Shima, at 3:30 p. m. on May 27, 1905, while the battle was going on between the Russian squadrons and the Japanese fleet near Okino Shima, and was taken to Miura Bay, in the province of Tsushima, where she was captured as having taken part in military operations. \* \* \*

The conclusion of the court is as follows:

A hospital ship is only exempt from capture if she fulfils certain conditions and is engaged solely in the humane work of aiding the sick and wounded. That she is liable to capture, should she be used by the enemy for military purposes, is admitted by international law, and is clearly laid down by the stipulations of the Hague Convention No. 3 of July 29, 1899, for the adaptation to maritime warfare of the principles of the Geneva Convention of August 22, 1864.<sup>19</sup> Although the Orel had been lawfully equipped and due notification concerning

<sup>18</sup> See volume 1, *Russian Cases*, p. 145.

<sup>19</sup> *Blue Book (Misc.)* No. 1, 1899, p. 349.

her had been given by the Russian government to the Japanese government, yet her action in communicating the orders of the commander-in-chief of the Russian second Pacific squadron to other vessels during her eastward voyage with the squadron, and her attempt to carry persons in good health, i. e., the master and three other members of the crew of a British steamship captured by the Russian fleet, to Vladivostock, which is a naval port in enemy territory, were evidently acts in aid of the military operations of the enemy. Further, when the facts that she was instructed by the Russian squadron to purchase munitions of war, and that she occupied the position usually assigned to a ship engaged in reconnaissance, are taken in consideration, it is reasonable to assume that she was constantly employed for military purposes on behalf of the Russian squadron. She is, therefore, not entitled to the exemptions laid down in the Hague Convention for the adaptation to maritime warfare of the principles of the Geneva Convention,<sup>20</sup> and may be condemned according to International Law. \* \* \*<sup>21</sup>

### THE SANTA CRUZ.

(High Court of Admiralty, 1798. 1 C. Rob. 50.)

This was a case of a Portuguese vessel taken by the French, 1st of August, 1796, and retaken by English cruisers, on the 28th, after being a month in the possession of the enemy. \* \* \*

Sir W. SCOTT.<sup>22</sup> \* \* \* In the arguments of the counsel, I have heard much of the rules which the law of nations prescribes on recapture, respecting the time when property vests in the captor; and it certainly is a question of much curiosity, to inquire what is the true rule on this subject; when I say, the true rule, I mean only the rule to which civilized nations, attending to just principles, ought to adhere;<sup>23</sup> for the moment you admit, as admitted it must be, that the practice of nations is various, you admit there is no rule operating with the proper force and authority of a general law.

It may be fit there should be some rule, and it might be either the rule of immediate possession, or the rule of pernoctation and twenty-four hour possession; or it might be the rule of bringing *infra præsidia*;

<sup>20</sup> Blue Book (Misc.) No. 1, 1899, p. 349.

<sup>21</sup> In *The Ophelia*, L. R. [1916] 2 A. C. 206, 231 (1916), Sir Arthur Channell, delivering the opinion of the Privy Council, said:

"They [their Lordships] are of opinion that the President was fully justified in finding that the *Ophelia* was not constructed or adapted or used for the special and sole purpose of affording aid and relief to the wounded, sick, and shipwrecked, and that she was adapted and used as a signalling ship for military purposes. Their Lordships agree in that finding, which of course justifies the condemnation of the vessel as lawful prize. They will humbly advise His Majesty that the appeal should be dismissed with costs."

<sup>22</sup> Part of statement and parts of opinion are omitted.

<sup>23</sup> *The Flad Oyen*, 1 C. Rob. 135, 139 (1799).

or it might be a rule requiring an actual sentence of condemnation. **Either** of these rules might be sufficient for general practical convenience, although in theory, perhaps, one might appear more just than another; but the fact is, there is no such rule of practice; nations concur in principle indeed, so far as require firm and secure possession; but their rules of evidence respecting the possession are so discordant, and lead to such opposite conclusions, that the mere unity of principle forms no uniform rule to regulate the general practice. But were the public opinion of European States more distinctly agreed, on any principle, as fit to form the rule of the law of nations on this subject, it by no means follows that any one nation would lie under an obligation to observe it.

That obligation could arise only from a reciprocity of practice in other nations; for from the very circumstance of the prevalence of a different rule among other nations, it would become not only lawful, but necessary, to that one nation to pursue a different conduct; for instance, were there a rule prevailing among other nations, that the immediate possession, and the very act of capture, should divest the property from the first owner, it would be absurd in Great Britain to act towards them on a more extended principle; and to lay it down as a general rule, that a bringing *infra præsidia*, though probably the true rule, should in all cases of recapture be deemed necessary to divest the original proprietor of his right; for the effect of adhering to such a rule would be gross injustice to British subjects. \* \* \*

If I am asked, under the known diversity of practice on this subject, what is the proper rule for a state to apply to the recaptured property of its allies? I should answer, that the liberal and rational proceeding would be, to apply in the first instance the rule of that country to which the recaptured property belongs. \* \* \* If there should exist a country in which no rule prevails, the recapturing country must then of necessity apply its own rule, and rest on the presumption, that that rule will be adopted and administered in the future practice of its allies. \* \* \* I understand it to be clearly this: That the maritime law of England, having adopted a most liberal rule of restitution on salvage, with respect to the recaptured property of its own subjects, gives the benefit of that rule to its allies, till it appears that they act towards British property on a less liberal principle. In such a case it adopts their rule, and treats them according to their own measure of justice. \* \* \*

## THE CARLOTTA.

(High Court of Admiralty, 1808. 5 C. Rob. 54.)

This was a question of salvage, on the recapture of a Spanish ship and cargo from a French cruiser. It appeared that the vessel was originally destined on a voyage from Montevideo to London, with some property on board belonging to British merchants; that in the course of this voyage, she had been seized by a British cruiser, who was bringing her to the port of London, when she was met and captured by a French privateer, and was afterwards recaptured, and brought to Jersey. \* \* \*

Sir W. SCOTT. The question now to be decided is, whether salvage is due on the neutral property in this ship, which has been recaptured out of the possession of the enemy. It certainly has not been the practice of this court to decree salvage under such circumstances generally; but, in consequence of the violent conduct of France during the last war, it was thought not unreasonable on the part of neutral merchants themselves, that salvage should be allowed. The conduct of the French nation, in the course of their warfare on land, during the present war, has unquestionably been as rapacious, and as little restrained by any regard to the rights of neutral nations, as it could possibly have been during any part of the last war. What the proceedings of the maritime courts of that country have been during the present war, I am not correctly informed; from the little which I have been able to collect, I am rather induced to believe, that they have been conducted with more regularity, and with a disposition more inclined to return to the established principles of justice, on which the prize system of ancient France, in common with that of the other maritime countries of Europe, was built.

I am, therefore, not disposed to hold generally that neutral property recaptured from French cruisers shall be subject to salvage. The rule, so far as it can be considered a general rule, is rather to be laid down the other way. At the same time, if any edict can be appealed to or any fact established, by which it can be shown that the property would have been exposed to condemnation in the courts of France, I shall hold that to be sufficient ground to induce me to pronounce for salvage in that particular case. With regard to the precedent of the *Jonge Lambert*, 5 C. Rob. 55, note, I think I am warranted to consider the authority of that case as in a great measure done away by the subsequent decision of the Lords in the late war, in which they have repeatedly pronounced for salvage on the recapture of neutral property. In departing from the old rule they have in some degree disclaimed the principle; and, I think, with great propriety, as far as it could be considered as an universal principle, governing the practice of our prize courts in all possible cases, without any possible exception. In the present instance there does not appear to me to be any grounds on

which it can be supposed that this property would have been condemned, merely because it came out of the hands of a British privateer, or because the original voyage had been from the colony of Spain to London. No edict has been produced from the French Code to show that this property would have been subject to any such penalty on either of those accounts, in the prize courts of France. The expenses of the recaptors must be fully paid; but I shall not pronounce salvage to be due.<sup>25</sup>

### THE MARY FORD.

(Supreme Court of the United States, 1796. 8 Dall. 188, 1 L. Ed. 568, Fed. Cas. No. 9,212a.)

The Mary Ford was a British vessel, captured in 1790 by a French squadron and abandoned at sea. The George, an American vessel, took possession of the Mary Ford, and brought it into Boston harbor, to save the ship and cargo, and then libelled it for salvage in the District Court. From a judgment in favor of the libellants, an appeal was taken to the Supreme Court.<sup>26</sup>

By THE COURT. We are unanimously of opinion, that the District Court had jurisdiction upon the subject of salvage; and that, consequently, they must have a power of determining to whom the residue of the property ought to be delivered.

In determining the question of property, we think that, immediately on the capture, the captors acquired such a right, as no neutral nation could justly impugn or destroy; and, consequently, we cannot say that the abandonment of the Mary Ford, under the circumstances of this case, revived and restored the interest of the original British proprietors.

Some doubts have been entertained by the court, whether on the principles of an abandonment by the French possessors, the whole

<sup>25</sup> See the recent case of *The Pontoporos*, 2 British and Colonial Prize Cas., 87 (1916), in which Sir Samuel Evans stated, according to the headnote, that:

"The general practice not to decree salvage for the recapture of neutral ships is subject to exceptions. The presumption that a neutral ship captured by a belligerent incurs no peril is displaced where the state to which the original captor belongs has sullied its character by gross violations of the law of nations or has promulgated decrees of condemnation, however unjust, on which the tribunals of the country are enjoined to act, and of which there is every reason to suppose that they will be carried into execution. The reasoning on which the general rule has been founded is then done away with, the peril is obvious, the case becomes simply that of meritorious rescue from the danger of condemnation or destruction, and salvage will be awarded."

For an account of the laws of the different countries on the subject of recapture and salvage, see Dana's edition of *Wheaton's Elements of International Law*, p. 466 et seq. (1866). See also United States Rev. St. § 4652 (U. S. Comp. St. § 8426), and the English Prize Act of 27 & 28 Vict. c. 25, § 40.

<sup>26</sup> A shortened statement has been substituted for that of the original report.

property ought not to have been decreed to the American libellants, or, at least, a greater portion of it by way of salvage; but as they have not appealed from the decision of the inferior court, we cannot now take notice of their interest in the cause.

Upon the whole, let the decree be affirmed.<sup>27</sup>

<sup>27</sup> In *Hopner v. Appleby*, 5 Mason, 71, 75, Fed. Cas. No. 6,699 (1823), Mr. Justice Story said:

"The possession of the captors is to be deemed a possession *bonae fidei* and inviolable; and as was said by the Supreme Court in the case of *The Mary Ford*, 3 Dall. 188, 198, 1 L. Ed. 563, Fed. Cas. No. 9,212a, immediately upon the capture the captors acquire such a right as no neutral nation can justly impugn or destroy. *The Josefa Segunda*, 5 Wheat. 338, 357, 5 L. Ed. 104 (1820)."

And in *Booth v. L'Esperanza*, Bee, 93, 3 Fed. Cas. 885 (1798), Bee, J., held, citing *The Mary Ford*, supra, that a vessel in distress, met with at sea, and brought into the port of a neutral power, must be restored, after payment of salvage to those who were in possession of her when she was met.

And in *L'Invincible*, 1 Wheat. 238, 258, 4 L. Ed. 80 (1816), Mr. Justice Johnson cites and explains the case in the text, holding that the courts of this country have no jurisdiction to redress any supposed torts committed on the high seas upon the property of its citizens by a cruiser regularly commissioned by a foreign and friendly power, except where such cruiser has been fitted out in violation of our neutrality.

In 1799, the American brig *Experience* was taken with two other vessels, by a British cruiser, recovered by its crew, and brought to Philadelphia. The British Government demanded her restored, in reply to which, on May 3, 1800, Secretary of State Pickering referred the British Minister to the Admiralty Courts of the United States. This was when Great Britain was at war, and the United States neutral. *Diplomatic Correspondence of the United States*, 149 (1862); Lawrence's edition of Wheaton's *Elements of International Law*, 666, note (1863); 4 Moore's *International Law Digest*, 416 (1906); 7 Id. 501.

During the Civil War, the situation was reversed. The United States being at war with the Southern States, and Great Britain neutral, the *Emily St. Pierre*, a British vessel, was captured, in 1862, by the United States blockading squadron, in the act of breaking the blockade of Charleston, South Carolina. It was ordered to Philadelphia for adjudication, in charge of a prize crew. The original crew regaining possession, it is said, by fraud and force, took the vessel to Liverpool and restored it to its owners. Mr. Charles Francis Adams, the American Minister, demanded its return. It was not returned. Lawrence's *Wheaton*, 667, note; 1 Moore's *Treatise on Extradition and Interstate Rendition*, 596 (1891).

The *Lone* entered the port of Matamoras, blockaded by a French squadron in 1838, and, leaving Matamoras, sailed for New Orleans. On the voyage thither, she was taken by a French cruiser, but some days thereafter was rescued by her captain and brought into New Orleans. Upon a demand made by the French government to the President for the return of the *Lone* to the French captors, Attorney General Grundy advised the President that he had no power to grant the demand; that the question was a judicial one, to be settled by the courts, not by the Executive, and that the claimants should resort to the courts, and there prosecute their claims. The Attorney General also advised the President that the liability for condemnation entirely ceases when the vessel has terminated its voyage in safety. 8 *Opinions of the Attorneys General*, 377; 4 Moore's *International Law Digest*, 416.

## THE BRUSSELS.

(Prize Court of Belgium, 1919. *Moniteur Belge*, November 6, 1919, 5804; Translation 16 *American Journal of International Law* [1922] 127.)

In case No. 46, S. S. Brussels, the Council renders the following decision:

In view of the introductory petition presented by the Commissioner of the Government requesting that the capture of the steamer Brussels, of about 1380 tons, formerly belonging to the Great Eastern Railway Company, whose offices are at Harwich, be declared effective and valid for the benefit of the Belgian state;

In view of the other documents incorporated into the pleadings;

Having heard the Commissioner of the Government Van Ginder-taelen in his reasons and motions:

Whereas, the steamer Brussels, flying the English flag and commanded by the late Captain Fryatt, was captured on the high seas by the German naval forces and taken to Zeebrugge;

Whereas, it was declared a legal prize by the decision of the Prize Court of Hamburg on November 15, 1916, confirmed by the Superior Prize Court at Berlin on July 29, 1917;

Whereas, it follows therefrom that the ship had become German property and that, according to the principles of the law of nations, it was subject to seizure when, in the month of October, 1918, the victorious Belgian troops captured it in the port of Zeebrugge, where it was sunk by the enemy;

Whereas, no objection could be made that, forming the subject of the recapture of an allied ship, this ship should, according to international customs, have been restored to its former owner;

Whereas, in the first place, there does not exist any general usage, and even to a less degree any written international rule, binding the recaptor to restitution in such a case;

Whereas, the Hague Convention is silent on this subject;

Whereas, as the judgments of this court, dated October 17, 1919, in the case of the S. S. Midsland and Gelderland, declared, England herself has never admitted the restitution of an allied or neutral ship recovered from the enemy, except under the condition of reciprocity;

Whereas, in fact, no treaty of reciprocity exists on this subject between Great Britain and Belgium;

But, whereas, moreover, as appears from the same decisions, the recapture or recovery, with the rights and obligations which certain publicists of international law attach thereto, is possible only if no judgment validating the original prize has been rendered;

Whereas, in case of the existence of such a judgment, we are dealing with a new prize which is governed with respect to all neutrals as well as allies, by the ordinary rules, and which admits of no restriction upon the absolute rights of the captor;

Whereas, moreover, in every prize case there is a governmental phase in which the captor state may decide it opportune to act in a spirit of generosity toward an allied or neutral power, and a contentious phase such as that in the present instance, in which the Prize Court vested with the litigation by the government of the captor state, has only to decide whether the prize was legitimately made according to the rules of international law;

Whereas, regardless of the regret that a Belgian prize court may feel in being compelled to retain an allied ship which has distinguished itself in the struggle against the common enemy, it could not, in the given case, allow itself to be guided by any other principles than those of the law tempered according to the circumstances by justice, without deviating from its course of duty;

And, whereas, even if no judgment had been pronounced validating the German prize or if that prize were considered as not having been validly adjudged by the competent tribunal, the Belgian state would, not in any less degree have derived as a result of the acts of the German authorities with regard to the ship a title to the prize in the juridical sense of the term, than it would have done later;

Whereas, in fact as was found in the aforementioned judgments in the case of the *Midsland* and the *Gelderland*, the *Brussels* was sunk by the German naval authorities somewhat to the right and a little to this side of the head of the mole of Zeebrugge, that is with the manifest object of obstructing the passage to the sea;

Whereas, moreover, the aforementioned authorities have caused twelve other ships to be sunk, either in the channel of approach to the sluice or in the floating docks of the ports of Bruges;

Whereas, all these operations formed an indivisible and systematically concerted unit with the double intention of bottling up the ports of Bruges, already obstructed as a result of the heroic act of war of the British navy, and of hindering the Allied Powers from taking possession of these ships in order to use them for the transportation of troops, and material of war, or of provisions for the use of their army;

Whereas, the German authorities have thus acted for a clearly determined military and defensive object;

Whereas, in sinking the *Brussels* under the aforementioned conditions and after a detention of more than one year, these authorities have committed with regard to the ship an act of appropriation *jure belli*, characterized and definitive in such a way that with regard to the hostile belligerent, the Belgian state, which has captured the ship subsequently, this ship can and should be considered for this very reason as an enemy ship and of such a nature as to form a basis for the intrinsic right of the captor;

Whereas, only an eventual right to indemnity for the benefit of the injured private individual and against the German state by reason



of such destruction, committed in the absence of any case of actual force majeure, is in order;

For these reasons:

THE COUNCIL, having heard the Commissioner of the Government, Van Gindertaelen, in his pertinent motions and rendering judgment in the absence of all other interested parties, declares the capture of the steamer *Brussels* effective and valid for the benefit of the Belgian state, and decrees, consequently, that this steamer shall belong in its totality to the latter. Expenses as in law.<sup>28</sup>

<sup>28</sup> During the World War (1914-18) Germany denied the right of an enemy merchant vessel to defend itself against capture. The most famous instance was the case of Captain Fryatt, commander of *The Brussels*. The facts are thus stated by a competent German authority:

"On July 27, 1916, a military court of the Marine Corps in Bruges pronounced the following sentence against the English Captain, Charles Fryatt: 'The accused is guilty of having undertaken, although not belonging to the military force of the enemy, to assist the hostile power and to injure the German military force, and he is therefore condemned to death, according to the customs of war. On March 28, 1915, while in command of the English merchantman *Brussels*, the accused endeavored to destroy by ramming a German submarine on the high seas.' The sentence was confirmed on the same day by the President of the Court of the Marine Corps and carried out by military execution at seven o'clock in the evening." Walter Jellinek, *Ueber die landesrechtliche Seite des Falles Fryatt*, *Archiv des öffentlichen Rechts*, vol. 39, p. 241 (1919).

The case of *The Brussels* should be considered in connection with Chapter XVIII, Section 8, Effect of Prize Decisions, post, p. 1069.

## CHAPTER XII

### DESTRUCTION OF PRIZE <sup>1</sup>

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#### SECTION 1.—ENEMY.

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#### THE ACTEON.

(High Court of Admiralty, 1815. 2 Dod. 48.)

This was the case of an American ship, which, on the 24th of January, 1813, sailed from Norfolk, in Virginia, to the port of Cadiz, laden with a cargo of about 4,200 barrels of flour, which had been shipped under a British <sup>2</sup> license, dated the 13th of August, 1812, and was to be in force for nine months from the time of its date. On the 27th of February, the vessel arrived at Cadiz; and the master having delivered his cargo, produced the license under which he had sailed to the British minister resident at that place, who granted him a further license, permitting him to ship a cargo of lawful merchandise, and to return with it to any port in the United States of America. The master having taken on board a few boxes of fruit, four quarter casks of wine, and some other trifling articles, set sail on the first of April, bound to Boston, in America. In the course of his voyage, he was boarded by several British ships, the commanders of which examined his license and permitted him to proceed on his voyage, which he accordingly did until about noon of the 12th of May, when he was captured by his Majesty's ship *La Hogue*, commanded by the honor-

<sup>1</sup> See "The Destruction of Merchant Ships under International Law" (1917), an admirable monograph by Sir Frederick Smith, then Attorney General, and later Viscount Birkenhead, Lord High Chancellor of Great Britain.

<sup>2</sup> In the year 1812, the British government, being very desirous that the port of Cadiz should receive a constant supply of American flour, granted numerous licenses, authorizing any vessels, except French vessels, being unarmed, and not less than 100 tons burden, and bearing any flag, except that of France, to import into Cadiz, from any port of the United States of America, cargoes of grain, meal, flour, or rice, without molestation on account of any hostilities which might exist between his Majesty and the United States, notwithstanding such ships and cargoes might be the property of any American citizens, and to whomsoever the same might belong, and to receive their freight, and to return to any port not blockaded, upon condition that the names and tonnage of the vessels, and the names of the masters should be indorsed on such licenses at the time of the vessels clearing from their ports of lading; and such licenses were to be in force for nine months from the time of their date. These licenses were transmitted from this country, by the various merchants, brokers, or agents who applied for them, to the United States of America, where they were disposed of, and used as occasions might require.

able Captain Capel, who, on the evening of the same day, set fire to the vessel and destroyed it.

A claim was given for the ship and cargo, as the property of citizens of the United States of America, protected by licenses granted by his Majesty's government, and by his excellency the minister plenipotentiary of Great Britain at the court of Spain; and, at the instance of the claimant, a monition was issued, calling upon the captors to proceed to the legal adjudication of the ship and cargo. An appearance was given under protest for the captor, and the case now came on for hearing. It was understood that the captors did not contend against a sentence of restitution, but objected to the payment of costs and damages. \* \* \*

Sir W. SCOTT. This question arises on the act of destruction of a valuable ship and cargo by one of his Majesty's cruisers. On the part of the claimants, restitution has been demanded, and there can be no doubt that they are entitled to receive it; indeed, I understand that it is not now opposed by the captor himself; but it remains to be settled what is to be the measure of restitution—how far it is to be carried. The natural rule is, that if a party be unjustly deprived of his property, he ought to be put as nearly as possible in the same state as he was before the deprivation took place; technically speaking, he is entitled to restitution, with costs and damages. This is the general rule upon the subject, but, like all other general rules, it must be subject to modification. If, for instance, any circumstances appear which show that the suffering party has himself furnished occasion for the capture, if he has by his own conduct in some degree contributed to the loss, then he is entitled to a somewhat less degree of compensation, to what is technically called simple restitution.

This is the general rule of law applicable to cases of this description, and the modification to which it is subject. Neither does it make any difference whether the party inflicting the injury has acted from improper motives or otherwise. If the captor has been guilty of no willful misconduct, but has acted from error and mistake only, the suffering party is still entitled to full compensation, provided, as I before observed, he has not, by any conduct of his own, contributed to the loss.<sup>3</sup> The destruction of the property by the captor may have been a meritorious act towards his own government, but still the person to whom the property belongs must not be a sufferer. As to him, it is an injury for which he is entitled to redress from the party who has inflicted it upon him; and if the captor has, by the act of destruction, conferred a benefit on the public, he must look to the government for his indemnity. The loss must not be permitted to fall on the innocent sufferer.

This American vessel, having been invited into the service by the government of this country, had carried a cargo of corn to the port of

<sup>3</sup> *The Felicity*, 2 Dod. 381 (1819).

Cadiz, for the use of the army, which at that time stood greatly in need of a supply. It is true that the license which had been here granted in the usual manner had afterwards been purchased for money in America, but I do not see what difference that can make in the consideration of this case; for if the license was general, which it appears to have been, it could be of no consequence who were the individuals who acted under it, provided they complied with the conditions annexed to it. There is nothing whatever to show that the parties acted otherwise than in strict conformity to the spirit and letter of the original license, signed by the secretary of state in London, and I must presume that they did so from the circumstance of their obtaining permission from the British minister in Spain to carry back a cargo to America.

Let us now look a little to what has been said in justification of the capture and destruction of this vessel. Why, it is said in the first place, that Captain Capel found the transfer of these licenses from one vessel to another rendered such cases suspicious, and made it necessary for him to use great vigilance in detecting them; but that did not at all impose upon him a necessity of destroying the vessels which were furnished with them. It is said, that the master acknowledged he had bought the license, but supposing the fact to be that he had done so, that alone would not render the transaction illegal; neither could the circumstance of the expiration of the time for which the license was granted have had any such effect, even supposing the fact to have been so, which it was not. It has been urged, too, that there were letters on board to America from the officers of Commodore Rodgers' squadron. What were the contents of those letters does not at all appear; but, in the absence of all proof to the contrary, I must presume that they were of an innocent kind, and addressed to private individuals, for if they had been of a public nature and of a dangerous tendency, I can have no doubt that they would have been preserved by Captain Capel, and exhibited in this cause.

Lastly, it has been said that Captain Capel could not spare men from his own ship to carry the captured vessel to a British port, and that he could not suffer her to go into Boston because she would have furnished important information to the Americans. These are circumstances which may have afforded very good reasons for destroying this vessel, and may have made it a very meritorious act in Captain Capel, as far as his own government is concerned, but they furnish no reason why the American owner should be a sufferer. I do not see that there is any thing that can fairly be imputed to the owner as contributing in any degree to the necessity of capturing or destroying his property, and I think, therefore, that he is entitled to receive the fullest compensation from the captor. It does not appear that Captain Capel is chargeable with having acted from any corrupt or malicious motive, and if, as I believe to have been the case, he has acted from a sense of duty and of obedience to the orders he received, I can have no doubt

that he will be indemnified upon a proper representation being made to the government. But this will not affect the right of the American claimant, whom I must pronounce to be entitled to restitution, with costs and damages, and I beg it may be understood that I do so without meaning in the slightest degree to throw any imputation on the conduct and character of Captain Capel, but merely for the purpose of giving a due measure of restitution to the claimant.<sup>4</sup>

<sup>4</sup> In the case of *The Leucade*, Spinks' Prize Cas. 217, 223 (1855), *The Acteon* was cited by counsel.

Dr. Lushington, in considering it, said: "That case I perfectly well remember having argued, and I have had recourse to the original papers to see whether my memory failed me or not." Therefore, in the case decided by Sir William Scott, and as his successor, he thus gave the weight of his own authority to the views of that great judge:

"We must bear in mind the wide difference between the detention of a vessel under the colours of the enemy, or under neutral flags. The destruction of a vessel under hostile colours is a matter of duty; the court may condemn on proof which would be inadmissible or wholly irregular in the instance of a neutral vessel. It may be justifiable or even praiseworthy in the captors to destroy an enemy's vessel. Indeed, the bringing to adjudication at all of an enemy's vessel is not called for by any respect to the right of the enemy proprietor, where there is no neutral property on board. But for totally different considerations, which I need not now enter upon, where a vessel under neutral colours is detained, it is the right of the neutral to be brought to adjudication, according to the regular course of proceeding in the Prize Court; and it is the very first duty of the captor to bring it in if it be practicable. From the performance of this duty the captor can be exonerated only by showing that he was a bona fide possessor, and that it was impossible for him to discharge it. No excuse for him as to inconvenience or difficulty can be admitted as between captors and claimants. If the ship be lost, that fact alone is no answer; the captor must show a valid cause for detention as well as the loss. If the ship be destroyed for reasons of policy alone, as to maintain a blockade or otherwise, the claimant is entitled to costs and damages. The general rule, therefore, is, that if a ship under neutral colours be not brought to a competent Court for adjudication, the claimants are, as against the captor, entitled to costs and damages. Indeed, if the captor doubt his power to bring a neutral vessel to adjudication, it is his duty, under ordinary circumstances, to release her." *The Leucade*, Id. 221, 222 (1855).

*The Felicity*, 2 Dodson 381, 386, 387 (1819), was an American ship captured by the British man-of-war *Endymion* on January 1, 1814, during the war between Great Britain and the United States. *The Felicity* was destroyed, as stated in the report, "after her captain and crew, with their baggage, were removed on board *The Endymion*." The British man-of-war was watching an American ship of war, *The President*, "with intent to encounter her," and the commander of *The Endymion* felt that he could not spare any of his crew to carry *The Felicity* into a British port. After stating at length these circumstances, Sir William Scott held that:

"Under this collision of duties nothing was left but to destroy her, for they could not, consistently with their general duty to their own country, or indeed its express injunctions, permit enemy's property to sail away unmolested. If impossible to bring in, their next duty is to destroy enemy's property. Where doubtful whether enemy's property, and impossible to bring in, no such obligation arises, and the safe and proper course is to dismiss. Where it is neutral, the act of destruction cannot be justified to the neutral owner, by the gravest importance of such an act to the public service of the captor's own state; to the neutral it can only be justified, under any such circumstances, by a full restitution in value. These are rules so clear in principle and established in practice, that they require neither reasoning nor precedent to illustrate or support them."

## THE LUSITANIA.

(District Court of the United States, S. D. New York, 1918. 251 Fed. 715.)

In Admiralty. In the matter of the petition of the Cunard Steamship Company, Limited, as owner of the steamship Lusitania, for limitation of its liability. Petition granted, and claims dismissed, without costs.

MAYER, District Judge.\* On May 1, 1915, the British passenger carrying merchantman Lusitania sailed from New York, bound for Liverpool, with 1,257 passengers and a crew of 702, making a total of 1,959 souls on board, men, women, and children. At approximately 2:10 on the afternoon of May 7, 1915, weather clear and sea smooth, without warning, the vessel was torpedoed and went down by the head in about 18 minutes, with an ultimate tragic loss of life of 1,195. Numerous suits having been begun against the Cunard Steamship Company, Limited, the owner of the vessel, this proceeding was brought in familiar form, by the steamship company, as petitioner, to obtain an adjudication as to liability, and to limit petitioner's liability to its interest in the vessel and her pending freight, should the court find any liability. \* \* \*

So far as equipment went, the vessel was seaworthy in the highest sense. \* \* \* The proof is absolute that she was not and never had been armed, nor did she carry any explosives. She did carry some 18 fuse cases and 125 shrapnel cases, consisting merely of empty shells, without any powder charge, 4,200 cases of safety cartridges, and 189 cases of infantry equipment, such as leather fittings, pouches, and the like. All these were for delivery abroad, but none of these munitions could be exploded by setting them on fire in mass or in bulk, nor by subjecting them to impact. \* \* \*

Having thus outlined the personnel, equipment, and cargo of the vessel, reference will now be made to a series of events preceding her sailing on May 1, 1915. On February 4, 1915, the Imperial German government issued a proclamation as follows:

"Proclamation.

"1. The waters surrounding Great Britain and Ireland, including the whole English Channel, are hereby declared to be war zone. On and after the 18th of February, 1915, every enemy merchant ship, found in the said war zone will be destroyed without its being always possible to avert the dangers threatening the crews and passengers on that account.

"2. Even neutral ships are exposed to danger in the war zone, as in view of the misuse of neutral flags ordered on January 31 by the British government, and of the accidents of naval war, it cannot always be avoided to strike even neutral ships in attacks that are directed at enemy ships.

\* Parts of the opinion are omitted.

"3. Northward navigation around the Shetland Islands, in the eastern waters of the North Sea, and in a strip of not less than 30 miles width along the Netherlands coast is in no danger.

"Von Pohl,

"Chief of the Admiral Staff of the Navy.

"Berlin, February 4, 1915."

This was accompanied by a so-called memorial, setting forth the reasons advanced by the German government in support of the issuance of this proclamation, an extract from which is as follows:

"Just as England declared the whole North Sea between Scotland and Norway to be comprised within the seat of war, so does Germany now declare the waters surrounding Great Britain and Ireland, including the whole English Channel, to be comprised within the seat of war, and will prevent by all the military means at its disposal all navigation by the enemy in those waters. To this end it will endeavor to destroy, after February 18 next, any merchant vessels of the enemy which present themselves at the seat of war above indicated, although it may not always be possible to avert the dangers which may menace persons and merchandise. Neutral powers are accordingly forewarned not to continue to intrust their crews, passengers or merchandise to such vessels."

To this proclamation and memorial the government of the United States made due protest under date of February 10, 1915. On the same day protest was made to England by this government regarding the use of the American flag by the Lusitania on its voyage through the war zone on its trip from New York to Liverpool of January 30, 1915, in response to which, on February 19, Sir Edward Grey, Secretary of State for Foreign Affairs, handed a memorandum to Mr. Page, the American Ambassador to England, containing the following statement:

"It was understood that the German government had announced their intention of sinking British merchant vessels at sight by torpedoes, without giving any opportunity of making any provisions for saving the lives of non-combatant crews and passengers. It was in consequence of this threat that the Lusitania raised the United States flag on her inward voyage and on her subsequent outward voyage. A request was made by the United States passengers who were embarking on board her that the United States flag should be hoisted, presumably to insure their safety." \* \* \*

Beginning with the 30th of January, 1915, and prior to the sinking of the Lusitania on May 7, 1915, German submarines attacked and seemed to have sunk 20 merchant and passenger ships within about 100 miles of the usual course of the Lusitania, chased 2 other vessels, which escaped, and damaged still another.

It will be noted that nothing is stated in the German memorandum, supra, as to sinking enemy merchant vessels without warning, but, on

the contrary, the implication is that settled international law as to visit and search, and an opportunity for the lives of passengers to be safeguarded, will be obeyed, "although it may not always be possible to avert the dangers which may menace persons and merchandise."

\* \* \*

On Saturday, May 1, 1915, the advertised sailing date of the *Lusitania* from New York to Liverpool on the voyage on which she was subsequently sunk, there appeared the following advertisement in the New York Times, New York Tribune, New York Sun, New York Herald, and New York World; this advertisement being, in all instances except one, placed directly over, under, or adjacent to the advertisement of the Cunard Line regarding the sailing of the *Lusitania*:

"Travelers intending to embark on the Atlantic voyage are reminded that a state of war exists between Germany and her allies and Great Britain and her allies. That the zone of war includes the waters adjacent to the British Isles. That in accordance with formal notice given by the Imperial German government vessels flying the flag of Great Britain or of any of her allies are liable to destruction in those waters and that travelers sailing in the war zone on ships of Great Britain or her allies do so at their own risk.

"April 22, 1915.

Imperial German Embassy,

"Washington, D. C."

This was the first insertion of this advertisement, although it was dated more than a week prior to its publication. \* \* \*

No transatlantic passenger liner, and certainly none carrying American citizens, had been torpedoed up to that time. The submarines, therefore, could lay their plans with facility to destroy the vessel somewhere on the way from Fastnet to Liverpool, knowing full well the easy prey which would be afforded by an unarmed, unconvoyed, well-known merchantman, which, from every standpoint of international law, had the right to expect a warning before its peaceful passengers were sent to their death. \* \* \*

I find, therefore, as a fact, that the captain, and, hence, the petitioner, were not negligent. The importance of the cause, however, justifies the statement of another ground which effectually disposes of any question of liability.

It is an elementary principle of law that even if a person is negligent, recovery cannot be had, unless the negligence is the proximate cause of a loss or damage.

There is another rule, settled by ample authority, viz. that, even if negligence is shown, it cannot be the proximate cause of the loss or damage, if an independent illegal act of a third party intervenes to cause the loss. \* \* \* The question, then, is whether the act of the German submarine commander was an illegal act.

The United States courts recognize the binding force of international law. As was said by Mr. Justice Gray in *The Paquete Habana*, 175 U.



S. 677, 700, 20 Sup. Ct. 290, 299, 44 L. Ed. 320: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."

At least, since as early as June 5, 1793, in the letter of Mr. Jefferson, Secretary of State, to the French minister, our government has recognized the law of nations as an "integral part" of the laws of the land. Moore's International Law Digest, I, p. 10; *The Scotia*, 14 Wall. 170, 187, 20 L. Ed. 822; *The New York*, 175 U. S. 187, 197, 20 Sup. Ct. 290, 44 L. Ed. 126; *Kansas v. Colorado*, 185 U. S. 125, 146, 22 Sup. Ct. 552, 46 L. Ed. 838; *Kansas v. Colorado*, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956. To ascertain international law: "Resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of commentators and jurists. \* \* \* Such works are resorted to by judicial tribunals \* \* \* for trustworthy evidence of what the law really is." *The Paquete Habana*, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320 (and authorities cited).

Let us first see the position of our government, and then ascertain whether that position has authoritative support. Mr. Lansing, in his official communication to the German government, dated June 9, 1915, stated: "But the sinking of passenger ships involves principles of humanity which throw into the background any special circumstances of detail that may be thought to affect the cases—principles which lift it, as the Imperial German government will no doubt be quick to recognize and acknowledge, out of the class of ordinary subjects of diplomatic discussion or of international controversy. Whatever be the other facts regarding the *Lusitania*, the principal fact is that a great steamer, primarily and chiefly a conveyance for passengers, and carrying more than a thousand souls, who had no part or lot in the conduct of the war, was torpedoed and sunk without so much as a challenge or a warning, and that men, women, and children were sent to their death in circumstances unparalleled in modern warfare. The fact that more than one hundred American citizens were among those who perished made it the duty of the government of the United States to speak of these things, and once more, with solemn emphasis, to call the attention of the Imperial German government to the grave responsibility which the government of the United States conceives that it has incurred in this tragic occurrence, and to the indisputable principle upon which that responsibility rests. The government of the United States is contending for something much greater than mere rights of property or privileges of commerce. It is contending for nothing less high and sacred than the rights of humanity, which every government honors itself in respecting, and which no government is justified in resigning on behalf of those under its care and authority. Only her actual resistance to capture, or refusal to stop when ordered to do so for the purpose of visit, could have afforded the commander of the submarine any justi-

fication for so much as putting the lives of those on board the ship in jeopardy. This principle the government of the United States understands the explicit instructions issued on August 3, 1914, by the Imperial German Admiralty to its commanders at sea, to have recognized and embodied, as do the naval codes of all other nations, and upon it every traveler and seaman had a right to depend. It is upon this principle of humanity, as well as upon the law founded upon this principle, that the United States must stand. \* \* \* The government of the United States cannot admit that the proclamation of a war zone from which neutral ships have been warned to keep away may be made to operate as in any degree an abbreviation of the rights either of American shipmasters or of American citizens bound on lawful errands as passengers on merchant ships of belligerent nationality. It does not understand the Imperial German government to question those rights. It understands it, also, to accept as established beyond question the principle that the lives of non-combatants cannot lawfully or rightfully be put in jeopardy by the capture or destruction of an unresisting merchantman, and to recognize the obligation to take sufficient precaution to ascertain whether a suspected merchantman is in fact of belligerent nationality, or is in fact carrying contraband of war under a neutral flag. The government of the United States, therefore, deems it reasonable to expect that the Imperial German government will adopt the measures necessary to put these principles into practice in respect of the safeguarding of American lives and American ships, and asks for assurances that this will be done." White Book of Department of State, entitled "Diplomatic Correspondence with Belligerent Governments Relating to Neutral Rights and Duties, European War No. 2," at page 172. Printed and distributed October 21, 1915.

The German government found itself compelled ultimately to recognize the principle insisted upon by the government of the United States, for, after considerable correspondence, and on May 4, 1916 (after the *Sussex* had been sunk), the German government stated: "The German submarine forces have had, in fact, orders to conduct submarine warfare in accordance with the general principles of visit and search and destruction of merchant vessels as recognized by international law; the sole exception being the conduct of warfare against the enemy trade carried on enemy freight ships that are encountered in the war zone surrounding Great Britain. \* \* \* The German government, guided by this idea, notifies the government of the United States that the German naval forces have received the following orders: In accordance with the general principles of visit and search and destruction of merchant vessels recognized by international law, such vessels, both within and without the area declared as naval war zone, shall not be sunk without warning and without saving human lives, unless these ships attempt to escape or offer resistance." See Official Communication by German Foreign Office to Ambassador Gerard, May 4, 1916 (White Book No. 3 of Department of State, pp. 302, 305).

There is, of course, no doubt as to the right to make prize of an enemy ship on the high seas, and, under certain conditions, to destroy her, and equally no doubt of the obligation to safeguard the lives of all persons aboard, whether passengers or crew. Phillimore on International Law (3d Ed.) vol. 3, p. 584; Sir Sherston Baker on First Steps in International Law, p. 236; G. B. Davis on Elements of International Law, pp. 358, 359; A. Pearce Higgins on War and the Private Citizen, pp. 33, 78, referring to proceedings of Institute of International Law at Turin in 1882; Creasy on International Law, p. 562, quoting Chief Justice Cockburn in his judgment in the Geneva Arbitration; L. A. Atherby-Jones on Commerce in War, p. 529; Professor Holland's article, Naval War College, 1907, p. 82; Oppenheim on International Law (2d Ed.) vol. 2, pp. 244, 311; Taylor on International Law, p. 572; Westlake on International Law (2d Ed.) p. 309, part II; Halleck on International Law, vol. 2, pp. 15, 16; Vattel's Law of Nations (Chitty's Ed.) 362. \* \* \*

In addition to the authorities supra are the regulations and practices of various governments. In 1512, Henry VIII issued instructions to the Admiral of the Fleet which accord with our understanding of modern international law. Hosack's Law of Nations, p. 168. Such has been England's course since. 22 Geo. II, c. 33, § 2, subsec. 9 (1749); British Admiralty Manual of Prize Law 188, §§ 303, 304.

Substantially the same rules were followed in the Russian and Japanese regulations, and probably in the codes or rules of many other nations. Russian Prize Regulations, March 27, 1895 (cited in Moore's Digest, vol. 7, p. 518); Japanese Prize Law of 1894, art. 22 (cited in Moore, supra, vol. 7, p. 525); Japanese Regulations, March 7, 1904 (see Takahashi's Cases on International Law during Chino-Japanese War).

The rules recognized and practiced by the United States, among other things, provide: "(10) In the case of an enemy merchantman it may be sunk, but only if it is impossible to take it into port, and provided always that the persons on board are put in a place of safety." U. S. White Book, European War, No. 3, p. 192.

These humane principles were practiced, both in the War of 1812 and during our own war of 1861-1865. Even with all the bitterness (now happily ended and forgotten) and all the difficulties of having no port to which to send a prize, Capt. Semmes, of the Alabama, strictly observed the rule as to human life, even going so far as to release ships because he could not care for the passengers. But we are not confined to American and English precedents and practices.

While acting contrary to its official statements, yet the Imperial German government recognized the same rule as the United States, and, prior to the sinking of the Lusitania, had not announced any other rule. The war zone proclamation of February 4, 1915, contained no warning that the accepted rule of civilized naval warfare would be discarded by the German government. Indeed, after the Lusitania was

sunk, the German government did not make any such claim, but, in answer to the first American note in reference to the *Lusitania*, the German Foreign Office, per Von Jagow, addressed to Ambassador Gerard a note, dated May 18, 1915, in which, *inter alia*, it is stated in connection with the sinking of the British steamer *Falaba*:

"In the case of the sinking of the English steamer *Falaba*, the commander of the German submarine had the intention of allowing passengers and crew ample opportunity to save themselves. It was not until the captain disregarded the order to lay to and took to flight, sending up rocket signals for help, that the German commander ordered the crew and passengers by signals and megaphone to leave the ship within 10 minutes. As a matter of fact he allowed them 23 minutes, and did not fire the torpedo until suspicious steamers were hurrying to the aid of the *Falaba*." White Book No. 2, U. S. Department of State, p. 169.

Indeed, as late as May 4, 1916, Germany did not dispute the applicability of the rule, as is evidenced by the note written to our government by Von Jagow, of the German Foreign Office, an extract from which has been quoted *supra*. Further, section 116 of the German Prize Code (Huberich & King translation, p. 68), in force at the date of the *Lusitania*'s destruction, conformed with the American rule. It provided: "Before proceeding to a destruction of the vessel, the safety of all persons on board, and, so far as possible, their effects, is to be provided for, and all ship's papers and other evidentiary material, which according to the views of the persons at interest, is of value for the formulation of the judgment of the prize court, are to be taken over by the commander."

Thus, when the *Lusitania* sailed from New York, her owner and master were justified in believing that, whatever else had theretofore happened, this simple, humane, and universally accepted principle would not be violated. \* \* \*

The fault, therefore, must be laid upon those who are responsible for the sinking of the vessel, in the legal as well as moral sense. It is therefore not the Cunard Line, petitioner, which must be held liable for the loss of life and property. The cause of the sinking of the *Lusitania* was the illegal act of the Imperial German government, acting through its instrument, the submarine commander, and violating a cherished and humane rule observed, until this war, by even the bitterest antagonists. As Lord Mersey said: "The whole blame for the cruel destruction of life in this catastrophe must rest solely with those who plotted and with those who committed the crime." \* \* \*

## THE LUDWIG and THE VORWÄRTS.

(French Provisional Commission Replacing the Council of State, 1872. 5 Calvo, *Le Droit International* [5th Ed., 1896] p. 279.)

Two vessels flying the German flag, the *Ludwig* and the *Vorwärts*, were burned on the day of their capture (October 21, 1870) by the commander of the vessel of war *Desaix* who drew up a report setting forth the necessity of this destruction. As a result of claims on the part of the owners of the *Ludwig* and of claims by the captors, the case was brought before the Prize Court sitting at Bordeaux, which decided on February 27, 1871, that it appeared from the ships' papers and from the examination that these vessels belonged to German subjects; that their capture was therefore legal and valid; that since the destruction was caused by force majeure in order to preserve the security of the operations of the captor, it was not in order to grant reparation for the benefit of the captured; that in acting as they did, the captors made use of a right which is doubtless rigorous but the exercise of which is provided for by the laws of war and recommended by the instructions which they bore.

The owners of the two vessels, as well as the consignees and the shippers of their cargoes, lodged an appeal from this decision before the Council of State. The former contested the legitimacy of the capture and accordingly of the destruction of the vessel and demanded that the value thereof be restored to them. On their side, the consignees and shippers of the cargo, availing themselves of their capacity as neutral subjects, invoked Article 3 of the declaration of the Congress of Paris of April 16, 1856, which exempts from confiscation neutral goods aboard an enemy vessel, and they claimed the value of their destroyed property.

The provisional commission charged with replacing the Council of State, by decree of March 16, 1872, rejected the appeal of both parties, basing its decision upon the following reasons:

"Considering that if, according to the terms of the declaration of the Congress of Paris of April 16, 1856, neutral goods are not subject to seizure aboard an enemy vessel, it follows from this only that the neutral who has loaded his goods upon this vessel is entitled to the restoration of his goods, or, in case of sale, to the payment of their value; but that it can not be deduced from this declaration that he can claim an indemnity by reason of the losses which may have been caused to him either by the capture of the vessel when this capture has been recognized as valid, or by the acts of war which accompanied or followed this capture;

"Considering that it appears from the examination that the capture of the *Ludwig* and of the *Vorwärts* was judged valid and that the destruction of the vessels with their cargoes took place at the order of the commander of the captor vessel, for the reason that the security of this vessel did not permit a part of the members of the crew to

be detached for the purpose of escorting the prizes to a port of France, by reason of the large number of prisoners aboard;

"That under these circumstances the destruction of these prizes constituted an act of war the advisability of which the owners of the cargoes can not be permitted to discuss, and which can not give rise to a right to indemnity on their part. \* \* \*"

### THE CHEREF.

(French Prize Court, 1915. *Journal Officiel*, January 9, 1916, p. 231.)

In the name of the French people, the Prize Court has rendered the following decision, between, on one hand, the captain, proprietors, shippers and consignees of the caic Cheref stopped at sea, 28° 17' east longitude and 36° 36' north latitude on May 12, 1915, at 8:30 o'clock by the French armed cruiser Jeanne d'Arc, and, on the other hand, the minister of the Navy, acting in behalf of the captors and of the Pension Fund for Disabled Sailors, \* \* \* having heard the report of M. Fuzier, member of the court and the observations of M. Chardenet, Government Commissioner, in support of the motions stated above,

THE COURT, after due deliberation.

Whereas, on the one hand, from the papers there appears to be no doubt that the caic Cheref was of Ottoman nationality; that at the time of its seizure war had actually existed between France and Turkey since October 29, 1914, at 3 a. m. when the Turks bombarded the port of Odessa and cannonaded a French ship, killing two French nationals on board; that thus the cargo of this caic should be considered as enemy property, according to the terms of article 59 of the Declaration of London; and that no proof or statement has been made to the contrary; that therefore the commodities composing this cargo constituted enemy merchandise under enemy flag and were not among those articles which in virtue of the declaration of the Paris Congress of April 16, 1856, were exempt from seizure;

Whereas, on the other hand, it is established by the above-mentioned report of the commander of the cruiser Jeanne d'Arc that it was impossible to tow this old and unseaworthy sailer into the nearest Allied port a hundred and twenty miles away; that thus the capturing vessel, after taking the cargo on board, legally destroyed the caic whose crew had fled to land at the approach of the cruiser,

Decides:

1. The seizure of the Turkish caic and its cargo is declared good and valid.
2. The sailer having been destroyed for the reasons indicated above, there is no way of determining its value.
3. The sum representing the value of 10 tons of barley, 50 tubs of oil and butter, and 11 sacks of flour committed to the French consul

at Alexandria shall be turned over to its rightful claimants, in conformity with the laws and regulations in force.

Deliberated at Paris, at the meeting of November 29, 1915. \* \* \*

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## SECTION 2.—NEUTRAL

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### THE KNIGHT COMMANDER.

(Supreme Prize Court of Russia, 1905. 1 Hurst & Bray's Russian and Japanese Prize Cases [1912] 54.)

#### Decision of the Vladivostock Prize Court.

By order of His Imperial Majesty, the Prize Court of the port of Vladivostock, on the 24th July (6th August) 1904, met and heard the case of the capture by a detachment of cruisers of the Pacific squadron on the 11th (24th) July in the Pacific Ocean of the British merchant steamer "Knight Commander." \* \* \* The facts of the case are as follows:

On the 11th (24th) July 1904, about 6 a. m., a separate division of cruisers under the command of Rear-Admiral Jessen, consisting of the *Rossia*, the *Gromoboi*, and the *Rurik*, while in the Pacific, in latitude 34° 21' N. and 138° 53' 5" E.,<sup>6</sup> sighted a merchant steamer. The cruiser *Rossia* gave chase, and when within 15 to 20 cables' lengths hoisted the signal "Stop," and then sent in succession two blank shots, and then two projectiles across her bow as the steamer continued on her course at full speed towards the entry into the Tokio Gulf. Only then did the steamer stop and raise the British commercial flag. By order of the commander of the detachment the cruiser *Rossia* hoisted the signal "Master come on board with papers," but as this order was not obeyed a party, headed by Lieutenant Gavrishenko and Sub-Lieutenant Baron Aminov, was sent on board to examine the steamer, papers, and cargo. The examination showed that the steamer was called the *Knight Commander*, of British nationality, J. R. Durant, master; that she was on a voyage to Japan with a cargo consisting of railroad material, bridge material, machinery, and various articles; that the master of the steamer was not able to present any documents for the cargo, but the examination of the holds by the above-named officers made it evident that they were filled with contraband of war; the other cargo evidently constituted only an unimportant fraction of the entire cargo. After examination of the steamer, Lieutenant Gavrishenko returned on board the cruiser, bringing the master and documents along with him. Having inquired of the master, Durant, the reason why there were no bills of lading for the cargo among the papers presented, and having

<sup>6</sup> To the south of Japan about 80 knots from Yokohama between Irosaki (cape) and Shichi To (islands).

learnt from him that the steamer only had coal for four days longer, Rear Admiral Jessen declared to the master that as the steamer was subject to condemnation, and could not be taken to a Russian port, on account of shortage of coal, she would be destroyed. Half an hour's time was given for the removal of the crew. At 8:32 the master returned on board his vessel and upon removal of all hands on board she was sunk by explosive shells at 9:15.

On the return of the separate detachment of cruisers from sea, the sinking of the said steamer was submitted to the examination of the Prize Court of the port of Vladivostock. \* \* \*

Therefore the court holds that the following facts are proved:

(1) The fact that the owner of the Knight Commander acted illegally in order to increase the resources of our antagonist, by transporting articles of contraband to him at Chemulpo, the immediate theatre of war;

(2) Suppression by the master of the said steamer of an entire file of important documents relating to his vessel and to his cargo, and undoubted knowledge on his part that he was conveying articles of contraband to the enemy; and

(3) The presence on the said steamship, at the time of capture, of contraband in quantity exceeding one-half of her entire cargo.

On these grounds and taking into consideration the actual facts of the present case, as provided by articles 5, 8-13, of the Regulations on Naval Prizes,<sup>7</sup> the Prize Court finds:

(1) That the British steamer Knight Commander was captured in a legal manner, in compliance with the rules laid down in articles 2, 3, 15-17 of the Instructions;<sup>8</sup>

(2) That the said steamer, having been captured while conveying contraband to the enemy in quantity exceeding one-half of her cargo, and the said contraband, are lawful prize;

And condemns the steamship Knight Commander and the contraband cargo on board her at the moment of capture as lawful prize.

The owners of the Knight Commander appealed against the above decision to the Supreme Prize Court, and various owners of cargo also presented petitions to the Supreme Prize Court claiming compensation for the goods belonging to them. \* \* \*

#### Decision of the Supreme Prize Court.

By order of His Imperial Majesty, the Supreme Prize Court assembled on the 19th day of November, 1905, \* \* \* heard the appeal against the judgment of the Vladivostock Port Prize Court of the 24th July 1904, holding the steamer Knight Commander and the contraband cargo on board at the time of capture to be liable to condemnation. \* \* \*

In accordance with article 11 of the Regulations relating to Naval

<sup>7</sup> Russian & Japanese Prize Cases, vol. I, App. A.

<sup>8</sup> Id., App. B.



**Prizes,<sup>6</sup>** merchant vessels of neutral nationality are subject to condemnation when they are caught in the act of carrying to the enemy, or to an enemy port, articles of contraband of war in quantity exceeding in bulk or weight half the total cargo, while such cargo is condemned under article 12 (1), when it constitutes contraband of war carried to the enemy or to an enemy port.

The literal interpretation of the Regulations quoted shows that, for the condemnation of a vessel carrying articles of contraband of war (other than appurtenances for fire-arms and stores and explosives), it is necessary to prove that this cargo exceeds in bulk or weight half the total cargo, while, for the condemnation of the cargo, it is entirely unnecessary to determine the proportion of contraband to the total cargo, as the condemnation of the cargo depends entirely on whether it constitutes contraband of war, and not on the quantity transported. Article 12 (1). This distinction must be borne in mind in deciding the present case, and therefore, to justify the condemnation of the cargo carried by the Knight Commander, it is sufficient to prove that it constituted contraband of war, and was being carried to an enemy port, while the quantity of the cargo carried has no importance. On the other hand, for the condemnation of the vessel, it is necessary to prove that she was carrying contraband exceeding in quantity half the total cargo. \* \* \*

The other objections to the decision of the Vladivostock Prize Court condemning the vessel were as follows:

1. That only an enemy vessel can be sunk, not a neutral.
2. That the Prize Court had infringed the law in not deciding the question as to the regularity of the sinking of the Knight Commander.
3. That the conditions which, according to law, are necessary to justify the sinking of a vessel did not exist at the time when the Knight Commander was sunk.
4. That the accusation made by the Prize Court against Captain Durant of concealing the destination of the cargo, and concealing and destroying the manifests and bills of lading, is not justified.

In the opinion of the Supreme Prize Court, none of the foregoing objections, even if correct, would entail the reversal of the decision of the Prize Court, because, as stated above, the condemnation of the vessel depends entirely on the existence of the conditions referred to in article 11 (1) of the Regulations relating to Naval Prizes,<sup>6</sup> and the circumstances referred to in the objections of the appellant are immaterial from the point of view of deciding the question whether the vessel was liable to condemnation.

But, apart from this, the Supreme Prize Court finds that all the objections raised are groundless.

First of all, the question of the regularity of sinking a vessel, according to article 58 of the Regulations relating to Prizes,<sup>7</sup> is not

<sup>6</sup> Russian & Japanese Prize Cases, vol. I, App. A.

one for the consideration of Prize Courts, but, according to article 21 of the Regulations relating to Naval Prizes, and of article 299 of the Naval Code of Punishments, is one for the consideration of the naval authorities and of a criminal court, because the sinking of a vessel is permitted on the personal responsibility of the naval commander, and the question, therefore, whether the extraordinary circumstances which incited him to sink the vessel were sufficient or not is a matter only for the superior officer of the person who had given the order to sink to decide, and not for a prize court.

Furthermore, according to the same article 21 of the Regulations relating to Prizes,<sup>10</sup> and article 40 of the Instructions on procedure in stopping vessels,<sup>11</sup> sanctioned under article 26 of the Regulations relating to Prizes, the danger of the vessel passing into the hands of the enemy and the distance of ports to which she could have been taken are grounds which justify the sinking of a vessel. The existence of these circumstances in the case of the Knight Commander is proved by the protocol drawn up on the 11th July, 1904. The argument of the appellant that a neutral vessel cannot legally be sunk is proved by articles 11 and 21 to be incorrect. Under article 11 merchant vessels of neutral nationality may be subject to capture; under article 21, every captured vessel may be sunk in extraordinary circumstances. The only reply, therefore, that can be given consistently with the existing Russian law to the objections raised by the appellant to the decision of the Prize Court must be in the negative.

It is at the same time impossible to agree with the assertions of the attorney of the shipowner that the destruction of a neutral vessel which is admissible by our laws is contrary to the principles of international law, even if the ambiguous denomination "neutral vessel" be understood as meaning neutral by nationality only, and not neutral according to her action. In support of his view, the attorney quoted a whole series of citations from writers who are opposed to the admissibility of the destruction of a neutral vessel, but the opinions of writers or scientists, although very authoritative, do not constitute binding rules of international law. It is no doubt very useful to listen to these opinions, but one is not bound to conform to them. Even if no opinions contrary to those alluded to are cited, it is not superfluous to quote from an article by the well-known English jurist, Professor Holland (1905),<sup>12</sup> who expresses doubt whether the sinking of a neutral vessel is contrary to the principles of international law, especially in view of the circumstances that the laws not only of Russia, but of France, the United States, and Japan,<sup>13</sup> permit it.

However, apart from formal references to various authorities, it is necessary to investigate on its merits the question whether the sinking of a neutral vessel is admissible. All agree that the principles of in-

<sup>10</sup> Russian & Japanese Prize Cases, vol. I, App. A.

<sup>11</sup> Id., App. B.

<sup>12</sup> Id., vol. I, App. I.

<sup>13</sup> Id., vol. II, App. A.

ternational law as to naval prizes must be based on a compromise between the interests of belligerents and of neutrals, a compromise arising from the necessity of protecting the rights of both parties. From this point of view the destruction of a captured vessel of neutral nationality ought not to be permitted, except in cases of special necessity in the interests of the belligerents. Such cases may, of course, occur more seldom with countries which have the good fortune to possess ports everywhere, than with a country in a less favourable position. But the absolute prohibition of the destruction of a neutral vessel, notwithstanding the most glaring violation of neutrality on her part, would be equivalent to completely depriving the belligerent under certain circumstances of the right to prevent the delivery to the enemy even of ammunition, which cannot be right, while as compared with the other belligerent, more favourably circumstanced, it would be quite unjust.

From the point of view of the principles of international law, based on the aforesaid compromise between the interests of belligerents and those of neutrals, it is not clear why some writers admit the right to sink an enemy vessel with a cargo owned by a neutral, and even to refuse to pay compensation for such cargo, but do not admit the right to sink a neutral vessel with contraband of war belonging to or intended for the enemy. In reality the gist of the whole question lies in this, that the interests of the owners ought not to suffer from that destruction of captured property which is sometimes indispensable in the interests of the belligerents. Under our existing prize law, however, which strictly protects the legal interests of owners, those interests could hardly have suffered, inasmuch as if the captured property had been condemned to the state, it would not have been the interests of the former owners that would have suffered, but those of the state destroying the cargo, which not only would have been deprived of the benefit of its possession, but would have been obliged to give prize money for the captured prize (article 44);<sup>14</sup> if, on the contrary, the property destroyed were held to be entitled to be released, the owners would have the right to demand compensation from the state (articles 28-30 and 32).

The argument of the attorney of the shipowner that the right accorded to a naval commander to destroy a vessel is equivalent to giving him the right of deciding a case in place of a prize court, is nothing more than a misunderstanding, as, according to the interpretation of the laws relating to prize, the order of a naval commander for the destruction of a captured vessel is an unavoidable incident in the case, and in no way decides the question as to the right to destroy such property before it is brought before the Prize Court for adjudication. On the contrary, articles 21 and 74 demand the subsequent decision of a prize court as to condemnation or release; but when once a prize

<sup>14</sup> Russian & Japanese Prize Cases, vol. I, App. A.

court has decided in favour of condemnation, the right to the captured property must necessarily be considered as having passed to the state from the moment of capture, and not from the date of the order of the court respecting its condemnation, in the same way that the right of inheritance is reckoned as belonging to the heirs from the moment of the inheritance, and not from the date of the order of the court recognising them as heirs to the same. The task of a prize court is to determine whether a capture is legal or illegal, or, in other words, to confirm the right of capture, or refuse such confirmation. \* \* \*

On all the foregoing considerations, the Supreme Prize Court decides—

(1) To confirm the judgment of the Vladivostock Prize Court and to dismiss the appeal of the attorney of the owners of the steamer Knight Commander and of the cargo.

(2) To dismiss the petitions of the attorneys of the owners of the cargo for a declaration that the goods referred to in these petitions are not liable to condemnation, and for compensation. \* \* \*

#### THE GLITRA.

(Supreme Prize Court of Berlin, 1915. *Entscheidungen des Oberprisengerichts in Berlin* [1918] 34.)

In the prize matter concerning the English steamer *Glitra* with *Leith* as her home port, the Imperial Supreme Prize Court of Berlin, at its sitting of July 30, 1915, has found as follows:

The appeals lodged by the plaintiffs under Nos. 9 to 12 of the decision are rejected as inadmissible; the appeals of the remaining plaintiffs are denied as unfounded.

The costs of the proceedings in appeal are to be borne by the plaintiffs.

#### Reasons.

On October 20, 1914, the steamer *Glitra* belonging to the firm of *Salversen & Co.* of *Leith*, with a cargo of sundry merchandise on the way from *Leith* to *Stavanger*, was seized by a submarine, and after the crew had left the ship, she was sunk together with her cargo.

In answer to the summons of the Prize Court issued in accordance with section 26 of the Prize Court Regulations, the thirteen parties interested in the cargo submitted claims for compensation of damages due to the destruction of their merchandise. The plaintiffs are the owners of Norwegian houses; the plaintiff figuring in claim No. 2 alone is a Danish insurance company which presents the rights of its Norwegian underwriter. The Prize Court has found that the ship which was sunk was subject to seizure and has denied the claims.

The appeal lodged against this decision is not well founded. The Prize Court has, in the first place, impartially established that the *Glitra* was an English ship, and that, given the circumstances of the

case, the destruction of the ship was necessary, in order to insure her capture. The Prize Court did not concern itself with the question as to whether or not the merchandise, on account of which claims for compensation were submitted, was neutral merchandise, because it came to the conclusion that if such had been the case, there would be no cause for a claim to compensation for damages. In justification of this conclusion it is stated that the question thus brought up has not been decided either in the Prize Regulations or in any international treaties, and, especially, it has not been decided in the London Declaration, as can be ascertained from a reading of it and of the history of its genesis. It is said that opinions had been equally divided. It is stated that the French memorandum declares that neutral cargoes were not entitled to claims for damages because, when the captor, for military reasons, holds the destruction of the prize to be necessary, such situation presents a military measure; while, on the other hand, the English memorandum admits the claim, provided the case does not involve contraband, because a permissible cargo on board of an enemy ship is not subject to seizure.

As regards the preliminary work of the conversations, the leading question: In view of the principle that neutral merchandise under enemy flag is not subject to seizure, will the owner of the merchandise, in case of the destruction of the ship, have to be indemnified, or is, in such case, the destruction of a ship a military action which does not obligate the belligerent to make indemnification?—had been discussed without arriving at an understanding. The Prize Court observes that in the course of these negotiations the matter of the admissibility of the destruction of neutral ships, subject to seizure, had been dealt with mainly. Confining herself to this particular matter, Germany had expressed herself in favor of compensation for neutral goods not subject to seizure. Japan alone had made a declaration with regard to the matter of neutral merchandise on an enemy ship which is being destroyed, namely, in the sense of England. Nothing has been shown to indicate that, as matters stand, Germany had meant to establish in the Prize Regulations a principle to the effect that when an enemy ship was destroyed, the neutral cargo was entitled to a claim for indemnification. The Prize Court held that at most an argument therefor could be deduced from article 114 of the Prize Regulations to the extent that it is here presupposed that in destroying a ship, compensation must be made for the destruction, at the same time, of that part of the cargo not subject to seizure. The argument is, however, not sufficiently conclusive. It may readily be assumed that article 114 refers only to the destruction of neutral ships, in view of the fact that the preceding and the following provision of the Prize Regulations deal only with such case.

This view must, in effect, be approved. The question to be settled is as to whether or not in case an enemy ship is lawfully destroyed, compensation must be made for neutral merchandise on board such ship which is destroyed at the same time. It is clear that neither in

the Prize Regulations nor in the London Declaration, an express prescription in regard to this matter is met with. Nor has the Prize Regulation indirectly provided for the settlement of that matter. The plaintiff believes that such a provision is found in No. 114 of the Prize Regulations. The judge of first instance has justly denied this, although we can not absolutely agree with him in all the reasons he gives regarding this matter. In the article referred to the commander is directed, before proceeding with the destruction of a ship, to see if the loss thereby accruing to the enemy is equivalent to the compensation for damages which must be paid for that part of the cargo subject to seizure and which is destroyed at the same time. In connection with this reference is made, parenthetically, among other things, to article 18, which deals with the seizure of enemy ships and states which part of the cargo is, at the same time, subject to seizure. This, in effect, looks as though the author of the Prize Regulations had, when dealing with article 114, thought that in the case of the destruction of an enemy ship compensation must be made for the part of the cargo not subject to seizure; it must also be admitted that the said reference bars the course taken by the first instance when it assumes that Article 114, even as the preceding and the following provision, dealt only with the destruction of neutral ships. In spite of that, however, the provision can not be given such scope of interpretation as the plaintiffs meant to lend to it. If it is so understood, it would materially come into a certain contradiction with that which the Prize Regulation prescribes in the immediately following article. As can be clearly seen from this, the Prize Regulation does not hold that, for the destruction of merchandise not subject to seizure, compensation must be made in every case. In the case of the lawful destruction of a neutral ship, compensation is prescribed for the merchandise destroyed along with the ship but not subject to seizure, in so far as this concerns neutral merchandise, but not in regard to enemy merchandise which, although under the protection of the neutral flag, is likewise not subject to seizure.

We must, furthermore, bear in mind that there are also enemy ships that are not subject to seizure, and, therefore, not subject to destruction, so that, even although at some time—possibly by reason of a pardonable error—the destruction took place, it may yet be asked whether or not a distinction should be drawn in regard to compensation for values destroyed along with the ship, between neutral and enemy merchandise, and for this reason it could seem advisable to direct the commanders of vessels, for such eventualities, to make the inquiry incumbent upon them according to article 114. But it is above all important to remember that article 114 is not *sedes materiae* and that, therefore, even assuming that the author of the law thought that in case of the lawful destruction of an enemy ship claims for compensation could be presented in behalf of the merchandise of neutrals, it would be wrong to find therein a positive decision of this at

least doubtful, and at all events very controverted question which was left open, although discussed at the London Conference.

As Wehberg points out in *Oesterreichische Zeitschrift für öffentliches Recht*, vol. II, 3 p. 282, Heilfron, *Jur. Wochenschrift*, 1915, p. 486, goes too far when he attributes to the Prize Regulations only the importance of an order promulgated by the emperor to the naval authorities. The Prize Regulations contain, to a large extent, positive law. But, with regard to the provision now under consideration, Heilfron's characterization fits perfectly. This article 114 is, in effect, but an order to the commanders of ships. Through it only the commander-in-chief in war speaks, and not the legislator. It is not its purpose to establish material right and it does not do so.

If, therefore, we are compelled to consider the most general principles of law in connection with the rules of the general law of warfare, it is found with absolute certainty that neutrals are not entitled to present a claim in case the destruction of the prize was, in the circumstances, justified. See article 112 of the Prize Regulations. The taking to port and the seizure of the enemy ship constitute a lawful war measure against the foreign state and stand approved in international law. Claims for damages, either on the part of the nationals of enemy states or on the part of neutrals cannot in all such cases be upheld. To be sure, according to article 3 of the Paris Declaration, neutral merchandise (that is to say, merchandise that is not contraband) may not be seized on board an enemy ship. It is, therefore, not subject to seizure in case the prize is taken to port. But it can be presumed that the parties interested in the cargo are entitled to present claims for compensation of damages that have arisen as a result of the ship's being taken to port, as the result of an interruption in the trip of the ship or the taking of the ship to another but the point of destination. Nor is it legitimate to present a claim for compensation in case the merchandise itself, as a result of the seizure of the ship, has sustained damage, nor for instance, if on the further journey of the prize it is lost as a result of an accident at sea. Since the seizure is a lawful act, there is no legal principle on which a claim may be presented for the damage which the neutral has sustained rather because he entrusted his merchandise to a ship exposed to danger. Therefore, the war measure being lawful, there is no legal ground on which a claim for damages may be based in case the merchandise is lost because the war operation directed against the ship was, according to the circumstances, necessarily directed against her cargo as well.

The legal question that is important in this matter may arise even in the course of warfare on land. Conditions may be such, and very frequently will be found to be such, that, for instance, while a fortified or defended place is being bombarded, the property of neutrals is damaged. But even in warfare on land where private property is protected to a greater extent than in naval warfare, there is no obligation, in such

cases, on the part of the belligerent state, to make compensation even to neutrals. See article 3 of the Fourth Convention of the Second Hague Conference. Compare Geffcken in Heffter, *Völkerrecht* (8th Ed.) § 150, note 1 (incorrect, at least inadequate, in that text of Heffter); Calvo, *Droit International* (4th Ed.) vol. IV, §§ 20 to 50 to 22 to 32; Bonfils, *Droits des gens* (1908) § 1217; Bordwell, *Law of War* (1908) p. 212.

But as regards, in particular, the conditions of naval warfare, there is no protection afforded to neutral merchandise by article 3 of the Paris Declaration, against the acts of the belligerent party made necessary by the circumstances of the war. Article 3, referred to above, is intended to afford protection against the prize law to which, up to the time of the Paris Declaration, neutral merchandise in the enemy ship was exposed. Whatever the circumstances of the war demand, must be permitted to take place without regard to the fact that neutral merchandise is on board the ship. Although, according to Article 2 of the Paris Declaration, the neutral flag protects enemy merchandise, this does not mean that vice versa the enemy ship is to be protected through neutral merchandise, protected in the first place, of course, only against destruction, but at the same time, and in innumerable cases, against any exercise of the prize law.

As far as can be ascertained, no one has disputed this even down to the most recent times. Compare Resolutions of the French Conseil d'État, May 21, 1872, in Dalloz, *Jurisprudence générale* (1871) III, No. 94, in the prize case Ludwig and Vorwärts; Dupuis, *Le Droit de la guerre maritime* (1899) p. 334; De Boeck, *De la propriété ennemie privée sous pavillon ennemi* (1882) § 146; Bordwell, *Law of War* (1908) p. 226; Wheaton, *International Law* (4th Ed.) p. 507, § 359e; Oppenheim, *International Law* (2d Ed.) Vol. II, p. 201 ff.; Calvo, *Droit International* (4th Ed.) Vol. V. §§ 30, 33, 30, 34; Hall, *International Law* (5th Ed.) p. 717 ff.

The assertion of the plaintiffs that the decision of the French Prize Court in the matter of The Ludwig and The Vorwärts had been almost generally disputed in the literature, has, apart from the quotations adduced from the most recent sources (Wehberg and Schramm; the quotation from Hall, p. 187—see above—is unintelligible), not been supported by documents, and must, therefore, be regarded as incorrect. Only in the most recent times, especially in Germany, there has arisen a conception of the theory which quite generally in the case of the destruction of merchandise not subject to seizure—merely or only in so far as neutral merchandise is concerned—demands the obligation to make compensation as a basic principle. Compare Schramm, *Prisenrecht* (1913) p. 338 ff.; Wehberg, *Seekriegsrecht* (1915) p. 297, notes 3 and 4; and Oesterr. Zeitschrift für öffentliches Recht, cited elsewhere; Rehm, *Deutsche Juristenzeitung* (1915) p. 454.

At the same time the general obligation for making compensation



is felt preconceivedly as being self-evident. The foundation is lacking and where it is subsequently sought to establish one, it does not appear convincing when compared with the explanations given above. Nor can the logic of the latter expositions be attacked by pointing out that warfare on land remains locally circumscribed to the national territory of the belligerents, while the ship sails the open seas. The fact that an enemy ship on the high seas is subject to seizure, and, if necessary, to attack, rests on the condition of international law as it exists, a condition which is perhaps to be deplored, but which is, nevertheless, a condition of fact. In all other respects, as soon as the ship is on the high seas, she is a part of the territory of her state on board of which the neutral, by a voluntary act on his part, has placed his merchandise, because he freighted it on a vessel of a belligerent country for the purpose of transportation across the sea.

In conclusion, it should be stated that it is not a defect of procedure when, as is stated in the appeal, the Prize Court has refrained from deciding as to whether or not the merchandise, to which the claims refer, was subject to seizure. It is the object of section 1 of the Prize Court Regulations clearly to define the prize jurisdiction, and if in section 2 the extent of the decision is prescribed, this means that thereby a limit has been set to which the courts must confine themselves; but nowhere is it prescribed that in any particular case a decision must be handed down with regard to the said questions even when the settlement of the claims presented does not depend thereon.

Notwithstanding the summons issued the plaintiffs under 9 and 12 have not paid the amount necessary to cover expenses. Their legal remedy was, therefore, not to be dealt with.<sup>12</sup>

<sup>12</sup> The *Indian Prince*, *Entscheidungen des Oberprisengerichts in Berlin*, 1918, 87 (1916), was an English vessel captured September 4, 1914, and sunk on its way from Santos by way of Trinidad, to ports of the United States. Part of the cargo belonged to citizens of the United States.

In the decision of the case, the Supreme Prize Court of Berlin considered at great length whether, according to article 12 of the Treaty of 1785, and article 13 of the Treaty of 1790, which had been revived by article 12 of the Treaty of 1828, between Prussia and the United States, compensation should be made to the American owners for the destruction of their property.

The court decided that the destruction of the property did not render Germany liable, on the ground that the neutral cargo shared the fate of the vessel which had been legally sunk.

The *Arena*, *Entscheidungen des Oberprisengerichts in Berlin*, 1918, 343 (1917), was a Norwegian, and therefore a neutral, ship, captured by a German submarine on April 2, 1916, as carrying contraband of war, and sunk because its proximity to the enemy forces at the time of capture made recapture possible.

The Supreme Prize Court of Berlin held, as to part of the cargo, consisting of non-contraband paper, that title had not passed to the English, and that it was neutral.

Damages were allowed.

## CHAPTER XIII

## RETALIATION

## THE LEONORA.

(Privy Council, 1919. L. R. [1919] A. C. 974.)

Appeals from decrees of the Admiralty Division (in Prize) dated April 18, 1918.<sup>1</sup> \* \* \*

The judgment of their Lordships was delivered by

LORD SUMNER.<sup>2</sup> The *Leonora*, a Dutch steamship bound from Rotterdam to Stockholm direct, was stopped on August 16, 1917, by His Majesty's torpedo boat F77, outside territorial waters, and shortly after passing Ymuiden. She was taken into Harwich. Her cargo, which was neutral-owned, consisted of coal, the produce of collieries in Belgium. It was not intended that she should call at any British or Allied port, nor had any application been made on her behalf for the appointment of a British port for the examination of her cargo. Both ship and cargo were condemned, pursuant to the Order in Council, dated February 16, 1917, and both the shipowners and the cargo owners appeal. \* \* \*

The appellants' main case was that the Order in Council was invalid, principally on the ground that it pressed so hardly on neutral merchants and interfered so much with their rights that, as against them, it could not be held to fall within such right of reprisal as a belligerent enjoys under the law of nations. \* \* \*

Upon the validity of the Order in Council itself the appellants advanced a two-fold argument. The major proposition was that the Order purported to create an offence, namely, failure to call at a British or Allied port, which is unknown to the law of nations, and to impose punishment upon neutrals for committing it; in both respects it was said that the order is incompetent. The minor proposition was that the belligerent's right to take measures of retaliation, such as it is, must be limited, as against neutrals, by the condition that the exercise of that right must not inflict on neutrals an undue or disproportionate degree of inconvenience. In the present case various circumstances of inconvenience were relied on, notably the perils of crossing the North Sea to a British port of call and the fact that no particular port of call in Great Britain had been appointed for the vessel to proceed to.

<sup>1</sup> [1918] p. 182.

<sup>2</sup> Parts of the opinion are omitted.

In *The Stigstad*\* their Lordships had occasion to consider and to decide some at least of the principles upon which the exercise of the right of retaliation rests, and by those principles they are bound. In the present case, nevertheless, they have had the advantage of counsel's full re-examination of the whole subject, and full citation of the authorities, and of a judgment by the President in the Prize Court, which is itself a monument of research. The case furthermore has been presented under circumstances as favourable to neutrals as possible, for the difference in the stringency of the two Orders in Council, that of 1915 and that of 1917, is marked, since in the case of the later order the consequences of disregarding it have been increased in gravity and the burden imposed on neutrals has become more weighty. If policy or sympathy can be invoked in any case they could be and were invoked here.

Their Lordships, however, after a careful review of their opinion in *The Stigstad*, think that they have neither ground to modify, still less to doubt that opinion, even if it were open to them to do so, nor is there any occasion in the present case to embark on a general restatement of the doctrine or a minute re-examination of the authorities.

There are certain rights, which a belligerent enjoys by the law of nations in virtue of belligerency, which may be enforced even against neutral subjects and to the prejudice of their perfect freedom of action, and this because without those rights maritime war would be frustrated and the appeal to the arbitrament of arms be made of none effect. Such, for example, are the rights of visit and search, the right of blockade and the right of preventing traffic in contraband of war. In some cases a part of the mode in which the right is exercised consists of some solemn act of proclamation on the part of the belligerent, by which notice is given to all the world of the enforcement of these rights and of the limits set to their exercise. Such is the proclamation of a blockade and the notification of a list of contraband. In these cases the belligerent sovereign does not create a new offence *motu proprio*; he does not, so to speak, legislate or create a new rule of law; he elects to exercise his legal rights and puts them into execution in accordance with the prescriptions of the existing law. Nor again in such cases does the retaliating belligerent invest a court of prize with a new jurisdiction or make the court his mandatory to punish a new offence. The office of a court of prize is to provide a formal and regular sanction for the law of nations applicable to maritime warfare, both between belligerent and belligerent and between belligerent and neutral. Whether the law in question is brought into operation by the

\* In the case of *The Stigstad*, L. R., [1919] App. Cas., 279 (1918), the retaliatory order of March 11, 1915, was involved, and in the principal case that of February 16, 1917.

For the texts of these two orders, claiming the right on the part of a belligerent to retaliate upon its enemy, even although the rights of neutrals are affected, see Appendix, pp. 1175, 1177.

act of both belligerents in resorting to war, as is the case with the rules of international law as to hostilities in general, or by the assertion of a particular right arising out of a particular provocation in the course of the war on the part of one of them, it is equally the duty of a court of prize, by virtue of its general jurisdiction as such, to provide for the regular enforcement of that right, when lawfully asserted before it, and not to leave that enforcement to the mere jurisdiction of the sword. Disregard of a valid measure of retaliation is as against neutrals just as justiciable in a court of prize as is breach of blockade or the carriage of contraband of war. The jurisdiction of a court of prize is at least as essential in the neutral's interest as in the interest of the belligerent, and if the court is to have power to release in the interest of the one, it must also have inherent power to condemn in justice to the other. Capture and condemnation are the prescriptive and established modes by which the law of nations as applicable to maritime warfare is enforced. Statutes and international conventions may invest the court with other powers or prescribe other modes of enforcing the law, and the belligerent sovereign may in the appropriate form waive part of his rights and disclaim condemnation in favour of some milder sanction, such as detention.

In the terms of the present order, which says that a vessel (paragraph 2) shall be "liable to capture and condemnation" and that goods (paragraph 3) shall be "liable to condemnation," some argument has been found for the appellants' main proposition, that the Order in Council creates an offence and attaches this penalty, but their Lordships do not accept this view. The order declares, by way of warning and for the sake of completeness, the consequences which may follow from disregard of it; but, if the occasion has given rise to the right to retaliate, if the belligerent has validly availed himself of the occasion, and if the vessel has been encountered at sea under the circumstances mentioned, the right and duty to bring the ship and cargo before a court of prize, as for a justiciable offence against the right of the belligerent, has arisen thereupon, and the jurisdiction to condemn is that which is inherent in the court. That a rebuttable presumption is to be deemed to arise under paragraph 1, and that a saving proviso is added to paragraph 2, are modifications introduced by way of waiver of the sovereign's rights. Had they been omitted the true question would still have been the same, though arising in a more acute form, namely, does this exercise of the right of retaliation upon the enemy occasion inconvenience or injustice to a neutral, so extreme as to invalidate it as against him? In principle it is not the belligerent who creates an offence and imposes a penalty by his own will and then by his own authority empowers and directs the Court of Prize to enforce it. It is the law of nations, in its application to maritime warfare, which at the same time recognizes the right, of which the belligerent can avail himself *sub modo*, and makes violation of that right, when so availed of, an offence, and is the foundation and authority for the

**right** and duty of the Court of Prize to condemn, if it finds the **capture** justified, unless that right has been reduced by statute or otherwise, or that duty has been limited by the waiver of his rights on the **part** of the sovereign of the captors.

It is equally inadmissible to describe such an Order in Council as **this** as an executive measure of police on the part of the crown for the purpose of preventing an inconvenient trade, or as an authority to a court of prize to punish neutrals for the enjoyment of their liberties and the exercise of their rights. Both descriptions, as is the way with descriptions arguendo, beg the question. Undoubtedly the right of retaliation exists. It is described in *The Zamora*, [1916] 2 A. C. 77; it is decided in *The Stigstad*, [1919] A. C. 279, as it had so often been decided by Sir William Scott over a century ago. It would be disastrous for the neutral, if this right were a mere executive right not subject to review in a Prize Court; it would be a denial of the belligerents' right, if it could be exercised only subject to a paramount and absolute right of neutrals to be free to carry on their trade without interference or inconvenience. This latter contention has already been negatived in *The Stigstad*, [1919] A. C. 279. The argument in favour of the former, drawn from the decisions of Sir William Scott, seems to their Lordships to be no less unacceptable. With the terms of the Proclamations and Orders in Council from 1806 to 1812 their Lordships are not now concerned. They were such that the decisions on them in many cases involved not merely the use of the term "blockade" but discussion of, or at least allusion to, the nature of that right. It is however, in their opinion a mistake to argue, as has been argued before them, that in those decisions the right to condemn was deemed to arise from the fact that the cases were cases of blockade, although the occasion for the blockade was the passing of a retaliatory order. In their opinion Sir William Scott's doctrine consistently was that retaliation is a branch of the rights which the law of nations recognizes as belonging to belligerents, and that it is as much enforceable by Courts of Prize as is the right of blockade. They find no warrant or authority for holding that it is only enforceable by them, when it chances to be exercised under the form or the conditions of a valid blockade. When once it is established that the conduct of the enemy gave occasion for the exercise of the right of retaliation, the real question is whether the mode in which it has been exercised is, such as to be invalid by reason of the burden which it imposes on neutrals, a question pre-eminently one of fact and of degree.

The onslaught upon shipping generally which the German Government announced and carried out at the beginning of 1917 is now matter of history. Proof of its formidable character, if proof were needed, is to be found in a comparison between the Retaliation Orders in Council of 1915 and of 1917, and their Lordships take the recitals of the latter order as sufficiently establishing the necessity for further invoking the right of retaliation. They address themselves accordingly to

what is the real question in the present appeal, namely, the character and the degree of the danger and inconvenience to which the trade of neutrals was in fact subjected by the enforcement of that order. They do not think it necessary to criticize theoretic applications of the language of the order to distant seas, where the enemy had neither trade nor shipping, a criterion which was argued for, but which they deem inapplicable. Nor have they been unmindful of the fact that, to some extent, a retaliatory order visits on neutrals the consequences of others' wrongdoing, always disputed though in the present case hardly disputable, and that the other belligerent, in his turn and also under the name of "retaliation," may impose upon them fresh restrictions, but it seems to them that these disadvantages are inherent in the nature of this established right, are unavoidable under a system which is a historic growth and not a theoretic model of perfection, and are relevant in truth only to the question of degree. Accordingly they have taken the facts as they affected the trade in which the *Leonora* was engaged, and they have sincerely endeavoured, as far as in them lay, to view these facts as they would have appeared to fair-minded and reasonable neutrals and to dismiss the righteous indignation which might well become those who recall only the crisis of a desperate and terrible struggle.

Compliance with the requirements of the Order in Council would have involved the *Leonora* in difficulties, partly of a commercial and partly of a military character. Her voyage, and with it the ordinary expenses of her voyage, would have been enlarged, and the loss of time and possibly the length of the voyage might have been added to by the fact that no port or class of ports of call had been appointed for the purpose of the order. Inconvenience of this character seems to be inevitable under the circumstances. In so far as it is measurable entirely in terms of money, the extra expense is such as could be passed on to the parties liable to pay freight, and neither by itself nor in connection with other and more serious matters should this kind of inconvenience be rated high.

It is important to observe that the order does not forbid the carriage of the goods in question altogether. The neutral vessel may carry them at her peril, and that peril, so far as condemnation is concerned, may be averted if she calls at an appointed port. The shipowner, no doubt, would say that if his ship is to make the call he will never be able to ship the cargo, for its chance of escape would be but small, and that if he is to get the cargo he must risk his ship and undertake to proceed direct to her destination. The contention is less formidable than it appears to be on the surface. Their Lordships know well, and the late President with his experience knew incomparably better, with what ingenuity and artifice the origin of a cargo and every other damaging circumstance about it have been disguised and concealed where the prize of success was high and the parties concerned were unfettered by scruples and inspired by no disinterested motives. They think

that the chance of escape in a British port of call must be measured against the enormous economic advantage to the enemy of carrying on this export trade for the support of his foreign exchange and the benefit of his much-needed imports, and they are convinced that the chance might well be sufficient to induce the promoters of the trade both to pay, and indeed to prepay, whatever freight the shipowner might require in order to cover extra insurance and the costs of a protracted voyage, and to give to the actual shipper such favourable terms of purchase, insurance or otherwise, as would lead him to expose his cargo to the risk of detection of its origin. They are far from thinking that compliance with the order would exclude neutrals from all the advantage of the trade. If the voyages were fewer in number they would tend to be more profitable singly, and in any case this particular traffic is but a very small part of the employment open, and legitimately so, to neutral traders, and the risk of its loss need not be regarded as of great moment. \* \* \*

Their Lordships recall and apply what was said in *The Stigstad*, that in estimating the burden of the retaliation account must be taken of the gravity of the original offence which provoked it, and that it is material to consider not only the burden which the neutral is called upon to bear, but the peril from which, at the price of that burden, it may be expected that belligerent retaliation will deliver him. It may be—let us pray that it may be so—that an order of this severity may never be needed and therefore may never be justified again, for the right of retaliation is one to be sparingly exercised and to be strictly reviewed. Still the facts must be faced. Can there be a doubt that the original provocation here was as grave as any recorded in history; that it menaced and outraged neutrals as well as belligerents; and that neutrals had no escape from the peril, except by the successful and stringent employment of unusual measures, or by an inglorious assent to the enslavement of their trade? Their Lordships have none.

On the evidence of attacks on vessels of all kinds and flags, hospital ships not excepted, which this record contains, it is plain that measures of retaliation and repression would be fully justified in the interest of the common good, even at the cost of very considerable risk and inconvenience to neutrals in particular cases. Such a conclusion having been established, their Lordships think that the burden of proof shifts, and that it was for the appellants to show, if they desired, that the risk and inconvenience were in fact excessive, for the matter being one of degree it is not reasonable to require that the crown, having proved so much affirmatively, should further proceed to prove a negative and to show that the risk and inconvenience in any particular class of cases were not excessive. Much is made in the appellants' evidence of the fact that calling at a British port would have taken the *Leonora* across a German mine field, but it is very noticeable that throughout the case the very numerous instances of losses by German action are cases of losses by the action of submarines and not by

mines. The appellants filed a series of affidavits, stating in identical terms that in proceeding to a British port of call vessels would incur very great risk of attack by submarines, especially if unaccompanied by an armed escort. Of the possibility of obtaining an armed escort or other similar protection they say nothing, apparently because they never had any intention of complying with the Order in Council, and therefore were not concerned to ascertain how much danger, or how little, their compliance would really involve. Proof of the amount of danger involved in crossing the mine field in itself is singularly lacking, but the fact is plain that after a voyage of no extraordinary character the *Leonora* did reach Harwich in safety.

Under these circumstances their Lordships see no sufficient reason why, on a question of fact, as this question is, they should differ from the considered conclusion of the President. He was satisfied that the Order in Council did not involve greater hazard or prejudice to the neutral trade in question than was commensurate with the gravity of the enemy outrages and the common need for their repression, and their Lordships are not minded to disturb his finding. The appeals accordingly fail. Their Lordships will humbly advise His Majesty that they should be dismissed with costs.<sup>4</sup>

<sup>4</sup> See the instructive and balanced article by Sir Erle Richards, on "British Prize Courts and the War," in the *British Year Book of International Law*, 1920-21, pp. 11-34. In the course of this article, he says:

"Decisions of British Prize Courts in this war have established the right of one belligerent to disregard the limits of International Law and to retaliate against neutral commerce, if the other belligerent has infringed neutral rights of trade to the detriment of the first belligerent; and the courts have given effect to that right by their decrees. The *Stigstad*, L. R. [1919] A. C. 219. In fact, British courts were bound so to hold, since it was found that the highest tribunal in prize in this country had settled the point in the Napoleonic wars. \* \* \* It was known that Lord Stowell had upheld the Retaliatory Orders in the Napoleonic wars and that Napoleon had claimed the right to retaliate in his decrees. But for some reason or other both the British Orders in Council and the French Decrees were treated by jurists as turning on the right of blockade. Moreover, the United States had gone to war in 1812 because of the British claim to enforce these orders, amongst other causes. That nation had therefore declined at that time to admit the validity of retaliation, and that in the most emphatic way. The right claimed is obviously one of extreme importance, for it enables belligerents to override the whole of the protection which the common law of nations and treaties have given to neutral trade, and yet if retaliation be a legal right, neutrals can have no cause of complaint. \* \* \* The whole matter is certain to be the subject of discussion at any future conference at which the laws of war at sea are under revision; and the right of retaliation will have behind it the usage of England and of France in their wars a century ago, and of Great Britain and Germany (and to some extent of France) in the late war; against it the action of the United States in 1812." Pages 29, 30, 33.



## CHAPTER XIV

### NATIONALITY OF PROPERTY IN AND DURING TRANSIT

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#### THE SALLY.

(Lords, 1795. 3 O. Rob. 300, note.)

The Sally, Griffiths, was a case of a cargo of corn shipped March, 1793, by Steward and Plunket, of Baltimore, ostensibly for the account and risk of Conyngham, Nesbit & Co., of Philadelphia, and consigned to them or their assigns. By an endorsement on the bill of lading, it was further agreed that the ship should proceed to Havre de Grace, and there wait such time as might be necessary, the orders of the consignee of the said cargo (the mayor of Havre) either to deliver the same at the port of Havre, or proceed therewith to any one port without the Mediterranean, on freight at the rate of 5s. per barrel on delivery at Havre, and 5s. 6d. at a second port, the freight to be settled by the shippers in America according to agreement.

Amongst the papers was a concealed letter from Jean Ternant, the minister of the French Republic to the United States, in which he informs the minister of foreign affairs in France: "The house of Conyngham & Co., already known to the ministers, by their former operations for France, is charged by me to procure without delay, a consignment of 22,000 bushels of wheat, 8,000 barrels of fine flour, 900 barrels of salted beef from New England. The conditions stipulated are the same as those of the contract of 2d November, 1792, with the American citizens, Swan & Co., for a like supply to be made to the Antilles, namely, that the grain, flour, and beef are to be paid at the current price of the markets at the time of their being shipped; that the freights shall be at the lowest course in the ports; that an insurance should be on the whole; and that a commission of five per cent. shall be allowed for all the merchants' expenses and fees. It has been moreover agreed, considering the actual reports of war, that the whole shall be sent as American property to Havre and to Nantes, with power to our government of sending the ships to other ports conditional on the usual freight. As you have not signified to me to whom these cargoes ought to be delivered in our ports, I shall provide each captain with a letter to the mayor of the place."

There was also a letter from J. Ternant to the mayor of the municipality of Havre. "Our government having ordered me to send supplies of provisions to your port, I inform you that the bearer of this, commanding the American ship, the Sally, is laden with a cargo of wheat, of which he will deliver you the bill of lading."

To the twelfth and twentieth interrogatories the master deposed, "that he believes the flour was the property of the French government, and on being unladen, would have immediately become the property of the French government."

In the argument it was insisted, on the part of the claimants, that the cargo was to be considered as the property of the American merchants; that it had been ordered of them, to be supplied and delivered at a certain place; and that under the general principle of law, property was not considered to be divested between the vendor and vendee till actual delivery.<sup>1</sup>

It was contended, that the contract remained executory till the completion by delivery in Europe; that the payment was contingent on the completion of the contract in this form, and that no money had passed, nor any compensation or agreement had intervened to produce an absolute conversion of the property; and it was prayed that the court would admit farther proof to ascertain that circumstance.

On the part of the captors it was replied, that the general rule of law subsisting between vendor and vendee in a commercial transaction, referring only to the contracting parties, and not affecting the rights of third persons, could not apply to contracts made in time of war, or in contemplation of war, where the rights of a belligerent nation intervened; that the effect of such a contract as the present would be to protect the trade of the contracting belligerent from his enemy; and that if it could be allowed, it would put an end to all capture. It was said to be a known principle of the prize court, that neutral property must be proved to be neutral at all periods from the time of shipment, without intermission, to the arrival and subsequent sale in the port of the enemy; that the twelfth and twentieth interrogatories were framed with this view to inquire, "whether on its arrival, etc., it shall and will belong to the same owner and no other, etc.," and a reference was made to the case of the *Charles Havenerswerth* in 1741, in which the form of attestation was directed to be prepared by the whole bar, and was established in the present form to ascertain the property at the several periods of shipment, and arrival in the enemy's ports; in cases where affidavits were to be received to supply the defects of the original evidence, in the place of plea and proof.

THE COURT said: It has always been the rule of the prize courts, that property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken in transitu, is to be considered as enemy's property. When the contract is made in time of peace or without any contemplation of war, no such rule exists. But in a case like the present, where the form of the contract was framed directly for the purpose of obviating the danger apprehended from approaching hostilities, it is a

<sup>1</sup> *Snee v. Trescot*, 1 Atk. 245 (1743); *Mason v. Lickbarrow*, 1 H. Black. 357 (1790); *Hunter v. Beal*, 3 T. Rep. 466 (1785).

rule which unavoidably must take place. The bill of lading expresses account and risk of the American merchants; but papers alone make no proof, unless supported by the depositions of the master. Instead of supporting the contents of his papers, the master deposes, "that on arrival the goods would become the property of the French government," and all the concealed papers strongly support him in this testimony. The *evidentia rei* is too strong to admit farther proof. Supposing that it was to become the property of the enemy on delivery, capture is considered as delivery. The captors, by the rights of war, stand in the place of the enemy, and are entitled to a condemnation of goods passing under such a contract, as of enemy's property. On every principle on which prize courts can proceed, this cargo must be considered as enemy's property.

Condemned.<sup>2</sup>

#### THE DANCKEBAAR AFRICAAN.

(High Court of Admiralty, 1798. 1 C. Rob. 107.)

This was a case of a Dutch ship, bound from Batavia to Holland, and taken on the 6th of November, 1795, about seven leagues to the southward of the Cape of Good Hope. On coming to the Cape of Good Hope, a claim was given on the part of Goetz and Vos, inhabitants of the Cape, and then become subjects of the crown of Great

<sup>2</sup> In the case of *The Anna Catharina*, 4 C. Rob. 107, 115, 118 (1802), the vessel was taken on a voyage from Hamburg to La Guayra, and the cargo, it appeared, was going under "a special agreement and contract with the Spanish government of the Caracas." It was alleged in the first place that the vessel and cargo were taking "the chance of the market," and that in any event, the Spanish government might refuse to take the goods.

On this state of affairs, Sir William Scott, following the law laid down in *The Sally*, held that goods shipped under contract to a belligerent port "become, in itinere, the property of the enemy," and that "the legal consequence of condemnation would on that ground alone attach upon it."

In the case of the ship *Francis and Cargo*, 1 Gall. 445, Fed. Cas. No. 5092 (1813), approved by the Supreme Court, 8 Cranch 354, 3 L. Ed. 587 (1814), a shipment made by an enemy shipper to his correspondent in America to belong to the latter at his election, in twenty-four hours after the arrival thereof, was held liable to condemnation as hostile property.

In war, property cannot change its character in transitu; and in this case, an election during the transit would not merge the hostile character of the property.

The law on the subject is shortly stated by Mr. Justice Story in *The Ann Green*, 1 Gall. 274, Fed. Cas. 958, 964, No. 414 (1812), who, in delivering the opinion of the court, said:

"The cases are, as I think, settled upon just principles, that decide that in time of war, property shall not be permitted to change character in its transit; nor shall property consigned, to become the property of the enemy on arrival, be protected by the neutrality of the shipper. Such contracts, however valid in time of peace, are considered, if made in war or in contemplation of war, as infringements of belligerent rights, and calculated to introduce the grossest frauds. In fact, if they could prevail, not a single bale of enemy's goods would ever be found upon the ocean." *Vrow Margaretha*, 1 C. Rob. 336 (1799); *Carl Walter*, 4 C. Rob. 207 (1802); *Jan Frederick*, 5 C. Rob. 129 (1804); *The Constantia*, 6 C. Rob. 321 (1807); *The Atlas*, 3 C. Rob. 299 (1801); *The Anna Catharina*, 4 C. Rob. 107 (1802); *Packet De Bilboa*, 2 C. Rob. 133 (1799).

Britain. The cargo had been delivered to them on bail to answer adjudication. \* \* \*

Sir W. SCOTT. I am of opinion that this is a decided case on the authority of the Supreme Court in *The Negotie en Zeevaart*. I remember that case well, having been junior counsel in it, and having attended much to it, as there was much difference of opinion respecting it in the court below.

It was a case of a ship sailing from Demarara to Middlebourg, in Holland, on the 30th of January, 1781, about six weeks after the declaration of hostilities against Holland. Demarara surrendered to the British forces on the 14th of March; and the capture was made on the 25th. The terms of capitulation were very favorable: "The inhabitants were to take the oath of allegiance; to be permitted to export their own property, and to be treated in all respects like British subjects, till his majesty's pleasure could be known;" and although this was in the first instance only under the proclamation of the captor, still that being accepted, it took complete effect. These terms were afterwards confirmed by the king. There was, therefore, in that case as strong a promise of protection as could be; and recognized and confirmed by the supreme authority of the state.

Under these circumstances, the judge of the admiralty thought the claim so strong, that he actually restored; and it was not his opinion alone. On appeal, however, the Lords were of opinion, that property sailing after declaration of hostilities, but before a capitulation, and taken on the voyage, was not protected by the intermediate capitulation. It was not determined on any ground of illegal trade, nor on any surmise, that when the owners became British subjects, the trade in which the property was embarked, became, *ex post facto*, illegal; nor was it at all taken into consideration, that Demarara had again become a Dutch colony at the time of adjudication. It was declared to be adjudged on the same principles as if the cause had come on at the time of capture. It was not on any of these grounds, but simply on the ground of Dutch property, that condemnation passed in that case. I remember a dictum of a great law lord then present, Lord Camden, "that the ship sailed as a Dutch ship, and could not change her character in transitu."

This decision of the Supreme Court must be binding on me, unless there are in the present case any distinctions that take it out of the law of that decision. The distinctions made, are, 1st, that the colony in this case was not hostile; and, 2dly, that the ship was not going into the hands of the enemy, but that she was coming first to the Cape into the hands of the owners, now become British subjects; and that they would have altered the ulterior destination to Holland.

On the first point, that Holland was not hostile, it is enough that hostilities have since followed, and with a retrospective operation. The state of affairs was at that time at best but very doubtful; and all property taken during that doubtful state of things has been since

condemned; but it is said, that although Holland has become hostile, the Cape has not. If it could be proved that the colony adhered to the old government, it might entitle them to be exempted from this hostile character; but that is not shown, and there is no reason to presume it. They surrendered as Dutch subjects; and, therefore, there is no pretence now to contend for a different character.

The other distinction is, that this property was coming to the hands of the owners, whilst in the Demarara case it was gone from them, and must have fallen into the possession of the mother country; but there is no decided proof that this ship was coming to the Cape; and if so, she is still to be considered as taken merely in transitu towards Holland, where the voyage was clearly to have ended; and in what character? As a Dutch ship, in a Dutch port. If the vessel had arrived at the Cape, I will not say, that coming actually into the hands of the capitulants, she might not have been protected as property in possession; but being taken before she arrived there, as Dutch property, I am bound down by the decision of the lords; and I think myself obliged to say, that her character could not be changed in transitu; and that she must be condemned as Dutch property.\*

\* In *The Circassian*, 2 Wall. 135, 17 L. Ed. 796 (1864), it was held by the Supreme Court (Mr. Justice Nelson dissenting), that "the occupation of a city by a blockading belligerent does not terminate a public blockade of it previously existing; the city itself being hostile, the opposing enemy in the neighborhood, and the occupation limited, recent, and subject to the vicissitudes of war."

The entrance of federal troops into the city of New Orleans did not, it was maintained, destroy the blockade, and therefore the *Circassian*, a British vessel arriving after the occupation of the city, was taken in delicto.

The case of *The Circassian* was later submitted to the American and British Claims Commission appointed under article 12 of the Treaty of May 8, 1871, between the United States and Great Britain. This Commission made awards in favor of all the claimants, which awards were paid by the United States. See 4 Moore's *International Arbitrations*, 3911-3923 (1898).

In *The Adula*, 176 U. S. 361, 20 Sup. Ct. 432, 44 L. Ed. 505 (1900), the court held that, although American troops occupied the mouth of the Bay, the blockade was still binding upon vessel bound for the city of Guantanamo, eighteen miles inland, and in the possession of the enemy. The Supreme Court relied upon *The Circassian* as decisive, notwithstanding the awards of the American and British Claims Commission, and condemned the vessel.

The *Danckebaar Africaan*, *supra*, and *The Circassian*, are thus criticised by an eminent authority:

"In both these cases the essential fact was lost sight of that the property of individuals engaged in mercantile acts is confiscated, not because they are personally hostile to the belligerent, but because they are members of the enemy state or closely associated with it, and so contribute to its strength, or else because they are doing acts inconvenient to the belligerent. So soon as they cease, in whatever manner, or from whatever cause, to be members of an enemy state, or to be associated with it, or so soon as their acts cease to be inconvenient, all reason for the confiscation of their property falls to the ground." William E. Hall, *A Treatise on International Law* (4th Ed., 1896), 529, 530.

To make a vessel liable for trading with the enemy, there should be the intent to trade, coupled with destination to an enemy port.

In *The Abby*, 5 C. Rob. 251, 252 (1804), counsel contended that "it could not be deemed a trading with the enemy, since the ship sailed before the breaking out of hostilities against Holland, and before the parties could have any knowledge of that event; and that, at the supposed time of arrival, Demarara

[to which the vessel was destined] had become a British settlement." Sir William Scott agreed to this contention.

In the case of *The Trende Sostre*, 6 C. Rob. 390, note (1807), Sir William Scott applied this principle to the law of contraband, saying:

"Because, from the moment when the Cape [of Good Hope] became a British possession, the goods lost their nature of contraband. They were going into the possession of a British settlement, and the consequence of any pre-emption that could be put upon them would be British pre-emption. It has been said that this is a principle which the court has not applied to cases of contraband; and that the court, in applying it to cases of blockade, did it only in consideration of the particular hardships consequent on that class of cases. But I am not aware of any material distinction; because the principle on which the court proceeded was, that there must be a delictum existing at the moment of seizure to sustain the penalty. It is said that the offence was consummated by the act of sailing, and so it might be with respect to the design of the party, and if the seizure had been made whilst the offence continued, the property would have been subject to condemnation. But when the character of the goods is altered, and they are no longer to be considered as contraband, going to the port of an enemy, it is not enough to say that they were going under an illegal intention. There may be the *mens rea*, not accompanied by the act of going to an enemy's port. I am of opinion therefore, that the same rule does apply to cases of contraband, and upon the same principle on which it has been applied in those of blockade; I am not aware of any cases in which the penalty of contraband has been inflicted on goods not in delicto, except in the recent class of cases respecting the proceeds of contraband carried outward with false papers. But on what principle have those decisions been founded? On this, that the right of capture having been defrauded in the original voyage, the opportunity should be extended to the returned voyage. Here the opportunity has been afforded till the character of the port of destination became British. Till that time the liability attached; after that, though the intention is consummated, there is a material defect in the body and substance of the offence, in the fact, though not in the intent. I am of opinion that it is a discharge, and a complete acquittal, that long before the time of seizure these goods had lost their noxious character of going as contraband to an enemy's port."

In *The Lisette*, 6 C. Rob. 387, 395 (1807), Sir William Scott held that the penalty of capture was destroyed by the raising of a blockade between the time of sailing and capture, saying on this point:

"It is said that the offence was consummated by the act of sailing; so it is in a certain sense. But the ship was not taken in delicto, and I have not had any case pointed out to me, in which the court has pronounced an unfavorable judgment on a ship seized for the breach of a bygone blockade. I know of no such case; and certainly the same reason for rigor does not exist; because the blockade being gone, the necessity of applying the penalty to prevent future transgression cannot continue. \* \* \* When the blockade is raised, a veil is thrown over every thing that has been done, and the vessel is no longer taken in delicto. The delictum may have been completed at one period, but it is by subsequent events entirely done away."

It had been previously held by the same learned judge, in *The Imina*, 3 C. Rob. 167 (1800), that the offence was purged by the act of the master of the vessel changing his destination from Amsterdam, then a blockaded port.

In *The Diana*, 5 C. Rob. 60, 64 (1803), Sir William Scott said:

"The goods in question were shipped in a time of peace, and under the faith of a treaty; and at the time when this court is called upon to decide on the claim, the proprietors are again restored to their British character, and are reintegrated subjects of this country. Under all these circumstances I should betray a very obtuse sense of what is absurd and unjust, if I did not feel it highly reasonable that they should be admitted to their *jus postliminii*, and be held entitled to the protection of British subjects."

In *The Orteric*, L. R. [1920] App. Cas., 724 (1920), the Privy Council decided, as stated in the headnote, that:

"Goods which at the date of their seizure in prize are not enemy property cannot be condemned as enemy goods, although the property in them has passed to an enemy before the issue of the writ claiming condemnation."

## THE PACKET DE BILBOA.

(High Court of Admiralty, 1799. 2 C. Rob. 133.)

This was a case of a claim of an English house, for goods shipped on board a Spanish vessel, by the order of Spanish merchants, before hostilities with Spain, and captured December, 1796, on a voyage from London to Corunna.

Sir Wm. Scott. This is a claim, of a peculiar nature, for goods sent by British subjects to Spain, shipped before hostilities, during the time of that situation of the two countries, of which it was unknown, even to our government, what would be the issue between them. There appears to be no ground to say that this contract was influenced by speculations on the prospect of a war, or that anything has been specially done to avoid the risks of war. It is sworn in the affidavit of the claimant "that this is the constant habit and practice of this trade"; whether it is the practice of the Spanish trade generally, or only the particular mode of these individuals in carrying on commerce together is not material, as the latter would be quite sufficient to raise the subject of this claim. The question is, in whom is the legal title? Because, if I should find that the interest was in the Spanish consignee, I must then condemn, and leave the British party to apply to the crown for that grace and favor which it is always ready to show; the property being condemnable to the crown as taken before hostilities.

The statement of the claim sets forth that these goods have not been paid for by the Spaniard. That would go but little way; that alone would not do; there must be many cases in which British merchants suffer from capture by our own cruisers, of goods shipped for foreign account before the breaking out of hostilities. It goes on to state "that, according to the custom of the trade, a credit of six, nine, or twelve months is usually given, and that it is not the custom to draw on the consignee till the arrival of the goods; that the sea risk in peace as well as war is on the consignor; that he insures, and has no remedy against the consignee for any accident that happens during the voyage." Under these circumstances, in whom does the property reside? The ordinary state of commerce is, that goods ordered and delivered to the master are considered as delivered to the consignee, whose agent the master is in this respect; but that general contract of the law may be varied by special agreement or by a particular prevailing practice, that presupposes an agreement amongst such a description of merchants. In time of profound peace, when there is no prospect of approaching war, there would unquestionably be nothing illegal in contracting that the whole risk should fall on the consignor till the goods came into possession of the consignee. In time of peace they may divide their risk as they please, and nobody has a right to say they shall not; it would not be at all illegal that goods not shipped in

time of war, or in contemplation of war, should be at the risk of the shipper. In time of war this cannot be permitted, for it would at once put an end to all captures at sea. The risk would in all cases be laid on the consignor, where it suited the purpose of protection. On every contemplation of a war, this contrivance would be practiced in all consignments from neutral ports to the enemy's country, to the manifest defrauding of all rights of capture. It is therefore considered to be an invalid contract in time of war, or, to express it more accurately, it is a contract which, if made in war, has this effect—that the captor has a right to seize it and convert the property to his own use;<sup>4</sup> for he having all the rights that belong to his enemy, is authorized to have his taking possession considered as equivalent to an actual delivery to his enemy, and the shipper who put it on board during a time of war must be presumed to know the rule, and to secure himself in his agreement with the consignee against the contingency of any loss to himself that can arise from capture. In other words, he is a mere insurer against sea risk, and he has nothing to do with the case of capture, the loss of which falls entirely on the consignee. If the consignee refuses payment and throws it upon the shipper, the shipper must be supposed to have guarded his own interests against that hazard, or he has acted improvidently and without caution.

The present contract is not of this sort; it stands as a lawful agreement, being made without any attention to the event of a war. The goods are sent at the risk of the shipper; if they had been lost, on whom would the loss have fallen but on him? What surer test of property can there be than this? It is the true criterion of property that, if you are the person on whom the loss will fall, you are to be considered as the proprietor. The bill of lading very much favors this account. The master binds himself to the shipper, "to deliver for you and in your name," by which it is to be understood that the delivery had not been made to the master for the consignee, but that he was to make the delivery in the name of the shipper to the consignee, till which time the inference is that they were to remain the property of the shipper. As to the payment of freight, that is not material, as in the end the purchaser must necessarily pay the carriage. The other consideration—who bears the loss?—much outweighs that; neither does the case put show the contrary. The case put is—supposing Spain and England both neutral and that these goods had been taken by the French and sold to great profit, to whose advantage would it have been? The answer is, if the goods were to continue the property of the shipper till delivery, it must have enured to his benefit, and not that of the consignee. To make the loss fall upon the shipper in

<sup>4</sup> *The Anna Catharina*, 4 C. Rob. 107 (1802); *The Josephine*, 4 C. Rob. 25 (1801); *The Aurora*, 4 C. Rob. 218 (1802); *The Neptunus*, 6 C. Rob. 403 (1807); *The Anne Green*, 1 Gall. 274, Fed. Cas. No. 414 (1812); *The Atlas*, 3 C. Rob. 299 (1801).



the case of the present shipment would be harsh in the extreme. He ships his goods in the ordinary course of traffic, by an agreement mutually understood between the parties, and in no wise injurious to the rights of any third party. An event subsequently happens which he could in no degree provide against. If he is to be the sufferer he is a sufferer without notice and without the means of securing himself; he was not called upon to know that the injustice of the other party would produce a war before the delivery of his goods. The consignee may refuse payment, referring to the terms of the contract which was made when it was perfectly lawful; and under what circumstances and on what principles the shipper could ever enforce payment against the consignee is not easy to discover. The goods have never been delivered in Spain; they were to have been at the risk of the shipper till delivery, and this under a perfectly fair contract. I must consider the property to reside still in the English merchant. It is a case altogether different from other cases which have happened on this subject *flagrante bello*. I am of opinion that, on all just considerations of ownership, the legal property is in the British merchant; that the loss must have fallen on the shipper, and the delivery was not to have been made till the last stage of the business, till they had actually arrived in Spain and had been put into the hands of the consignee; and therefore I shall decree restitution of the goods to the shipper.

On prayer that the captor's expenses might be paid, it was answered that they had already had the benefit of the condemnation of the ship.

THE COURT. I think there has been a great service performed to the shipper. If the goods had not been captured they would have gone into the possession of the enemy. The captor did right in bringing the question before the court, and he ought by no means to be a loser. I shall not give a salvage, but shall direct the expenses of the captor to be paid out of the proceeds.

#### THE MIRAMICHI.

(High Court of Justice, Admiralty Division, 1914. L. R. [1915] Prob. Div. 71.)

Claim by Muir & Co., of New York, U. S. A., merchants, and the Guaranty Trust Company of New York, bankers, in respect of a part cargo of wheat purchased by George Fries & Co., of Colmar, and Gebrueder Zimmern & Co., of Mannheim in the German Empire, shipped at Galveston, Texas, on board the British steamship *Miramichi* for conveyance to Rotterdam and seized at Eastham, as enemy property, by the Customs on behalf of the Crown. \* \* \*

Sir SAMUEL EVANS, President. \* \* \*

The sellers contracted to sell the cargo to the buyers on June 25 for shipment during the month of July, 1914, from a port of U. S. A. direct or indirect to Rotterdam at a price to include cost, freight, and

\* The statement of facts is abridged and parts of the opinion are omitted.

insurance; in other words, the contract was what is so well known as a c. i. f. contract. Payment (or in the American terminology "reimbursement") was to be "by check against documents." The sellers were to furnish policies of insurance, or certificates of insurance (free of war risk). A clause for settlement of disputes in London was included, which shows (apart from anything else) that any disputes were to be determined according to English law.

The sellers had bought the wheat to enable them to fulfill their contract with the buyers from C. B. Fox, a grain merchant in Galveston.

The wheat was shipped by Fox at Galveston on July 23, 1914. The bill of lading was given in favour of Fox, the shipper, and was made out unto the order of one Davis, or to his or their assigns. It was indorsed generally, and in due course the sellers paid Fox for the wheat and obtained the bill of lading. They did not indorse it in favour of the buyers, and it remained a bill of lading only indorsed generally.

The necessary insurances were effected and the certificates of insurance were obtained by the sellers on July 23.

On July 28 the sellers drew a bill of exchange upon the buyers, and, according to the statement of the Attorney General, discounted it with the bankers (the Guaranty Trust Company of New York, who have joined them as claimants). On the same date they deposited with the bankers the bill of lading and certificates of insurance to be delivered up on payment by the buyers through a Berlin bank of the amount due on the bill of exchange for the cost and insurance, less the freight, which was credited, as it was to be paid for by the buyers on delivery.

On the same date also the original documents were forwarded to the Berlin bank for credit of the New York bank, by the steamship *Savoie*, which sailed from New York on July 29 and arrived at Le Havre on August 5; and duplicate documents were forwarded by the steamship *Carmania*, which sailed from New York on July 29 and arrived at Liverpool on August 7. The buyers were duly notified of these matters, and an invoice was forwarded to them by the sellers on the same day (July 28) with all the necessary particulars of the shipment bill of exchange, and documents.

So far as the buyers are concerned, no further information was given to the Court except that the documents were tendered to them, and that on the tender they refused to accept the documents, or to pay the sum due under the bill of exchange and indorsed on the bill of lading as follows: "Refused on account of late production, nearly one month after normal due date. Colmar, September 3, 1914. Geo. Fries."

That reason was a mere excuse; the real reason, no doubt, was that war had broken out. The sellers, therefore, or their bankers, still hold the bill of lading, and the bill of exchange remains unpaid.

These, I think, are all the material facts. \* \* \*

Very difficult questions often arise at law as to when the property in goods carried by sea is transferred, or vests; and at whose risk goods are at a particular time, or who suffers by their loss.

These are the kind of questions which are often brushed aside in the Prize Court when the transactions in which they are involved take place during war or were embarked in when war was imminent or anticipated.

But where, as in the present case, all the material parts of the business transaction took place bona fide during peace, and it becomes necessary to decide questions of property, I hold that the law to be applied is the ordinary municipal law governing contracts for the sale and purchase of goods.

Where goods are contracted to be sold and are shipped during peace without any anticipation of imminent war, and are seized or captured afloat after war has supervened, the cardinal principle is, in my opinion, that they are not subject to seizure or capture unless under the contract the property in the goods has by that time passed to the enemy. \* \* \*

In my opinion the result of the many decisions from *Wait v. Baker* (1848) 2 Ex. 1, up to *Ogg v. Shuter* (1875) 1 C. P. D. 47, *Mirabita v. Ottoman Bank* (1878) 3 Ex. D. 164, and thence up to the Sale of Goods Act, 1893; and of the provisions of the Sale of Goods Act, 1893, itself, following closely on these matters the judgment of Cotton, L. J., in *Mirabita v. Ottoman Bank* [1878] 3 Ex. D. 164; and of the decisions subsequent to the act, e. g., *Dupont v. British South Africa Co.* [1901] 18 Times L. R. 24, *Ryan v. Ridley* [1902] 8 Com. Cas. 105, and *Biddell v. E. Clemens Horst* [1911] 1 K. B. 214, 934, [1912] A. C. 18, is that, in the circumstances of the present case, the goods had not at the time of seizure passed to the buyers; but that the sellers had reserved a right of disposal or a *jus disponendi* over them, and that the goods still remained their property, and would so remain until the shipping documents had been tendered to and taken over by the buyers, and the bill of exchange for the price had been paid.

It follows that the goods seized were the property of the American claimants, and were not subject to seizure; the court decrees accordingly, and orders the goods to be released to the claimants. \* \* \*

#### THE SALLY MAGEE.

(Supreme Court of the United States, 1865. 3 Wall. 451, 18 L. Ed. 197.)

Appeal from a decree of the District Court for the Southern District of New York, condemning as enemy's property the bark *Sally Magee* and her cargo, captured during the late rebellion; the question before this court being, however, only as to the cargo; the condemnation of the vessel not being appealed from. \* \* \*

All the goods were to be delivered at Richmond. The vessel sailed from Rio for Richmond on the 12th of May, 1861. When forty-five days out from Rio, and before any intelligence of the war had reached

her, she was captured as prize, and sent to New York, where both the vessel and cargo were libelled in the District Court. Upon the return of the monition, on the 23d of July, 1861, two claims, both made by Fry, Price & Co., of New York, were interposed relative to the cargo. In July, 1863—two years after the proceedings on prize were instituted—both the vessel and cargo were condemned, the latter having been appraised at the considerable sum of \$69,000. \* \* \*

Mr. Justice SWAYNE delivered the opinion of the court.<sup>7</sup>

When a vessel is liable to confiscation, the first presumption is that the cargo is in the same situation.<sup>8</sup> The bills of lading in the case are in evidence. The goods were consigned to parties living in Richmond. This vested the ownership in them. Such is the legal effect of a bill of lading as regards the consignee, unless the contrary is shown by the bill of lading itself or by extrinsic evidence.<sup>9</sup> Upon the proofs there was clearly a *prima facie* case for the condemnation of the entire cargo. \* \* \*

The ownership of property in such cases cannot be changed while it is in transitu. The capture clothes the captors with all the rights of the owner which subsisted at the commencement of the voyage, and anything done thereafter, designed to incumber the property, or change its ownership, is a nullity. No lien created at any time by the secret convention of the parties is recognized. Sound public policy and the right administration of justice forbid it. This rule is rigidly enforced by all prize tribunals. The property was shipped to the enemy. It was diverted from its course by the capture. The allegation of a lien wears the appearance of an afterthought. It strikes us as a scheme devised under pressure, to save, if possible, something from the vortex which it was foreseen inevitably awaited the vessel and cargo. \* \* \*

Decree affirmed.<sup>10</sup>

\* Part of the statement of facts and part of the opinion are omitted.

† Nelson, J., not having sat; having been indisposed.

§ Wheaton, Appendix, 24.

§ Laurence v. Minturn, 17 How. 100, 15 L. Ed. 58 (1854).

<sup>10</sup> In the *San José Indiano*, 2 Gall. 268, 21 Fed. Cas. 389, 398, No. 12,322 (1814), Mr. Justice Story, sitting at Circuit, said:

"The single question presented in this claim is, in whom the property vested during its transit; if in Mr. Lizaur, then it is to be restored; if in the shippers, then it is to be condemned. It is contended on behalf of the claimant, that the goods, having been purchased by order of Mr. Lizaur, the property vested in him immediately by the purchase, and the contract being executed by the sale, no delivery was necessary to perfect the legal title; that nothing was reserved to the shippers, but a mere right of stoppage in transitu, and that if they had been burnt before the shipment, or lost during the voyage, the loss must have fallen on Mr. Lizaur. As to the doctrine of stoppage in transitu, I do not conceive it can apply to this case. That right exists in the single case of insolvency, and presupposes, not only that the property in the goods has passed to the consignee, but that the possession is in a third person in their transit to the consignee. It cannot, therefore, touch a case, where the actual or constructive possession still remains in the shipper or his exclusive agents."

## CHAPTER XV

### BELLIGERENT USE OF NEUTRAL TERRITORY

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#### SECTION 1.—BASE OF HOSTILE OPERATIONS

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##### THE SALVADOR.

(Privy Council, 1870. L. R. 1870, 3 Privy Council, 218.)

For the material portion of *The Salvador*, in so far as this reference is concerned, see *The Three Friends*, post, p. 838.

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##### THE SANTISSIMA TRINIDAD.

##### THE ST. ANDRE.

(Supreme Court of the United States, 1822. 7 Wheat. 283, 5 L. Ed. 454.)

Appeal from the Circuit Court of Virginia.

This was a libel filed by the consul of Spain, in the District Court of Virginia, in April, 1817, against eighty nine bales of cochineal, two bales of jalap, and one box of vanilla, originally constituting part of the cargoes of the Spanish ships *Santissima Trinidad* and *St. Andre*, and alleged, to be unlawfully and piratically taken out of those vessels on the high seas by a squadron consisting of two armed vessels called the *Independencia del Sud* and the *Altravida*, and manned and commanded by persons assuming themselves to be citizens of the United Provinces of the Rio de la Plata. The libel was filed, in behalf of the original Spanish owners, by Don Pablo Chacon, consul of his Catholic Majesty for the port of Norfolk; and as amended, it insisted upon restitution principally for three reasons: (1) That the commanders of the capturing vessels, the *Independencia* and the *Altravida*, were native citizens of the United States, and were prohibited by our treaty with Spain of 1795, from taking commissions to cruise against that power. (2) That the said capturing vessels were owned in the United States, and were originally equipped, fitted out, armed and manned in the United States, contrary to law. (3) That their force and armament had been illegally augmented within the United States. \* \* \*

The District Court, upon the hearing of the cause, decreed restitution to the original Spanish owners. That sentence was affirmed in the Circuit Court, and from the decree of the latter the cause was brought by appeal to this court.

Mr. Justice STORY delivered the opinion of the court.<sup>1</sup>

Upon the argument at the bar several questions have arisen, which have been deliberately considered by the court; and its judgment will now be pronounced. The first in the order, in which we think it most convenient to consider the cause, is, whether the *Independencia* is in point of fact a public ship, belonging to the government of Buenos Ayres. The history of this vessel, so far as is necessary for the disposal of this point, is briefly this: She was originally built and equipped at Baltimore as a privateer during the late war with Great Britain, and was then rigged as a schooner, and called the *Mammoth*, and cruized against the enemy. After the peace she was rigged as a brig, and sold by her original owners. In January, 1816, she was loaded with a cargo of munitions of war, by her new owners, (who are inhabitants of Baltimore), and being armed with twelve guns, constituting a part of her original armament, she was despatched from that port, under the command of the claimant, on a voyage, ostensibly to the Northwest Coast, but in reality to Buenos Ayres. By the written instructions given to the supercargo on this voyage, he was authorized to sell the vessel to the government of Buenos Ayres, if he could obtain a suitable price. She duly arrived at Buenos Ayres, having exercised no act of hostility, but sailed under the protection of the American flag, during the voyage. At Buenos Ayres the vessel was sold to Captain Chaytor and two other persons; and soon afterwards she assumed the flag and character of a public ship, and was understood by the crew to have been sold to the government of Buenos Ayres; and Captain Chaytor made known these facts to the crew, and asserted that he had become a citizen of Buenos Ayres; and had received a commission to command the vessel as a national ship; and invited the crew to enlist in the service; and the greater part of them accordingly enlisted. From this period, which was in May, 1816, the public functionaries of our own and other foreign governments at that port, considered the vessel as a public ship of war, and such was her avowed character and reputation. No bill of sale of the vessel to the government of Buenos Ayres is produced, and a question has been made principally from this defect in the evidence, whether her character as a public ship is established. It is not understood that any doubt is expressed as to the genuineness of Captain Chaytor's commission, nor as to the competency of the other proofs in the cause introduced, to corroborate it. The only point is, whether supposing them true, they afford satisfactory evidence of her public character. We are of opinion that they do. In general the commission of a public ship, signed by the proper authorities of the nation to which she belongs, is complete proof of her national character. A bill of sale is not necessary to be produced. Nor will the courts of a foreign country inquire into the means by which the title to the property has been acquired. It

<sup>1</sup> The statement of facts is abridged and parts of the opinion are omitted.

would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy. The commission, therefore, of a public ship, when duly authenticated, so far at least as foreign courts are concerned, imports absolute verity, and the title is not examinable. The property must be taken to be duly acquired, and cannot be controverted. This has been the settled practice between nations; and it is a rule founded in public convenience and policy, and cannot be broken in upon, without endangering the peace and repose, as well of neutral as of belligerent sovereigns. The commission in the present case is not expressed in the most unequivocal terms; but its fair purport and interpretation must be deemed to apply to a public ship of the government. If we add to this the corroborative testimony of our own and the British consul at Buenos Ayres, as well as that of private citizens, to the notoriety of her claim of a public character; and her admission into our own ports as a public ship, with the immunities and privileges belonging to such a ship, with the express approbation of our own government, it does not seem too much to assert, whatever may be the private suspicion of a lurking American interest, that she must be judicially held to be a public ship of the country whose commission she bears. \* \* \*

The next question growing out of this record, is whether the property in controversy was captured in violation of our neutrality, so that restitution ought, by the law of nations, to be decreed to the libellants. Two grounds are relied upon to justify restitution: First, that the *Independencia* and *Altravida* were originally equipped, armed, and manned as vessels of war in our ports; secondly, that there was an illegal augmentation of the force of the *Independencia* within our ports. Are these grounds, or either of them, sustained by the evidence? \* \* \*

The question as to the original illegal armament and outfit of the *Independencia* may be dismissed in a few words. It is apparent, that though equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war during the voyage she would have been justly condemnable as good prize, for being engaged in a traffick prohibited by the law of nations. But there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit; and which only exposes the persons engaged in it to the penalty of confiscation. Supposing, therefore, the voyage to have been for commercial purposes, and the sale at Buenos Ayres to have been a bona fide sale, (and there is nothing in the evidence before us to contradict it,) there is no pretence to say, that the original outfit on the voyage was illegal, or that a capture made after the sale was, for that cause alone, invalid.

The more material consideration is as to the augmentation of her force in the United States, at a subsequent period. \* \* \* The Court is, therefore, driven to the conclusion, that there was an illegal augmentation of the force of the *Independencia* in our ports, by a substantial increase of her crew; and this renders it wholly unnecessary to enter into an investigation of the question, whether there was not also an illegal increase of her armament. \* \* \*

This view of the question renders it unnecessary to consider another which has been discussed at the bar respecting what is denominated the right of expatriation. \* \* \* And here we are met by an argument on behalf of the claimant, that the augmentation of the force of the *Independencia* within our ports, is not an infraction of the law of nations, or a violation of our neutrality; and that so far as it stands prohibited by our municipal laws the penalties are personal, and do not reach the case of restitution of captures made in the cruise, during which such augmentation has taken place. It has never been held by this court, that an augmentation of force or illegal outfit affected any captures made after the original cruise was terminated. By analogy to other cases of violations of public law the offence may well be deemed to be deposited at the termination of the voyage, and not to affect future transactions. But as to captures made during the same cruise, the doctrine of this court has long established that such illegal augmentation is a violation of the law of nations, as well as of our own municipal laws, and as a violation of our neutrality, by analogy to other cases, it infects the captures subsequently made with the character of torts, and justifies and requires a restitution to the parties who have been injured by such misconduct. It does not lie in the mouth of wrongdoers, to set up a title derived from a violation of our neutrality. The cases in which this doctrine has been recognized and applied, have been cited at the bar, and are so numerous and so uniform, that it would be a waste of time to discuss them, or to examine the reasoning by which they are supported: More especially as no inclination exists on the part of the court to question the soundness of these decisions. If, indeed, the question were entirely new, it would deserve very grave consideration, whether a claim founded on a violation of our neutral jurisdiction could be asserted by private persons, or in any other manner than by a direct intervention of the government itself. In the case of a capture made within a neutral territorial jurisdiction, it is well settled, that as between the captors and the captured, the question can never be litigated. It can arise only upon a claim of the neutral sovereign asserted in his own courts or the courts of the power having cognizance of the capture itself for the purposes of prize. And by analogy to this course of proceeding, the interposition of our own government might seem fit to have been required before cognizance of the wrong could be taken by our courts. But the practice from the beginning in this class of causes, a period of nearly 30 years, has been uniformly the



other way; and it is now too late to disturb it. If any inconvenience should grow out of it, from reasons of state policy or executive discretion, it is competent for Congress to apply at its pleasure the proper remedy. \* \* \*

Upon the whole, it is the opinion of the court that the decree of the Circuit Court be affirmed, with costs.<sup>2</sup>

<sup>2</sup> In *La Amistad de Rues*, 5 Wheat., 385, 389, 5 L. Ed. 115 (1820), Mr. Justice Story said:

"The doctrine heretofore asserted in this court is, that whenever a capture is made by any belligerent, in violation of our neutrality, if the prize come voluntarily within our jurisdiction, it shall be restored to the original owners. This is done, upon the footing of the general law of nations; and the doctrine is fully recognised by the act of Congress of 1794. But this court have never yet been understood to carry their jurisdiction, in cases of violation of neutrality, beyond the authority to decree restitution of the specific property, with the costs and expenses, during the pending of the judicial proceedings. We are now called upon to give general damages for plunderage, and if the particular circumstances of any case shall hereafter require it, we may be called upon to inflict exemplary damages, to the same extent as in the ordinary cases of marine torts. We entirely disclaim any right to inflict such damages; and consider it no part of the duty of a neutral nation, to interpose, upon the mere footing of the law of nations, to settle all the rights and wrongs which may grow out of a capture between belligerents."

In *United States v. Guinet*, 2 Dall. 321, 1 L. Ed. 898 (1795), it was held, according to the headnote, that:

"The conversion of a merchant-vessel of a foreign belligerent power into a vessel of war, within a port of the United States, with intent to cruise against another belligerent power, at peace with this country, is to be deemed an original outfit; and is a breach of the neutrality laws of the United States."

"In the case of *La Nereyda*, 8 Wheat. 108, 5 L. Ed. 574 (1823), a Spanish ship of war was captured by the privateer *Irresistible*, which was fitted out, owned, and commanded by American citizens, cruising under a commission from Artigas, as chief of the Oriental Republic of Rio de la Plata. The prize was taken to Margarita, an island of Venezuela, and there condemned as prize, Venezuela being an ally of the Oriental Republic. She was there commissioned as a Venezuelan privateer, and came to Baltimore. Here she was libelled on behalf of the king of Spain on the ground that the *Irresistible* had been illegally fitted out in an American port. A claim was set up by one Francesche, who alleged that he had bought her at the prize sale. The Supreme Court (Story, J., giving the opinion) held that this purchase was not proved, and that she was still in the hands and ownership of the owners of the *Irresistible*; that their title was not improved by the condemnation, if valid otherwise; and restored her to the king of Spain. Dana's Wheaton, 555, note." Freeman Snow's Cases and Opinions on International Law (1893) 407, 408, note.

Other early cases in the United States courts on this question are: *Williamson v. The Betsey*, Bee, 67, Fed. Cas. No. 17,750 (1795); *Moodie v. The Brothers*, Bee, 76, Fed. Cas. No. 9,743 (1795); *British Consul v. The Nancy*, Bee, 78, Fed. Cas. No. 1,898 (1795); *Glass v. The Betsey*, 3 Dall. 6, 1 L. Ed. 485 (1794); *The Magdalena*, (Talbot v. Janson) 3 Dall. 133, 1 L. Ed. 540 (1796); *Moodie v. The Alfred*, 3 Dall. 307, 1 L. Ed. 614 (1796); *Moodie v. The Phoebe Anne*, 3 Dall. 319, 1 L. Ed. 618 (1796); *The Alerta v. Moran*, 9 Cranch, 359, 3 L. Ed. 758 (1815); *La Invincible*, 1 Wheat. 238, 4 L. Ed. 80 (1816); *The Estrella*, 4 Wheat. 298, 4 L. Ed. 574 (1819); *La Conception*, 6 Wheat. 235, 5 L. Ed. 249 (1821); *The Bello Corrunes*, 6 Wheat. 152, 5 L. Ed. 229 (1821); *The Gran Para*, 7 Wheat. 471, 5 L. Ed. 501 (1822); *The Arrogante Barcelones*, 7 Wheat. 496, 5 L. Ed. 507 (1822); *The Fanny*, 9 Wheat. 659, 6 L. Ed. 184 (1824).

For an admirable digest of these cases, the doctrines they establish and for principal cases involving a breach of our neutrality acts, as well as Great Britain's shortcomings in the Civil War, see Dana's Wheaton, note 215, pp. 538-581 (1866).

## UNITED STATES v. QUINCY.

(Supreme Court of the United States, 1832. 6 Pet. 445, 8 L. Ed. 458.)

For the material portion of this case, see *The Three Friends*, post, p. 836.

## UNITED STATES v. THE METEOR.

(Circuit Court of the United States, S. D. New York, 1868. 3 Am. Law Rev. 173, Fed. Cas. No. 15,760.)

The Meteor was built in the United States in 1865, during the war then pending between Chile and Spain, and sold to the Chilean government, without armament, and then, it was alleged, commissioned when in the United States, as a Chilean privateer. She was libelled in New York and seized January 23, 1866. Upon a hearing before Judge Betts, that learned judge held that "there must be a decree condemning and forfeiting the property under seizure, in accordance with the prayer of the libel."<sup>4</sup>

NELSON, Circuit Justice. This is an appeal in admiralty from a decree of condemnation in a libel of information for the violation of the neutrality laws of the United States. We have examined the pleadings and proofs in the case, and have been unable to concur in the judgment of the court below, but from the pressure of other business have not found time to write out at large the grounds and reasons for the opinion arrived at. We must, therefore, for the present, be content in the statement of our conclusions in the matter.

1. Although negotiations were commenced and carried on between the owners of the Meteor and agents of the government of Chile for the sale of her to the latter, with the knowledge that she would be employed against the government of Spain, with which Chile was at war, yet these negotiations failed and came to an end from the inability of the agents to raise the amount of the purchase-money demanded; and if the sale of the vessel, in its then condition and equipment, to the Chilean government would have been a violation of our neutrality laws, of which it is unnecessary to express any opinion, the termination of the negotiation put an end to this ground of complaint.

2. The furnishing of the vessel with coal and provisions for a voyage to Panama, or some other port of South America, and the purpose of the owners to send her thither, in our judgment, was not in pursuance of an agreement or understanding with the agents of the Chilean government, but for the purpose and design of finding a market for her, and that the owners were free to sell her on her arrival there to the government of Chile or of Spain, or of any other government or person with whom they might be able to negotiate a sale.

<sup>4</sup> The above statement of the case is taken from 3 Wharton's Digest (2d Ed., 1887) 561, 562.

3. The witnesses chiefly relied on to implicate the owners in the negotiations with the agents of the Chilean government, with a view and intent of fitting out and equipping the vessel to be employed in the war with Spain, are persons who had volunteered to negotiate on behalf of the agents with the owners in expectation of large commissions in the event of a sale, or persons in the expectation of employment in some situation in the command of the vessel, and very clearly manifest their disappointment and chagrin at the failure of the negotiations, and whose testimony is to be examined with considerable distrust and suspicion. We are not satisfied that a case is made out, upon the proofs, of a violation of the neutrality laws of the United States, and must, therefore, reverse the decree below, and enter a decree dismissing the libel.<sup>5</sup>

<sup>5</sup> An appeal was taken by the government from the decision of the Circuit Court to the Supreme Court of the United States, but was not prosecuted to a hearing, being dismissed by consent, November 9, 1868.

For a criticism on Judge Betts' ruling, see an article in the *North American Review* for October, 1866 (vol. 103, p. 488).

"The substance of the evidence adduced by the government was briefly as follows: The *Meteor* was a swift seagoing steamship. She was built by a number of public-spirited citizens, with the intention of offering her to the United States government, for the purpose of pursuing and destroying the *Alabama*. To this end she was capable of carrying a moderate armament; but her chief merit lay in her speed, to which every other consideration had been made subordinate. Before she was finished, the need for such vessels had ceased. She had since been used by government as a transport ship for troops, and afterward had been employed as a freighting vessel, in the merchant service, between home ports. Originally two Parrott guns had been placed on board her, which had been subsequently removed; and beyond this, she had received no warlike equipment whatsoever. She had on board 750 tons of coal, being about 12 tons per day for the shortest voyage to Panama, and provisions for six months, a portion of which were marked "reserved stores." She was for sale for several months. There was war between Spain and Chile, pending which a certain accredited agent of Chile, in New York, wished to buy staunch seagoing steamers; the *Meteor*, among others, attracted his attention (though through no act of her owners), and suited his purpose \* \* \* The owners, the Messrs. Forbes, were ready and willing to sell the vessel to this Chilean agent; but she was to be sold and delivered in precisely the condition in which she was then lying at the wharf, for the full price in cash down. This money could not be thus raised. The whole plan, for this reason, fell through; and the negotiations conclusively ceased. The vessel with the coal and provisions before named, was cleared or about to clear for Panama, when she was seized under the libel. The informer was one of the three disappointed adventurers. The evidence was explicit to the effect that in the negotiations with the Messrs. Forbes, nothing was for a moment contemplated, save an outright sale of the vessel as she lay, for cash down in full. It was further explicit and consistent, to the effect that the negotiations concerning the sale were understood by all parties to have been finally and totally abandoned, without having accomplished anything, a long time before the seizure." 3 *American Law Review*, 234, 236, 237 (1869).

In a note to his edition of *Wheaton's Elements of International Law*, Mr. Dana said:

"It will be seen at once, by these abstract definitions, that our rules do not interfere with bona fide commercial dealings in contraband of war. An American merchant may build and fully arm a vessel, and supply her with stores, and offer her for sale in our own market. If he does any acts, as an agent or servant of a belligerent, or in pursuance of an arrangement or understanding with a belligerent, that she shall be employed in hostilities when sold, he is

## THE THREE FRIENDS.

(Supreme Court of the United States, 1897. 166 U. S. 1, 17 Sup. Ct. 495, 41 L. Ed. 897.)

The steamer *Three Friends* was seized November 7, 1896, by the collector of customs for the district of St. John's, Florida, as forfeited to the United States under section 5283 of the Revised Statutes, and thereupon, November 12, was libeled on behalf of the United States in the District Court for the Southern District of Florida. \* \* \*

Mr. Chief Justice FULLER delivered the opinion of the court.\* \* \* \*

We agree with the district judge that the contention that forfeiture under section 5283 depends upon the conviction of a person or persons for doing the acts denounced is untenable. The suit is a civil suit in rem for the condemnation of the vessel only, and is not a criminal prosecution. The two proceedings are wholly independent and pursued in different courts, and the result in each might be different. Indeed, forfeiture might be decreed if the proof showed the prohibited acts were committed though lacking as to the identity of the particular person by whom they were committed. The *Palmyra*, 12 Wheat. 1, 14, 6 L. Ed. 531; The *Ambrose Light* (D. C.) 25 Fed. 408; The *Me-teor*, 17 Fed. Cas. 178.

The *Palmyra* was a case of a libel of information against the vessel to forfeit her for a piratical aggression, under certain acts of Congress which made no provision for the personal punishment of the offenders, but it was held that, even if such provision had been made, conviction would not have been necessary to the enforcement of forfeiture. And Mr. Justice Story, delivering the opinion, said: "It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach in rem; but it was a part, or at least a consequence, of the judgment of conviction. It is plain from this statement, that no right to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offence; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of

guilty. He may, without violating our law, send out such a vessel, so equipped, under the flag and papers of his own country, with no more force of crew than is suitable for navigation, with no right to resist search or seizure, and to take the chances of capture as contraband merchandise, of blockade, and of a market in a belligerent port. \* \* \* Such a trade in contraband, a belligerent may cut off by cruising the seas and by blockading his enemy's ports. But, to protect himself against vessels sailing out of a neutral port to commit hostilities, it would be necessary for him to hover off the ports of the neutral; and, to do that effectually, he must maintain a kind of blockade of the neutral coast, which, as neutrals will not permit, they ought not to give occasion for." Page 563.

\* Part of the opinion dealing with questions of procedure has been omitted.

the judgment of conviction. In the contemplation of the common law, the offender's right was not divested until the conviction. But this doctrine never was applied to seizures and forfeitures, created by statute in rem, cognizable on the revenue side of the Exchequer. The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this whether the offence be *malum prohibitum* or *malum in se*. The same principle applies to proceedings in rem, on seizures in the Admiralty. Many cases exist, where the forfeiture for acts done attaches solely in rem, and there is no accompanying penalty in personam. Many cases exist where there is both a forfeiture in rem and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been and so this court understands the law to be, that the proceeding in rem stands independent of, and wholly unaffected by, any criminal proceeding in personam." And see *The Malek Adhel*, 2 How. 210, 11 L. Ed. 239; *United States v. The Little Charles*, 1 Brock. 347, Fed. Cas. No. 15,612.

The libel alleged that the vessel was "furnished, fitted out, and armed, with intent that she should be employed in the service of a certain people, to wit, certain people then engaged in armed resistance to the government of the king of Spain, in the island of Cuba, to cruise and commit hostilities against the subjects, citizens, and property of the king of Spain, in the island of Cuba, with whom the United States are and were at that date at peace."

The learned District Judge held that this was insufficient under section 5283, because it was not alleged "that said vessel had been fitted out with intent that she be employed in the service of a foreign prince or state, or of any colony, district, or people recognized as such by the political power of the United States."

In *Wiborg v. United States*, 163 U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289, which was an indictment under section 5286, we referred to the eleven sections from 5281 to 5291, inclusive, which constitute title LXVII of the Revised Statutes, and said: "The statute was undoubtedly designed in general to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency," and the consideration of the present case arising under section 5283 confirms us in the view thus expressed.

It is true that in giving a résumé of the sections, we referred to section 5283 as dealing "with fitting out and arming vessels in this country in favor of one foreign power as against another foreign power with which we are at peace," but that was matter of general description, and the entire scope of the section was not required to be indicated.

The title is headed "Neutrality," and usually called, by way of convenience, the "Neutrality Act," as the term "Foreign Enlistment Act"

is applied to the analogous British statute, but this does not operate as a restriction.

Neutrality, strictly speaking, consists in abstinence from any participation in a public, private or civil war, and in impartiality of conduct toward both parties, but the maintenance unbroken of peaceful relations between two powers, when the domestic peace of one of them is disturbed, is not neutrality in the sense in which the word is used when the disturbance has acquired such head as to have demanded the recognition of belligerency. And, as mere matter of municipal administration, no nation can permit unauthorized acts of war within its territory in infraction of its sovereignty, while good faith towards friendly nations requires their prevention.

Hence, as Mr. Attorney General Hoar pointed out (13 Opinions, 177, 178), though the principal object of the act was "to secure the performance of the duty of the United States, under the law of nations, as a neutral nation in respect of foreign powers," the act is nevertheless an act "to punish certain offences against the United States by fines, imprisonment, and forfeitures, and the act itself defines the precise nature of those offences."

These sections were brought forward from the act of April 20, 1818, 3 Stat. 447, c. 88, entitled, "An act in addition to the 'Act for the punishment of certain crimes against the United States,' and to repeal the acts therein mentioned," which was derived from the act of June 5, 1794, 1 Stat. 381, c. 50, entitled, "An act in addition to the 'Act for the punishment of certain crimes against the United States,' and the act of March 3, 1817, 3 Stat. 370, c. 58, entitled, "An act more effectually to preserve the neutral relations of the United States." The piracy act of March 3, 1819, 3 Stat. 510, c. 77, Rev. Stat. §§ 4293, 4294, 4295, 4296, 5368, supplemented the acts of 1817 and 1818.

The act of 1794, which has been generally recognized as the first instance of municipal legislation in support of the obligations of neutrality, and a remarkable advance in the development of international law, was recommended to Congress by President Washington in his annual address on December 3, 1793, was drawn by Hamilton, and passed the Senate by the casting vote of Vice President Adams. Ann. 3d Cong. 11, 67. Its enactment grew out of the proceedings of the then French minister, which called forth President Washington's proclamation of neutrality in the spring of 1793. And though the law of nations had been declared by Chief Justice Jay, in his charge to the grand jury at Richmond, May 22, 1793 (Wharton's State Trials, 49, 56), and by Mr. Justice Wilson, Mr. Justice Iredell and Judge Peters, on the trial of Henfield in July of that year (Id. 66, 84), to be capable of being enforced in the courts of the United States criminally, as well as civilly, without further legislation, yet it was deemed advisable to pass the act in view of controversy over that position, and, moreover, in order to provide a comprehensive code in prevention of acts

by individuals within our jurisdiction inconsistent with our own authority, as well as hostile to friendly powers.

Section 5283 of the Revised Statutes is as follows:

“Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out or arming, of any vessel with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district or people, to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace, or who issues or delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she may be so employed, shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years. And every such vessel, her tackle, apparel and furniture, together with all materials, arms, ammunition and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer, and the other half to the use of the United States.”\*

By referring to section 3 of the act of June 5, 1794, section 1 of the act of 1817, and section 3 of the act of 1818, it will be seen that the words “or of any colony, district, or people” were inserted in the original law by the act of 1817, carried forward by the act of 1818, and so into section 5283.

The immediate occasion of the passage of the act of March 3, 1817, appears to have been a communication, under date of December 20, 1816, from the Portuguese minister to Mr. Monroe, then Secretary of State, informing him of the fitting out of privateers at Baltimore to act against Portugal, in case it should turn out that that government was at war with the “self-styled government of Buenos Ayres,” and soliciting “the proposition to Congress of such provisions of law as

\*Congress re-enacted the neutrality laws, with very slight differences in wording, in sections 9-18 of the Act to codify, revise and amend the penal laws of the United States, approved March 4, 1909 (United States Statutes at Large, vol. 35, p. 1088 [U. S. Comp. St. §§ 10173-10182]). Subsequent to the outbreak of the war with Germany, additional legislation was enacted on the subject, to wit, the Act of May 7, 1917, and Title V of the Act of June 15, 1917 (United States Statutes at Large, vol. 40, pp. 39 and 221 [U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 10174, 10182b-10182i]).

The latter act repealed a joint resolution of Congress of March 4, 1915, empowering the President to better enforce and maintain the neutrality of the United States.

A joint resolution approved March 14, 1912, relates to the export of arms to an American country in which conditions of domestic violence exist, and which the President finds are promoted by the use of arms and munitions of war procured from the United States (United States Statutes at Large, vol. 37, p. 630 [Comp. St. §§ 7677, 7678]).

will prevent such attempts for the future." On December 26, 1816, President Madison sent a special message to Congress, in which he referred to the inefficacy of existing laws "to prevent violations of the obligations of the United States as a nation at peace towards belligerent parties and other unlawful acts on the high seas by armed vessels equipped within the waters of the United States," and, "with a view to maintain more effectually the respect due to the laws, to the character, and to the neutral and pacific relations of the United States," recommended further legislative provisions. This message was transmitted to the minister December 27, and he was promptly officially informed of the passage of the act in the succeeding month of March. Geneva Arbitration, Case of the United States, 138. In Mr. Dana's elaborate note to section 439 of his edition of Wheaton, it is said that the words "colony, district, or people" were inserted on the suggestion of the Spanish minister that the South American provinces in revolt and not recognized as independent might not be included in the word "state." Under the circumstances this act was entitled as "to preserve the neutral relations of the United States," while the title of the act of 1794 described it as "in addition" to the Crimes Act of April 30, 1790, 1 Stat. 112, c. 9, and the act of 1818 was entitled in the same way. But there is nothing in all this to indicate that the words "colony, district, or people" had reference solely to communities whose belligerency had been recognized, and the history of the times, an interesting review of which has been furnished us by the industry of counsel, does not sustain the view that insurgent districts or bodies, unrecognized as belligerents, were not intended to be embraced. On the contrary, the reasonable conclusion is that the insertion of the words "district or people" should be attributed to the intention to include such bodies, as, for instance, the so-called Oriental Republic of Artigas, and the governments of Pétion and Christophe, whose attitude had been passed on by the courts of New York more than a year before in *Hoyt v. Gelston*, 13 Johns. 141, *Gelston v. Hoyt*, 13 Johns. 561, which was then pending in this court on writ of error. There was no reason why they should not have been included, and it is to the extended enumeration as covering revolutionary bodies laying claim to rights of sovereignty, whether recognized or unrecognized, that Chief Justice Marshall manifestly referred in saying, in *The Gran Para*, 7 Wheat. 471, 489, 5 L. Ed. 501, that the act of 1817 "adapts the previous laws to the actual situation of the world." At all events, Congress imposed no limitation on the words "colony, district, or people," by requiring political recognition.

Of course a political community whose independence has been recognized is a "state" under the act; and, if a body embarked in a revolutionary political movement, whose independence has not been, but whose belligerency has been recognized, is also embraced by that term, then the words "colony, district, or people," instead of being limited



to a political community which has been recognized as a belligerent, must necessarily be held applicable to a body of insurgents associated together in a common political enterprise and carrying on hostilities against the parent country, in the effort to achieve independence, although recognition of belligerency has not been accorded.

And as agreeably to the principles of international law and the reason of the thing, the recognition of belligerency, while not conferring all the rights of an independent state, concedes to the government recognized the rights, and imposes upon it the obligations, of an independent state in matters relating to the war being waged, no adequate ground is perceived for holding that acts in aid of such a government are not in aid of a state in the sense of the statute.

Contemporaneous decisions are not to the contrary, though they throw no special light upon the precise question.

*Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381, decided at February term, 1818 (and below January and February, 1816), was an action of trespass against the collector and surveyor of the port of New York for seizing the ship *American Eagle*, her tackle, apparel, etc. The seizure was made July 10, 1810, by order of President Madison under section three of the act of 1794, corresponding to section 5283. The ship was intended for the service of Pétion against Christophe, who had divided the island of Hayti between them and were engaged in a bloody contest, but whose belligerency had not been recognized. It was held that the service of "any foreign prince or state" imported a prince or state which had been recognized by the government, and as there was no recognition in any manner, the question whether the recognition of the belligerency of a *de facto* sovereignty would bring it within those words, did not arise.

The case of *The Estrella*, 4 Wheat. 298, 4 L. Ed. 574, involved the capture of a Venezuelan privateer on April 24, 1817. There was a recapture by an American vessel, and the prize thus came before the court at New Orleans for adjudication. The privateer was found to have a regular commission from Bolivar, issued as early as 1816, but it had violated section two of the act of 1794, which is the same as section two of the act of 1818, omitting the words "colony, district, or people" (and is now section 5282 of the Revised Statutes), by enlisting men at New Orleans, provided Venezuela was a state within the meaning of that act. The decision proceeded on the ground that Venezuela was to be so regarded on the theory that recognition of belligerency made the belligerent to that intent a state.

In *The Nueva Anna and Liebre*, 6 Wheat. 193, 5 L. Ed. 239, the record of a prize court at "Galveztown," constituted under the authority of the "Mexican Republic," was offered in proof, and this court refused to recognize the belligerent right claimed, because our government had not acknowledged "the existence of any Mexican republic or state at war with Spain"; and in *The Gran Para*, 7 Wheat. 471,

5 L. Ed. 501, Chief Justice Marshall referred to Buenos Ayres as a state within the meaning of the act of 1794.

Even if the word "state" as previously employed admitted of a less liberal signification, why should the meaning of the words "colony, district, or people" be confined only to parties recognized as belligerent? Neither of these words is used as equivalent to the word "state," for they were added to enlarge the scope of a statute which already contained that word. The statute does not say foreign colony, district, or people, nor was it necessary, for the reference is to that which is part of the dominion of a foreign prince or state, though acting in hostility to such prince or state. Nor are the words apt if confined to a belligerent. As argued by counsel for the government, an insurgent colony under the act is the same before as after the recognition of belligerency, as shown by the instance of the colonies of Buenos Ayres and Paraguay, the belligerency of one having been recognized, but not of the other, while the statute was plainly applicable to both. Nor is district an appropriate designation of a recognized power *de facto*, since such a power would represent not the territory actually held but the territory covered by the claim of sovereignty. And the word "people," when not used as the equivalent of state or nation, must apply to a body of persons less than a state or nation, and this meaning would be satisfied by considering it as applicable to any consolidated political body.

In *United States v. Quincy*, 6 Pet. 445, 467, 8 L. Ed. 458, an indictment under the third section of the act of 1818, the court disposed of the following, among other points, thus:

"The last instruction or opinion asked on the part of the defendant was: 'That according to the evidence in the cause, the United Provinces of Rio de la Plata is, and was at the time of the offence alleged in the indictment, a government acknowledged by the United States, and thus was a 'state' and not a 'people' within the meaning of the act of Congress under which the defendant is indicted; the word 'people' in that act being intended to describe communities under an existing government not recognized by the United States; and that the indictment therefore cannot be supported on this evidence.

"The indictment charges that the defendant was concerned in fitting out the *Bolivar* with intent that she should be employed in the service of a foreign 'people'; that is to say, in the service of the United Provinces of Rio de la Plata. It was in evidence, that the United Provinces of Rio de la Plata had been regularly acknowledged as an independent nation by the executive department of the government of the United States, before the year 1827. And therefore it is argued that the word 'people' is not properly applicable to that nation or power.

"The objection is one purely technical, and we think not well founded. The word 'people,' as here used, is merely descriptive of the power in whose service the vessel was intended to be employed; and it is one of the denominations applied by the act of Congress to a foreign

power. The words are, 'in the service of any foreign prince or state, or of any colony, district, or people.' The application of the word 'people' is rendered sufficiently certain by what follows under the *videlicet*, 'that is to say, the United Provinces of Rio de la Plata.' This particularizes that which by the word 'people' is left too general. The descriptions are no way repugnant or inconsistent with each other, and may well stand together. That which comes under the *videlicet* only serves to explain what is doubtful and obscure in the word 'people.'"

All that was decided was that any obscurity in the word "people" as applied to a recognized government was cured by the *videlicet*.\*

*Nesbitt v. Lushington*, 4 T. R. 783, was an action on a policy of insurance in the usual form, and among the perils insured against were "pirates, rovers, thieves," and "arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever." The vessel with a cargo of corn was driven into a port and was seized by a mob who assumed the government of her and forced the captain to sell the corn at a low price. It was ruled that this was a loss by pirates, and the maxim *noscitur a sociis* was applied by Lord Kenyon and Mr. Justice Buller. Mr. Justice Buller said: "'People' means 'the supreme power'; 'the power of the country,' whatever it may be. This appears clear from another part of the policy; for where the underwriters insure against the wrongful acts of individuals, they describe them by the names of 'pirates, rogues, thieves'; then having stated all the individual persons, against whose acts they engage, they mention other risks, those occasioned by the acts of 'kings, princes, and people of what nation, condition, or quality soever.' Those words therefore must apply to 'nations' in their collective capacity."

As remarked in the brief of Messrs. Richard H. Dana, Jr., and Horace Gray, Jr., filed by Mr. Cushing in *Mauran v. Insurance Co.*, 6 Wall. 1, 18 L. Ed. 836, the words were "doubtless originally inserted with the view of enumerating all possible forms of government, monarchical, aristocratical, and democratic."

The British Foreign Enlistment Act, 59 Geo. III, c. 69, was bottomed on the act of 1818, and the seventh section, the opening portion of which corresponded to the third section of that act. Its terms were, however, considerably broader and left less to construction. But we

\*In the same case Justice Thompson, ruling on another point, said in behalf of the Court: "The law does not prohibit armed vessels belonging to citizens of the United States from sailing out of our ports; it only requires the owners to give security (as was done in the present case) that such vessels shall not be employed by them to commit hostilities against foreign powers at peace with the United States. The collectors are not authorized to detain vessels, although manifestly built for warlike purposes, and about to depart from the United States, unless circumstances shall render it probable that such vessels are intended to be employed by the owners to commit hostilities against some foreign power, at peace with the United States. All the latitude, therefore, necessary for commercial purposes, is given to our citizens; and they are restrained only from such acts as are calculated to involve the country in war."

think the words "colony, district, or people" must be treated as equally comprehensive in their bearing here.\*

In the case of *The Salvador*, L. R. 3 P. C. 218, the *Salvador* had been seized under warrant of the governor of the Bahama Islands and proceeded against in the Vice Admiralty Court there for breach of that section, and was, upon the hearing of the cause, ordered to be restored, the court not being satisfied that the vessel was engaged, within the meaning of the section, in aiding parties in insurrection against a foreign government, as such parties did not assume to exercise the powers of government over any portion of the territory of such government. This decision was overruled on appeal by the Judicial Committee of the Privy Council, and Lord Cairns, delivering the opinion, said:

"It is to be observed that this part of the section is in the alternative. The ship may be employed in the service of a foreign prince, state, or potentate, or foreign state, colony, province, or part of any province or people; that is to say, if you find any consolidated body in the foreign state, whether it be the potentate, who has the absolute dominion, or the government, or a part of the province, or of the people, or the whole of the province or the people acting for themselves, that is sufficient. But by way of alternative it is suggested that there may be a case where, although you cannot say that the province, or the people, or a part of the province or people are employing the ship, there yet may be some person or persons who may be exercising, or assuming to exercise, powers of government in the foreign colony or state, drawing the whole of the material aid for the hostile proceedings from abroad; and, therefore, by way of alternative, it is stated to be sufficient, if you find the ship prepared or acting in the service of any person or persons exercising, or assuming to exercise, any powers of government in or over any foreign state, colony, province, or part of any province or people; but that alternative need not be resorted to, if you find the ship is fitted out and armed for the purpose of being 'employed in the service of any foreign state or people, or part of any province or people.' \* \* \*

"It may be (it is not necessary to decide whether it is or not) that you could not state who were the person or persons, or that there were any person or persons exercising, or assuming to exercise, powers of government in Cuba, in opposition to the Spanish authorities. That may be so; their lordships express no opinion upon that subject, but they will assume that there might be a difficulty in bringing the case within that second alternative of the section, but their lordships are clearly of opinion that there is no difficulty in bringing the case under

\*As the British Act of 1819, which was in force until 1870, did not give adequate powers to the government, Parliament passed on August 9, 1870, a new Foreign Enlistment Act (33 & 34 Vict. c. 90), which is still in force.

the first alternative of the section, because their lordships find these propositions established beyond all doubt—there was an insurrection in the island of Cuba; there were insurgents who had formed themselves into a body of people acting together, undertaking and conducting hostilities; these insurgents, beyond all doubt, formed part of the province, or people of Cuba; and beyond all doubt the ship in question was to be employed, and was employed, in connection with and in the service of this body of insurgents."

We regard these observations as entirely apposite, and while the word "people" may mean the entire body of the inhabitants of a state; or the state or nation collectively in its political capacity; or the ruling power of the country; its meaning in this branch of the section, taken in connection with the words "colony" and "district," covers in our judgment any insurgent or insurrectionary "body of people acting together, undertaking and conducting hostilities," although its belligerency has not been recognized. Nor is this view otherwise than confirmed by the use made of the same words in the succeeding part of the sentence, for they are there employed in another connection, that is, in relation to the cruising, or the commission of hostilities, "against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace;" and, as thus used, are affected by obviously different considerations. If the necessity of recognition in respect of the objects of hostilities, by sea or land, were conceded, that would not involve the concession of such necessity in respect of those for whose service the vessel is fitted out.

Any other conclusion rests on the unreasonable assumption that the act is to remain ineffectual unless the government incurs the restraints and liabilities incident to an acknowledgment of belligerency. On the one hand, pecuniary demands, reprisals, or even war, may be the consequence of failure in the performance of obligations towards a friendly power, while on the other, the recognition of belligerency involves the rights of blockade, visitation, search, and seizure of contraband articles on the high seas, and abandonment of claims for reparation on account of damages suffered by our citizens from the prevalence of warfare.

No intention to circumscribe the means of avoiding the one by imposing as a condition the acceptance of the contingencies of the other can be imputed.

Belligerency is recognized when a political struggle has attained a certain magnitude and affects the interests of the recognizing power; and in the instance of maritime operations, recognition may be compelled, or the vessels of the insurgents, if molesting third parties, may be pursued as pirates. *The Ambrose Light* (D. C.) 25 Fed. 408; 3 Whart. Dig. Int. Law, § 381; and authorities cited.

But it belongs to the political department to determine when bellig-

erency shall be recognized, and its action must be accepted according to the terms and intention expressed.

The distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in a material sense and of war in a legal sense, is sharply illustrated by the case before us. For here the political department has not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare prevailing before, at the time and since this forfeiture is alleged to have been incurred.

On June 12, 1895, a formal proclamation was issued by the President and countersigned by the Secretary of State, informing the people of the United States that the island of Cuba was "the seat of serious civil disturbances accompanied by armed resistance to the authority of the established government of Spain, a power with which the United States are and desire to remain on terms of peace and amity"; declaring that "the laws of the United States prohibit their citizens, as well as all others being within and subject to their jurisdiction, from taking part in such disturbances adversely to such established government, by accepting or exercising commissions for warlike service against it, by enlistment or procuring others to enlist for such service, by fitting out, or arming, or procuring to be fitted out and armed ships of war for such service, by augmenting the force of any ship of war engaged in such service and arriving in a port of the United States, and by setting on foot or providing or preparing the means for military enterprises to be carried on from the United States against the territory of such government," and admonishing all such citizens and other persons to abstain from any violation of these laws.

In his annual message of December 2, 1895, the President said:

"Cuba is again gravely disturbed. An insurrection in some respects more active than the last preceding revolt, which continued from 1868 to 1878, now exists in a large part of the eastern interior of the island, menacing even some populations on the coast. Besides deranging the commercial exchanges of the island, of which our country takes the predominant share, this flagrant condition of hostilities, by arousing sentimental sympathy and inciting adventurous support among our people, has entailed earnest effort on the part of this government to enforce obedience to our neutrality laws, and to prevent the territory of the United States from being abused as a vantage ground from which to aid those in arms against Spanish sovereignty.

"Whatever may be the traditional sympathy of our countrymen as individuals with a people who seem to be struggling for larger autonomy and greater freedom, deepened as such sympathy naturally must be in behalf of our neighbors, yet the plain duty of their government is to observe in good faith the recognized obligations of international relationship. The performance of this duty should not be made more

difficult by a disregard on the part of our citizens of the obligations growing out of their allegiance to their country, which should restrain them from violating as individuals the neutrality which the nation of which they are members is bound to observe in its relations to friendly sovereign states. Though neither the warmth of our people's sympathy with the Cuban insurgents, nor our loss and material damage consequent upon the futile endeavors thus far made to restore peace and order, nor any shock our humane sensibilities may have received from the cruelties which appear to especially characterize this sanguinary and fiercely conducted war, have in the least shaken the determination of the government to honestly fulfill every international obligation, yet it is to be earnestly hoped, on every ground, that the devastation of armed conflict may speedily be stayed, and order and quiet restored to the distracted island, bringing in their train the activity and thrift of peaceful pursuits."

July 27, 1896, a further proclamation was promulgated, and in the annual message of December 7, 1896, the President called attention to the fact that "the insurrection in Cuba still continues with all its perplexities," and gave an extended review of the situation.

We are thus judicially informed of the existence of an actual conflict of arms in resistance of the authority of a government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents by the political department has not taken place; and it cannot be doubted that, this being so, the act in question is applicable.

We see no justification for importing into section 5283 words which it does not contain and which would make its operation depend upon the recognition of belligerency; and while the libel might have been drawn with somewhat greater precision, we are of opinion that it should not have been dismissed. \* \* \*

The decree must be reversed, and the cause remanded to the District Court, with directions to resume custody of the vessel and proceed with the case in conformity with this opinion.

Ordered accordingly.

Mr. Justice HARLAN dissenting.<sup>1</sup>

<sup>1</sup> The dissenting opinion of the learned Justice is omitted.

## THE "ALABAMA" CLAIMS

(Arbitration under Treaty of May 8, 1871, between the United States and Great Britain, 1872. Papers relating to the Treaty of Washington, IV, 49.)

The treaty between the United States and Great Britain, concluded May 8, 1871, provided, in part, as follows:<sup>8</sup>

Article I.—Whereas differences have arisen between the government of the United States and the government of her Britannic Majesty, and still exist, growing out of the acts committed by the several vessels which have given rise to the claims generically known as the "Alabama Claims";

And whereas her Britannic Majesty has authorized her High Commissioners and Plenipotentiaries to express, in a friendly spirit, the regret felt by her Majesty's government for the escape, under whatever circumstances, of the Alabama and other vessels from British ports, and for the depredations committed by those vessels:

Now, in order to remove and adjust all complaints and claims on the part of the United States, and to provide for the speedy settlement of such claims which are not admitted by her Britannic Majesty's Government, the high contracting parties agree that all the said claims growing out of acts committed by the aforesaid vessels and generically known as the "Alabama claims," shall be referred to a tribunal of arbitration to be composed of five arbitrators, to be appointed in the following manner, that is to say: One shall be named by the President of the United States; one shall be named by her Britannic Majesty; his Majesty the King of Italy shall be requested to name one; the President of the Swiss Confederation shall be requested to name one; and his Majesty the Emperor of Brazil shall be requested to name one.

\* \* \*

Article II.—The arbitrators shall meet at Geneva, in Switzerland, at the earliest convenient day after they shall have been named, and shall proceed impartially and carefully to examine and decide all questions that shall be laid before them on the part of the governments of the United States and her Britannic Majesty respectively. All questions considered by the tribunal, including the final award, shall be decided by a majority of all the arbitrators. \* \* \*

Article VI.—In deciding the matters submitted to the arbitrators they shall be governed by the following three rules, which are agreed upon by the high contracting parties as rules to be taken as applicable to the case, and by such principles of international law, not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case.

<sup>8</sup> 1 Malloy's Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers (1910) 700.



## RULES

A neutral government is bound—

First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly. To exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

Her Britannic Majesty has commanded her high commissioners and plenipotentiaries to declare that Her Majesty's government cannot assent to the foregoing rules as a statement of the principles of international law which were in force at the time when the claims mentioned in article I arose, but that Her Majesty's government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the future, agrees that in deciding the questions between the two countries, arising out of those claims, the arbitrators should assume that Her Majesty's government had undertaken to act upon the principles set forth in these rules.

And the high contracting parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime powers, and to invite them to accede to them. \* \* \*

## DECISION AND AWARD

\* \* \* The tribunal having since fully taken into their consideration the treaty and also the cases, counter-cases, documents, evidence, and arguments, and likewise all other communications made to them by the two parties during the progress of their sittings, and having impartially and carefully examined the same, has arrived at the decision embodied in the present award:

Whereas, having regard to the sixth and seventh articles of the said treaty, the arbitrators are bound under the terms of the said sixth article, "in deciding the matters submitted to them, to be governed by the three rules therein specified and by such principles of international law, not inconsistent therewith as the arbitrators shall determine to have been applicable to the case";

And whereas the "due diligence," referred to in the first and third of the said rules, ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfill the obligations of neutrality on their part;

And whereas the circumstances out of which the facts constituting the subject-matter of the present controversy arose were of a nature to call for the exercise on the part of Her Britannic Majesty's government of all possible solicitude for the observance of the rights and the duties involved in the proclamation of neutrality issued by Her Majesty on the 13th day of May, 1861;

And whereas the effects of a violation of neutrality, committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the government of the belligerent power, benefited by the violation of neutrality, may afterwards have granted to that vessel; and the ultimate step, by which the offense is completed, cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence;

And whereas the privilege of extritoriality, accorded to vessels of war, has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and, therefore, can never be appealed to for the protection of acts done in violation of neutrality;

And whereas the absence of a previous notice cannot be regarded as a failure in any consideration required by the law of nations, in those cases in which a vessel carries with it its own condemnation;

And whereas, in order to impart to any supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters, as a base of naval operations for a belligerent, it is necessary that the said supplies should be connected with special circumstances, of time, of persons, or of place, which may combine to give them such character;

And whereas, with respect to the vessel called the Alabama, it clearly results from all the facts relative to the construction of the ship, at first designated by the number "290," in the port of Liverpool, and its equipment and armament in the vicinity of Terceira, through the agency of the vessels called the Agrippina and the Bahama, dispatched from Great Britain to that end, that the British government failed to use due diligence in the performance of its neutral obligations, and especially that it omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States during the construction of the said number "290," to take in due time any effective measures of prevention, and that those orders which

it did give at last, for the detention of the vessel, were issued so late that their execution was not practicable;

And whereas, after the escape of that vessel, the measures taken for its pursuit and arrest were so imperfect as to lead to no result, and therefore cannot be considered sufficient to release Great Britain from the responsibility already incurred;

And whereas, in spite of the violations of the neutrality of Great Britain, committed by the "290," this same vessel, later known as the Confederate cruiser Alabama, was on several occasions freely admitted into the ports of colonies of Great Britain, instead of being proceeded against as it ought to have been in any and every port within British jurisdiction in which it might have been found;

And whereas the government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed:

Four of the arbitrators for the reasons above assigned, and the fifth, for reasons separately assigned by him, are of opinion that Great Britain has in this case failed, by omission, to fulfill the duties prescribed in the first and the third of the rules, established by the sixth article of the treaty of Washington.

And whereas, with respect to the vessel called the Florida, it results from all the facts relative to the construction of the Oreto in the port of Liverpool, and to its issue therefrom, which facts failed to induce the authorities in Great Britain to resort to measures adequate to prevent the violation of the neutrality of that nation, notwithstanding the warnings and repeated representations of the agents of the United States, that Her Majesty's government has failed to use due diligence to fulfill the duties of neutrality;

And whereas it likewise results from all the facts relative to the stay of the Oreto at Nassau, to her issue from that port, to her enlistment of men, to her supplies, and to her armament, with the co-operation of the British vessel Prince Alfred, at Green Cay, that there was negligence on the part of the British colonial authorities;

And whereas, notwithstanding the violation of the neutrality of Great Britain, committed by the Oreto, this same vessel, later known as the Confederate cruiser Florida, was, nevertheless, on several occasions freely admitted into the ports of British colonies;

And whereas the judicial acquittal of the Oreto at Nassau cannot relieve Great Britain from the responsibility incurred by her under the principles of international law; nor can the fact of the entry of the Florida into the Confederate port of Mobile, and of its stay there during four months, extinguish the responsibility previously to that time incurred by Great Britain:

For these reasons the tribunal, by a majority of four voices to one, is of opinion, that Great Britain has in this case failed, by omission,

to fulfill the duties prescribed in the first, in the second, and in the third, of the rules established by Article VI of the Treaty of Washington.

And whereas, with respect to the vessel called the *Shenandoah*, it results from all the facts relative to the departure from London of the merchant vessel, the *Sea King*, and to the transformation of that ship into a Confederate cruiser under the name of the *Shenandoah*, near the island of Madeira, that the government of Her Britannic Majesty is not chargeable with any failure, down to that date, in the use of due diligence to fulfill the duties of neutrality;

But whereas it results from all the facts connected with the stay of the *Shenandoah* at Melbourne, and especially with the augmentation which the British government itself admits to have been clandestinely effected of her force, by the enlistment of men within that port, that there was negligence on the part of the authorities at that place:

For these reasons the tribunal is unanimously of opinion, that Great Britain has not failed, by any act or omission, "to fulfill any of the duties prescribed by the three rules of article VI in the Treaty of Washington, or by the principles of international law not inconsistent therewith," in respect to the vessel called the *Shenandoah*, during the period of time anterior to her entry into the port of Melbourne;

And, by a majority of three to two voices, the tribunal decides that Great Britain has failed, by omission, to fulfill the duties prescribed by the second and third of the rules aforesaid, in the case of this same vessel, from and after her entry into Hobson's Bay, and is, therefore, responsible for all acts committed by that vessel after her departure from Melbourne, on the 18th day of February, 1865.

And so far as relates to the vessels called the *Tuscaloosa* (tender to the *Alabama*), the *Clarence*, the *Tacony*, and the *Archer*, (tenders to the *Florida*), the tribunal is unanimously of opinion, that such tenders or auxiliary vessels, being properly regarded as accessories, must necessarily follow the lot of their principals, and be submitted to the same decision which applies to them respectively.

And so far as relates to the vessel called *Retribution*, the tribunal, by a majority of three to two voices, is of opinion, that Great Britain has not failed, by any act or omission, to fulfill any of the duties prescribed by the three rules of article VI in the Treaty of Washington, or by the principles of international law not inconsistent therewith.

And so far as relates to the vessels called the *Georgia*, the *Sumpster*, the *Nashville*, the *Tallahassee*, and the *Chickamauga*, respectively, the tribunal is unanimously of opinion, that Great Britain has not failed, by any act or omission, to fulfill any of the duties prescribed by the three rules of article VI in the Treaty of Washington, or by the principles of international law not inconsistent therewith.

And so far as relates to the vessels called the *Sallie*, the *Jefferson*

**Davis, the Music, the Boston, and the V. H. Joy** respectively, the tribunal is unanimously of opinion that they ought to be excluded from consideration for want of evidence.

And whereas, so far as relates to the particulars of the indemnity claimed by the United States, the cost of pursuit of the Confederate cruisers are not, in the judgment of the tribunal, properly distinguishable from the general expenses of the war carried on by the United States:

The tribunal is, therefore, of opinion, by a majority of three to two voices, that there is no ground for awarding to the United States any sum by way of indemnity under this head.

And whereas, prospective earnings cannot properly be made the subject of compensation, inasmuch as they depend in their nature upon future and uncertain contingencies:

The tribunal is unanimously of opinion that there is no ground for awarding to the United States any sum by way of indemnity under this head.

And whereas, in order to arrive at an equitable compensation for the damages which have been sustained, it is necessary to set aside all double claims for the same losses, and all claims for "gross freights," so far as they exceed "net freights";

And, whereas, it is just and reasonable to allow interest at a reasonable rate;

And, whereas, in accordance with the spirit and letter of the Treaty of Washington, it is preferable to adopt the form of adjudication of a sum in gross, rather than to refer the subject of compensation for further discussion and deliberation to a board of assessors, as provided by article X of the said treaty:

The tribunal, making use of the authority conferred upon it by article VII of the said treaty, by a majority of four voices to one, awards to the United States a sum of \$15,500,000 in gold, as the indemnity to be paid by Great Britain to the United States, for the satisfaction of all the claims referred to the consideration of the tribunal, conformably to the provisions contained in article VII of the aforesaid treaty.

And, in accordance with the terms of article XI of the said treaty, the tribunal declares that "all the claims referred to in the treaty as submitted to the tribunal are hereby fully, perfectly, and finally settled."

Furthermore, it declares that "each and every one of the said claims, whether the same may or may not have been presented to the notice of, or made, preferred, or laid before the tribunal, shall henceforth be considered and treated as finally settled, barred, and inadmissible."

In testimony whereof this present decision and award has been made in duplicate, and signed by the arbitrators who have given their assent

thereto, the whole being in exact conformity with the provisions of article VII of the said treaty of Washington.

Made and concluded at the Hotel de Ville of Geneva, in Switzerland, the 14th day of the month of September, in the year of our Lord one thousand eight hundred and seventy-two.

CHARLES FRANCIS ADAMS,  
FREDERICK SCLOPIS,

STÄMPFLI,  
VICOMTE D'ITAJUBÁ.\*

## SECTION 2.—CAPTURE IN NEUTRAL WATERS

### THE ANNA.

(High Court of Admiralty, 1805. 5 C. Rob. 373.)

Sir W. SCOTT.† \* \* \*

I am of opinion that the right of territory is to be reckoned from those islands. That being established, it is not denied that the actual capture took place within the distance of three miles from the islands, and at the very threshold of the river. But it is said that the act of capture is to be carried back to the commencement of the pursuit, and that if a contest begins before, it is lawful for a belligerent cruiser to follow, and to seize his prize within the territory of a neutral state. And the authority of Bynkershoek is cited on this point. True it is, that that great man does intimate an opinion of his own to that effect; but with many qualifications, and as an opinion, which he did not find to have been adopted by any other writers. I confess I should have been inclined to have gone along with him, to this extent, that if a cruiser, which had before acted in a manner entirely unexceptionable, and free from all violation of territory; had summoned a vessel to submit to examination and search, and that vessel had fled to such places as these, entirely uninhabited, and the cruiser had without in-

\* The three rules of the Treaty of Washington, as they are generally called, were the subject of much discussion at the time of their promulgation. Great Britain declared that they did not state the duties of neutrals as they were at the time of the adoption of the rules. The opinions of publicists were divided. There is, however, no difference of opinion at the present day. They are admitted to state correctly the duties of neutral nations in time of war, and they are in substance incorporated in articles 5 and 8 of Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War, signed at The Hague, October 18, 1907.

For the text of this Convention, see Appendix, p. 1158.

“Warships building to the order of a belligerent in neutral yards must obviously be detained, and likewise any which there is reason to believe are destined for his use. Thus Great Britain, on the outbreak of the Spanish-American War, prevented the departure of the Brazilian battleships, *Amazo-*

† For the facts of this case and the portion of the opinion relating to accretion, see ante, p. 195.

jury or annoyance to any person whatever, quietly taken possession of his prey, it would be stretching the point too hardly against the captor, to say that on this account only it should be held an illegal capture. If nothing objectionable had appeared in the conduct of the captors before, the mere following to such a place as this is, would, I think, not invalidate a seizure otherwise just and lawful.

But that brings me to a part of the case, on which I am of opinion that the privateer has laid herself open to great reprehension. Captors must understand that they are not to station themselves in the mouth of a neutral river, for the purpose of exercising the rights of war from that river, much less in the very river itself. It appears from the privateer's own log-book that this vessel has done both; and as to any attempt to shelter this conduct under the example of King's ships, which I do not believe, and which, if true, would be no justification to others, captors must, I say, be admonished that the practice is altogether indefensible, and that if King's ships should be guilty of such misconduct, they would be as much subject to censure as other cruisers. It is unnecessary to go over all the entries in the log. The captors appear by their own description to have been standing off and on, obtaining information at the Balize, overhauling vessels in their course down the river, and making the river as much subservient to the purposes of war, as if it had been a river of their own country. This is an inconvenience which the states of America are called upon to resist, and which this court is bound on every principle to discourage and correct.

With respect to one vessel, it appears that the Bilboa, under Spanish colors, and an undoubted Spanish ship, had been captured and carried into the river; and it was stated in an affidavit which was exhibited to account for the absence of the usual witnesses in that case, that the prisoners had escaped. The cause was brought on upon the evidence of the releasing witnesses under this representation. It now appears by an entry in this log "that the prisoners were set on shore"; an act highly unjustifiable, in its own nature, independent of the deception with which it has been accompanied. The prisoners are the king's prisoners, and captors are particularly enjoined by the instructions not to release any prisoners belonging to the ships of the enemy, and they violate their duty whenever they do. When I advert to the imposition that has been put upon the court in that transaction, how can I trust myself to any representation coming from the same per-

nas and Almirante Abrew, which had been sold to the United States. Higgins, *Hague Peace Conferences*, p. 466 (1909). And this should apply equally to merchant ships, which it is known are intended to be converted by the belligerent into commerce destroyers, as in the case of the four liners sold to Russia in 1904 by the Hamburg-Amerika and North German Lloyd Steamship Companies and absorbed into the Russian volunteer fleet. Brassey's *Naval Annual*, 1904." J. A. Hall, *The Law of Naval Warfare*, 151, 152 (1921).

sons. Indeed, I think, I can perceive strong traits of bad faith running throughout the whole conduct of the captors in the present case. In answer to the complaint that has been made against the captors for bringing this prize to England, it was said, that it was done at the desire of the master of the captured vessel; though in the affidavit of the master, which is not contradicted, it is sworn, "that the captors offered to set him on shore, but that he refused to be separated from his cargo."

The conduct of the captors has on all points been highly reprehensible. Looking to all the circumstances of previous misconduct, I feel myself bound to pronounce, that there has been a violation of territory, and that as to the question of property, there was not sufficient ground of seizure; and that these acts of misconduct have been further aggravated, by bringing the vessel to England, without any necessity that can justify such a measure. In such a case it would be falling short of the justice due to the violated rights of America, and to the individuals who have sustained injury by such misconduct, if I did not follow up the restitution which has passed on the former day, with a decree of costs and damages.<sup>9</sup>

<sup>9</sup> In *The Twee Gebroeders*, 3 C. Rob. 162, 164 (1800), the same great judge said: "I am of opinion that no use of a neutral territory, for the purposes of war, is to be permitted. I do not say remote uses, such as procuring provisions and refreshments, and acts of that nature, which the law of nations universally tolerates; but that no proximate acts of war are in any manner to be allowed to originate on neutral grounds; and I cannot but think that such an act as this, that a ship should station herself on neutral territory, and send out her boats (as was done in this case) on hostile enterprises, is an act of hostility much too immediate to be permitted. For, suppose that even a direct hostile use should be required to bring it within the prohibition of the law of nations, nobody will say that the very act of sending out boats to effect a capture is not itself an act directly hostile, not complete, indeed, but inchoate, and clothed with all the characters of hostility. If this could be defended, it might as well be said that a ship lying in a neutral station might fire shot on a vessel lying out of the neutral territory; the injury in that case would not be consummated, nor received on neutral ground; but no one would say that such an act would not be an hostile act, immediately commenced within the neutral territory. And what does it signify to the nature of the act, considered for the present purpose, whether I send out a cannon-shot which shall compel the submission of a vessel lying at two miles distance, or whether I send out a boat armed and manned, to effect the very same thing at the same distance? It is in both cases the direct act of the vessel lying in neutral ground. The act of hostility actually begins, in the latter case, with the launching and manning and arming the boat that is sent out on such an errand of force."

In the case of *The Dusseldorf*, L. R. [1920] A. C. 1084-1042 (1920), the Privy Council held that the *Dusseldorf*, which had been mistakenly captured by a British man-of-war within Norwegian territorial waters, should be returned to Norway with suitable expressions of regret, and that the appellant, the royal Norwegian consul-general in London was entitled to be paid such expenses of removing the *Dusseldorf* from British waters to Norwegian or other neutral waters, "as may have fallen, or will ultimately fall, on the government of Norway."

In the case of *The Valeria*, L. R. [1921] 1 A. C. 477 (1921), it appeared that the *Valeria* was attacked and captured within Norwegian waters, but owing to

SCOTT INT.LAW



## THE ANNE.

(Supreme Court of the United States, 1818. 8 Wheat. 485, 4 L. Ed. 428.)

Appeal to the Circuit Court for the District of Maryland.

The British ship *Anne*, with a cargo belonging to a British subject, was captured by the privateer *Ultor*, while lying at anchor near the Spanish part of the island of St. Domingo, on the 13th of March, 1815, and carried into New York for adjudication. The master and supercargo were put on shore at St. Domingo, and all the rest of the crew, except the mate, carpenter, and cook, were put on board the capturing ship. After arrival at New York, the deposition of the cook only was taken, before a commissioner of prize, and that, together with the ship's papers, was transmitted by the commissioner, under seal, to the district judge of Maryland district, to which district the *Anne* was removed, by virtue of the provisions of the act of Congress of the 27th of January, 1813, c. 478.

Prize proceedings were duly instituted against the ship and cargo, and a claim was afterwards interposed in behalf of the Spanish consul, claiming restitution of the property, on account of an asserted violation of the neutral territory of Spain. The testimony of the carpenter was thereupon taken by the claimant, and the captors were also admitted to give testimony as to the circumstances of the capture; and, upon the whole evidence, the district court rejected the claim, and pronounced a sentence of condemnation to the captors. Upon appeal to the circuit court, peace having taken place, the British owner, Mr. Richard Scott, interposed a claim for the property, and the decree of the District Court was affirmed, *pro formâ*, to bring the cause for a final adjudication before this court.

STORY, Justice, delivered the opinion of the court.<sup>10</sup> The first question which is presented to the court is, whether the capture was made within the territorial limits of Spanish St. Domingo. \* \* \* And without entering into a minute examination, in this conflict of testimony, we are of opinion that the weight of evidence is, decidedly, that the capture was made within the territorial limits of Spanish St. Domingo.

And this brings us to the second question in the cause; and that is, whether it was competent for the Spanish consul, merely by virtue of

bad weather, it was abandoned and sunk by gunfire. The Norwegian government claimed restitution for the vessel in money.

The Privy Council held that though the sovereignty of the King of Norway had been violated by the capture of the vessel within Norwegian waters, nevertheless, the Norwegian government could not recover in respect of a proprietary interest in the ship, either for the Government itself, or for the German owners of the vessel.

See *The Ambiorix*, *Entscheidungen des Oberprisengerichts in Berlin* [1918] 170 (1916), in which a Belgian steamship, captured within the territorial waters of Sweden, was released.

<sup>10</sup> Part of the opinion is omitted.

his office, and without the special authority of his government, to interpose a claim in this case for the assertion of the violated rights of his sovereign. We are of opinion that his office confers on him no such legal competency. \* \* \*

The claim of the Spanish government for the violation of its neutral territory being thus disposed of, it is next to be considered whether the British claimant can assert any title founded upon that circumstance. By the return of peace, the claimant became rehabilitated with the capacity to sustain a suit in the courts of this country; and the argument is, that a capture made in a neutral territory is void; and, therefore, the title by capture being invalid, the British owner has a right to restitution. The difficulty of this argument rests in the incorrectness of the premises. A capture made within neutral waters is, as between enemies, deemed, to all intents and purposes, rightful; it is only by the neutral sovereign that its legal validity can be called in question; and as to him and him only, is it to be considered void. The enemy has no rights whatsoever; and if the neutral sovereign omits or declines to interpose a claim, the property is condemnable, *jure belli*, to the captors. This is the clear result of the authorities; and the doctrine rests on well established principles of public law.

There is one other point in the case which, if all other difficulties were removed, would be decisive against the claimant. It is a fact, that the captured ship first commenced hostilities against the privateer. This is admitted on all sides; and it is no excuse to assert that it was done under a mistake of the national character of the privateer, even if this were entirely made out in the evidence. While the ship was lying in neutral waters, she was bound to abstain from all hostilities, except in self defence. The privateer had an equal title with herself to the neutral protection, and was in no default in approaching the coast without showing her national character. It was a violation of that neutrality which the captured ship was bound to observe, to commence hostilities for any purpose in these waters; for no vessel coming thither was bound to submit to search, or to account to her for her conduct or character. When, therefore, she commenced hostilities, she forfeited the neutral protection, and the capture was no injury for which any redress could be rightfully sought from the neutral sovereign.

The conclusion from all these views of the case is, that the ship and cargo ought to be condemned as good prize of war. \* \* \* 11

<sup>11</sup> In the case of the British ship *Grange*, captured in Delaware Bay by a French privateer (1793), it was held by Attorney General Randolph (1 Op. Atty. Gen. 32-38 [1852]) that, if the captured ship was brought within the jurisdiction of the United States, it was their duty as neutrals to restore her to the owners. To the same effect, see *La Estrella*, 4 Wheat. 298, 4 L. Ed. 574 (1819).

See, also, the early American case, *Soult v. L'Africaine*, Bee, 204, Fed. Cas. No. 13,179 (1804).

To the effect that a capture made by belligerents within neutral waters passes title but justifies the neutral to demand an apology, indemnity, or the

## THE GENERAL ARMSTRONG.

(Arbitration under terms of Convention of February 26, 1851, between Portugal and the United States, 1852. 2 Moore's International Arbitrations, 1094.)

We, Louis Napoleon, President of the French Republic:

The government of the United States and that of Her Majesty the Queen of Portugal and of the Algarves, having, by the terms of a convention signed at Washington on the 26th of February, 1851, asked us to pronounce as arbiter upon a claim relative to the American privateer General Armstrong, which was destroyed in the port of Fayal, on the 27th of September, 1814,

After having caused myself to be correctly and circumstantially informed in regard to the facts which have been the cause of the difference, and after having maturely examined the documents duly signed, in the name of the two parties, which have been submitted to our inspection by the representatives of both powers,

Considering that it appears as a fact that, the United States being at war with Her Britannic Majesty, and Her Most Faithful Majesty preserving neutrality, the American brig General Armstrong, commanded by Captain Reid, legally provided with letters of marque, and armed as a privateer, having sailed from the port of New York, did, on the 26th September, 1814, cast anchor in the port of Fayal, one of the Azores Islands, constituting part of Her Most Faithful Majesty's dominions;

That it is equally clear that, on the evening of the same day, an English squadron commanded by Commodore Lloyd, entered the same port;

That it is no less certain that, during the following night, without respect for the rights of sovereignty and of neutrality of Her Most Faithful Majesty, a bloody encounter took place between the Americans and the English, and that, on the 27th September, one of the vessels belonging to the English squadron ranged herself alongside the American privateer, for the purpose of cannonading her; that this demonstration, accompanied by the act, caused Captain Reid, together with his crew, to abandon his vessel and destroy her;

Considering that, if it be clear that, on the night of the 26th of

return of the captured vessel, see *The Sir William Peel*, 5 Wall. 517, 535, 18 L. Ed. 696 (1866); *The Adela*, 6 Wall. 266, 18 L. Ed. 821 (1867); *The Florida*, 101 U. S. 37, 43, 25 L. Ed. 898 (1879).

In an early French case, *The Perle*, Conseil des Prises, "An VIII," 1 Pistoye et Duverdy, 100 (1800), it was decided that a belligerent capture in neutral waters is illegal whether under the guns of a fort, or on the undefended coast; and the captured ship will be restored by the courts (French) of the captor's country.

September, some English longboats, commanded by Lieutenant Robert Fausset, of the British navy, approached the American brig, the General Armstrong, it is not clear that the men who manned the boats were provided with arms and ammunition;

That it appears as a fact, from the documents which have been produced, that, those longboats having approached the American brig, the crew of the latter, after having hailed them and summoned them to haul off, immediately fired upon them, and that some men were killed on board the English boats, and others wounded, some of them mortally, without any attempt having been made on the part of the crew of the boats to repel, immediately, force by force;

Considering that the report of the governor of Fayal proves that the American captain did not apply to the Portuguese government for protection until blood had already been shed, and that when the fire had ceased the brig General Armstrong came to anchor under the castle, at the distance of a stone's throw; that the governor affirms that it was only then that he was informed of what was passing in the port;

That he several times interposed with Commodore Lloyd, with a view to obtain a cessation of hostilities and to complain of the violation of neutral territory;

That he effectively prevented some American sailors, who were on land, from embarking on board the American brig, for the purpose of prolonging a conflict which was contrary to the law of nations;

That the weakness of the garrison of the island, and the undoubted decay of the guns in the forts, rendered all armed intervention on his part impossible;

Considering, in this state of things, that Captain Reid, not having applied, in the beginning, for the intervention of the neutral sovereign, and having had recourse to arms for the purpose of repelling an unjust aggression of which he claimed to be the object, thus failed to respect the neutrality of the territory of the foreign sovereign, and released that sovereign from the obligation to afford him protection by any other means than that of a pacific intervention;

From which it follows that the government of Her Most Faithful Majesty cannot be held responsible for the results of a collision, which took place in contempt of her rights of sovereignty, in violation of the neutrality of her territory, and without the local officers or lieutenants having been requested in proper time and warned to grant aid and protection to those to whom it was due:

Therefore, we have decided and we declare that the claim presented by the government of the United States against Her Most Faithful Majesty has no foundation, and that no indemnity is due by Portugal, in consequence of the loss of the American brig, the privateer General Armstrong.

Done and signed in duplicate, under the seal of the state, at the palace of the Tuileries, on the thirtieth day of the month of November, in the year of grace one thousand eight hundred and fifty-two.

[Seal.]

L. NAPOLEON.<sup>12</sup>

By the Prince President:

DROUYN DE L'HUYS.

### THE ITATA.

#### SOUTH AMERICAN S. S. CO. v. UNITED STATES.

(United States and Chilean Claims Commission under Convention of August 7, 1892. 3 Moore's International Arbitrations, 3037.)

See ante, p. 367, for a report of the case.

#### THE TINOS, BOGADOS, KYTHNOS, ANATOLIA, etc.

(French Prize Council, 1917. Journal Officiel, January 9, 1918, p. 401.)

In the name of the French people, the Prize Court has rendered the following decision between,

On the one hand, the owners and captains of the steamers Tinos, Bogados, Kythnos, Anatolia, Athena, Seriphos, Malta, Berthilde, Berger Wilhelm, Korana, Salona, Marienbad, and of the sailer Sabbadino, seized on September 1, 2, and 4, 1916, in the roads of the Piræus, Eleusis, and Syra by the allied naval authorities;

And, on the other hand, the Minister of the Navy acting in the name and as representative of the State and on behalf of the rightful claimants of the proceeds of prizes, according to the laws and regulations in force; \* \* \*

Having heard M. Henri Fromageot, member of the Court, in his report, and M. Chardenet, Commissioner of the Government, in his statements in support of his aforementioned motions, the Court, after due deliberation,

Whereas, on September 1, 2, and 4, 1916, the allied naval authorities in the Eastern Mediterranean have seized in the roads of the Piræus the German vessels Tinos, Bogados, Anatolia, and Seriphos, and in the roads of Eleusis the German vessels Athena, Malta, Salona, Berthilde and Berger Wilhelm, as well as the Austro-Hungarian steamers Korana, Marienbad and Sabbadino, and finally at Syra the German vessel Kythnos;

<sup>12</sup> See criticism of the award in Dana's Wheaton, note 208, p. 528, and for an elaborate account of the origin, history and final settlement of this interesting episode, see 2 Moore's Int. Arb. 1071-1132.

See, also, A. de Lapradelle et N. Politis, *Recueil des Arbitrages Internationaux*, vol. I, pp. 635-660 (1905).

Whereas, the enemy nationality of said vessels, determined by the papers found on board, is expressly recognized by the claimant owners, all of German or Austro-Hungarian nationality; whereas, for this reason said vessels could be captured in conformity with the principles of international law, sanctioned by the Navy Orders of August, 1681;

Whereas, however, the owners contest the validity of the seizures by claiming that they took place in the territorial waters of Greece, the neutrality of which they invoke;

But whereas, it appears from the documents appended to the evidence that, according to the chronological history of the present war, since the outbreak of the war, Germany and her allies, after having used the Greek ports and waters as bases for obtaining supplies and undertaking naval operations, have made said waters the theatre of their hostilities; whereas, for example, from August 6 to 19, 1914, according to its own log-book, the German steamer Bogados, now captured, supplied the German cruisers Goeben and Breslau with coal in the roads of Rusa (Greece); whereas, on June 9, 1915, a supply base for providing enemy submarines with benzine was found at Samothrace (Ægean Sea); whereas, on November 18, 1915, the existence of a similar base was discovered at Corfu and vainly protested on April 8, 1916, by the royal government then in power in Greece; whereas, on December 17, 1915, several other similar bases had to be destroyed on the coasts of Argolis, Crete and Cavalla; whereas, on January 6, 1916, important stores of arms and ammunitions, owned by the enemy, were reported to the German consulate in the port of Salonica; whereas, on January 22, 1916, an enemy submarine torpedoed an Allied transport at the point of Kara-Bouroum (Gulf of Salonica) in Greek territorial waters; whereas, on January 23, 1916, new enemy submarine supply bases were reported in the islets near Crete; whereas, on May 5, 1916, a German military dirigible, threatening to attack the port and roads of Salonica, had to be brought down by Allied flying squadrons; whereas, on May 9, 1916, German aeroplanes attempted to bombard the ports of Rhodes and Budrun; whereas, after having invaded Greek territory, the armed forces of the enemy have not hesitated on June 26, 27, 28, and August 19 and 30, 1916, to seize and proceed to occupy cities and ports of Greece by driving out the Greek forces and taking possession of the means of defence, and by attacking the allied armies of France, Great Britain and Russia, powers that are guaranteeing the independence of Greece;

Whereas, the claimants emphasize the fact that the contraband articles handled, and the contraband articles carried on by individuals for the profit of the enemy cannot change the character of Greece as a neutral state;

But whereas, the acts herein mentioned are hostile acts committed by the forces and authorities themselves of the enemy in Greek

waters, ports and territory, although they may have been the facilities of private individuals;

Whereas, under these circumstances, without its being necessary to determine the attitude of the royal government then in power in Greece in regard to neutrality, it is sufficient to note that the succession of hostile acts committed by the enemy in the waters and territory of Greece has transformed it into a theatre of war and has deprived the enemy *de facto* of the advantages of a neutrality which the vessels of the enemy now vainly attempt to invoke;

Whereas, consequently in conformity with the body of international law, developed in the course of previous wars (Prize Court and High Prize Court of Japan, May 21, 1904, and May 30, 1905, the case of *The Ekaterinoslav*, pp. 51, 57, and 66; for the case of *The Mukden*, pp. 71, 77, 78, and 95—Japanese Prize Cases, pp. 4, 7, 14, and 16) the exception raised by the claimant owners is untenable;

Whereas, the Court is asked to decide only on the validity of the capture of the ships and accordingly is not to pass judgment on the question of their cargoes, on granting the proceeds of the prizes;

Whereas, the Minister of the Navy concluded that, since the prizes were made by the allied naval forces, the proceeds thereof should be divided in conformity with the Franco-British Agreement of November 9, 1914; whereas, it is in order to pass judgment on said conclusions;

**Decides:**

1. The capture of the German ships *Tinos*, *Bogados*, *Kythnos*, *Anatolia*, *Athena*, *Seriphos*, *Malta*, *Berthilde*, *Berger Wilhelm*, and of the Austro-Hungarian ships *Korana*, *Salona*, *Marienbad*, and *Sabbadino*, together with their rigging, tackle, equipment and supplies of every kind, seized on September 1, 2, and 4, 1916, in the roads of the *Piræus*, *Eleusis* and *Syra* by the allied naval authorities, is declared good and valid.

2. The net proceeds of the prize will be divided among the assigns, as provided by the Franco-British Agreement of November 9, 1914.

3. The objects and effects which are their personal property will be restored to the captains and members of the crews or to their assigns.

\* \* \*

## SECTION 3.—ABUSE OF HOSPITALITY

## THE APPAM.

(Supreme Court of the United States, 1917. 243 U. S. 124, 37 Sup. Ct. 337. 61 L. Ed. 633, Ann. Cas. 1917D, 442.)

Mr. Justice DAY delivered the opinion of the court.<sup>18</sup>

These are appeals from the District Court of the United States for the Eastern District of Virginia, in two admiralty cases. No. 650 was brought by the British & African Steam Navigation Company, Limited, owner of the British steamship, Appam, to recover possession of that vessel. No. 722 was a suit by the master of the Appam to recover possession of the cargo. In each of the cases the decree was in favor of the libellant.

The facts are not in dispute and from them it appears: That during the existence of the present war between Great Britain and Germany, on the fifteenth day of January, 1916, the steamship Appam was captured on the high seas by the German cruiser, Moewe. The Appam was a ship under the British flag, registered as an English vessel, and is a modern cargo and passenger steamship of 7,800 tons burden. At the time of her capture she was returning from the West Coast of Africa to Liverpool, carrying a general cargo of cocoa beans, palm oil, kernels, tin, maize, sixteen boxes of specie, and some other articles. At the West African port she took on 170 passengers, eight of whom were military prisoners of the English Government. She had a crew of 160 or thereabouts, and carried a three-pound gun at the stern. The Appam was brought to by a shot across her bows from the Moewe, when about a hundred yards away, and was boarded without resistance by an armed crew from the Moewe. \* \* \*

At the time of the capture, the Appam was approximately distant 1,590 miles from Emden, the nearest German port; from the nearest available port, namely, Punchello, in the Madeiras, 130 miles; from Liverpool, 1,450 miles; and from Hampton Roads, 3,051 miles. The Appam was found to be in first class order, seaworthy, with plenty of provisions, both when captured and at the time of her arrival in Hampton Roads.

The order or commission delivered to Lieutenant Berg by the commander of the Moewe is as follows: "Information for the American Authorities. The bearer of this, Lieutenant of the Naval Reserve Berg, is appointed by me to the command of the captured English steamer Appam, and has orders to bring this ship into the nearest American harbor and there to lay up. Kommando S. M. H. Moewe, Count

<sup>18</sup> Parts of the opinion are omitted.



**Zu Dohna, Cruiser Captain and Commander. [Imperial Navy Stamp.] Kommando S. M. H. Moewe."**

Upon arrival in Hampton Roads, Lieutenant Berg reported his arrival to the collector, and filed a copy of his instructions to bring the Appam into the nearest American port and there to lay up.

On February 2d, His Excellency, the German Ambassador, informed the State Department of the intention, under alleged treaty rights, to stay in an American port until further notice, and requested that the crew of the Appam be detained in the United States for the remainder of the war. The prisoners brought in by the Appam were released by order of the American government.

On February 16th, and sixteen days after the arrival of the Appam in Hampton Roads, the owner of the Appam filed the libel in case No. 650, to which answer was filed on March 3d. On March 7th, by leave of court, an amended libel was filed, by which the libellant sought to recover the Appam upon the claim that holding and detaining the vessel in American waters was in violation of the law of nations and the laws of the United States and of the neutrality of the United States. The answer of the respondents to the amended libel alleged that the Appam was brought in as a prize by a prize master, in reliance upon the Treaty of 1799 between the United States and Prussia; that by the general principles of international law the prize master was entitled to bring his ship into the neutral port under these circumstances, and that the length of stay was not a matter for judicial determination; and that proceedings had been instituted in a proper prize court of competent jurisdiction in Germany for the condemnation of the Appam as a prize of war; and averred that the American court had no jurisdiction.

The libel against the Appam's cargo was filed on March 13th, 1916, and answer filed on March 31st. During the progress of the case, libellant moved the court to sell a part of the cargo as perishable; on motion the court appointed surveyors, who examined the cargo and reported that the parts so designated as perishable should be sold; upon their report orders of sale were entered, under which such perishable parts were sold, and the proceeds of that sale, amounting to over \$600,000, are now in the registry of the court, and the unsold portions of the cargo are now in the custody of the marshal of the Eastern District of Virginia. \* \* \*

From the facts which we have stated, we think the decisive questions resolve themselves into three: First, was the use of an American port, under the circumstances shown, a breach of this nation's neutrality under the principles of international law? Second, was such use of an American port justified by the existing treaties between the German government and our own? Third, was there jurisdiction and right to condemn the Appam and her cargo in a court of admiralty of the United States?

It is familiar international law that the usual course after the capture of the Appam would have been to take her into a German port, where a prize court of that nation might have adjudicated her status, and, if it so determined, condemned the vessel as a prize of war. Instead of that, the vessel was neither taken to a German port, nor to the nearest port accessible of a neutral power, but was ordered to, and did, proceed over a distance of more than three thousand miles, with a view to laying up the captured ship in an American port.

It was not the purpose to bring the vessel here within the privileges universally recognized in international law, i. e., for necessary fuel or provisions, or because of stress of weather or necessity of repairs, and to leave as soon as the cause of such entry was satisfied or removed. The purpose for which the Appam was brought to Hampton Roads, and the character of the ship, are emphasized in the order which we have quoted to take her to an American port and there lay her up, and in a note from His Excellency, the German Ambassador, to the Secretary of State, in which the right was claimed to keep the vessel in an American port until further notice (*Diplomatic Correspondence with Belligerent Governments, Relating to Neutral Rights and Duties*, Department of State, European War No. 3, p. 331), and a further communication from the German Ambassador forwarding a memorandum of a telegram from the German government concerning the Appam (*Id.* p. 333), in which it was stated: "Appam is not an auxiliary cruiser but a prize. Therefore she must be dealt with according to article 19 of Prusso-American treaty of 1799. Article 21 of Hague Convention concerning neutrality at sea is not applicable, as this convention was not ratified by England and is therefore not binding in present war according to article 28. The above-mentioned article 19 authorizes a prize ship to remain in American ports as long as she pleases. Neither the ship nor the prize crew can therefore be interned nor can there be question of turning the prize over to English."

In view of these facts, and this attitude of the Imperial government of Germany, it is manifest that the Appam was not brought here in any other character than as a prize, captured at sea by a cruiser of the German navy, and that the right to keep her here, as shown in the attitude of the German government and in the answer to the libel, was rested principally upon the Prussian-American Treaty of 1799.

The principles of international law recognized by this government, leaving the treaty aside, will not permit the ports of the United States to be thus used by belligerents. If such use were permitted, it would constitute of the ports of a neutral country harbors of safety into which prizes, captured by one of the belligerents, might be safely brought and indefinitely kept.

From the beginning of its history this country has been careful to maintain a neutral position between warring governments, and not to allow the use of its ports in violation of the obligations of neutrality;

nor to permit such use beyond the necessities arising from the perils of the seas or the necessities of such vessels as to sea-worthiness, provisions and supplies. Such usage has the sanction of international law (Dana's note to Wheaton on International Law [1866, 8th American Edition] § 391), and accords with our own practice (Moore's Digest of International Law, vol. 7, 936, 937, 938).

A policy of neutrality between warring nations has been maintained from 1793 to this time. In that year President Washington firmly denied the use of our ports to the French Minister for the fitting out of privateers to destroy English commerce. This attitude led to the enactment of the Neutrality Act of 1794, afterwards embodied in the Act of 1818, enacting a code of neutrality, which among other things inhibited the fitting out and arming of vessels; the augmenting or increasing of the force of armed vessels; or the setting on foot in our territory of military expeditions; and empowering the President to order foreign vessels of war to depart from our ports and compelling them so to do when required by the law of nations. Moore on International Arbitrations, vol. 4, 3967 et seq.

This policy of the American government was emphasized in its attitude at the Hague Conference of 1907. Article 21 of the Hague Treaty provides: "A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions. It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew."

Article 22 provides: "A neutral power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in article 21."

To these articles, adherence was given by Belgium, France, Austria-Hungary, Germany, the United States, and a number of other nations. They were not ratified by the British government. This government refused to adhere to article 23, which provides: "A neutral power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a prize court. It may have the prize taken to another of its ports. If the prize is convoyed by a war-ship, the prize crew may go on board the convoying ship. If the prize is not under convoy, the prize crew are left at liberty."

And in the proclamation of the convention the President recited the resolution of the Senate adhering to it, subject to the "reservation and exclusion of its article 23 and with the understanding that the last clause of article 3 of the said Convention implies the duty of a neutral power to make the demand therein mentioned for the return of a ship

captured within the neutral jurisdiction and no longer within that jurisdiction." 36 Stat. pt. II, p. 2438.

While this treaty may not be of binding obligation, owing to lack of ratification, it is very persuasive as showing the attitude of the American government when the question is one of international law; from which it appears clearly that prizes could only be brought into our ports upon general principles recognized in international law, on account of unseaworthiness, stress of weather, or want of fuel or provisions, and we refused to recognize the principle that prizes might enter our ports and roadsteads, whether under convoy or not, to be sequestered pending the decision of a prize court. From the history of the conference it appears that the reason for the attitude of the American delegates in refusing to accept article 23 was that thereby a neutral might be involved in participation in the war to the extent of giving asylum to a prize which the belligerent might not be able to conduct to a home port. See Scott on Peace Conferences, 1899-1907, vol. II, p. 237 et seq.

Much stress is laid upon the failure of this government to proclaim that its ports were not open to the reception of captured prizes, and it is argued that having failed to interdict the entrance of prizes into our ports permission to thus enter must be assumed. But whatever privilege might arise from this circumstance it would not warrant the attempted use of one of our ports as a place in which to store prizes indefinitely, and certainly not where no means of taking them out are shown except by the augmentation of her crew, which would be a clear violation of established rules of neutrality.

As to the contention on behalf of the appellants that article XIX of the Treaty of 1799 justifies bringing in and keeping the Appam in an American port, in the situation which we have outlined, it appears that in response to a note from His Excellency, the German Ambassador, making that contention, the American Secretary of State, considering the treaty, announced a different conclusion (Diplomatic Correspondence with Belligerent Governments, *supra*, p. 335 et seq.); and we think this view is justified by a consideration of the terms of the treaty. \* \* \*

It remains to inquire whether there was jurisdiction and authority in an admiralty court of the United States, under these circumstances, to order restoration to an individual owner of the vessel and cargo.

The earliest authority upon this subject in the decisions of this court is found in the case of *Glass v. The Sloop Betsey*, 3 Dall. 6, 1 L. Ed. 485, decided in 1794, wherein it appeared that the commander of the French privateer, the *Citizen Genet*, captured as a prize on the high seas the sloop *Betsey* and sent the vessel into Baltimore, where the owners of the sloop and cargo filed a libel in the District Court of Maryland, claiming restitution because the vessel belonged to subjects of the king of Sweden, a neutral power, and the cargo was owned

jointly by Swedes and Americans. The District Court denied jurisdiction, the Circuit Court affirmed the decree, and an appeal was prosecuted to this court. The unanimous opinion was announced by Mr. Chief Justice Jay, holding that the District Courts of the United States possessed the powers of courts of admiralty, whether sitting as an instance or as a prize court, and sustained the jurisdiction of the District Court of Maryland, and held that that court was competent to inquire into and decide whether restitution should be made to the complainants conformably to the laws of nations and the treaties and laws of the United States.

The question came again before this court in the case of *The Santissima Trinidad*, decided in 1822, reported in 7 Wheat. 283, 5 L. Ed. 454. In that case it was held that an illegal capture would be invested with the character of a tort, and that the original owners were entitled to restitution when the property was brought within our jurisdiction.

\* \* \*

In the subsequent cases in this court this doctrine has not been departed from. *L'Invincible*, 1 Wheat. 238, 258, 4 L. Ed. 80; *The Estrella*, 4 Wheat. 298, 308-311, 4 L. Ed. 574; *La Amistad de Rues*, 5 Wheat. 385, 390, 5 L. Ed. 115.

It is insisted that these cases involve illegal captures at sea, or violations of neutral obligation, not arising because of the use of a port by sending in a captured vessel and keeping her there in violation of our rights as a neutral. But we are at a loss to see any difference in principle between such cases and breaches of neutrality of the character here involved in undertaking to make of an American port a depository of captured vessels with a view to keeping them there indefinitely. Nor can we consent to the insistence of counsel for appellant that the Prize Court of the German Empire has exclusive jurisdiction to determine the fate of the *Appam* as lawful prize. The vessel was in an American port and under our practice within the jurisdiction and possession of the District Court which had assumed to determine the alleged violation of neutral rights, with power to dispose of the vessel accordingly. The foreign tribunal under such circumstances could not oust the jurisdiction of the local court and thereby defeat its judgment. *The Santissima Trinidad*, supra, 7 Wheat. 355, 5 L. Ed. 454.

Were the rule otherwise than this court has frequently declared it to be, our ports might be filled in case of a general war such as is now in progress between the European countries, with captured prizes of one or the other of the belligerents, in utter violation of the principles of neutral obligations which have controlled this country from the beginning.

The violation of American neutrality is the basis of jurisdiction, and the admiralty courts may order restitution for a violation of such neutrality. In each case the jurisdiction and order rests upon the authority of the courts of the United States to make restitution to private

owners for violations of neutrality where offending vessels are within our jurisdiction, thus vindicating our rights and obligations as a neutral people.

It follows that the decree in each case must be affirmed.<sup>14</sup>

<sup>14</sup> It has become the practice of neutral nations to disarm belligerent men-of-war who either seek refuge within their ports or remain in neutral waters after the time fixed by the neutral power for their departure, acting in accordance with international law.

For the origin of internment, which is a modern remedy, see 7 Moore's Digest of International Law, 992 et seq., and article 24 of Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War, signed at The Hague in 1907, post, p. 1158.

## CHAPTER XVI

## ASSISTANCE BY NEUTRALS TO BELLIGERENTS

## SECTION 1.—UNNEUTRAL SERVICE

## THE OROZEMBO.

(High Court of Admiralty, 1807. 6 C. Rob. 490.)

This was a case \* \* \* of an American vessel that had been ostensibly chartered by a merchant at Lisbon, "to proceed in ballast to Macao, and there to take a cargo to America," but which had been afterwards, by his directions, fitted up for the reception of three military officers of distinction, and two persons in civil departments in the government of Batavia, who had come from Holland to take their passage to Batavia, under the appointment of the government of Holland. There were also on board a lady and some persons in the capacity of servants, making in the whole seventeen passengers. \* \* \*

SIR W. SCOTT.<sup>1</sup> This is the case of an admitted American vessel; but the title to restitution is impugned, on the ground of its having been employed, at the time of the capture, in the service of the enemy, in transporting military persons first to Macao and ultimately to Batavia. That a vessel hired by the enemy, for the conveyance of military persons, is to be considered as a transport subject to condemnation, has been in a recent case held by this court, and on other occasions. What is the number of military persons that shall constitute such a case, it may be difficult to define. In the former case there were many, in the present there are much fewer in number; but I accède to what has been observed in argument, that number alone is an insignificant circumstance in the considerations on which the principle of law on this subject is built, since fewer persons, of high quality and character, may be of more importance than a much greater number of persons of lower condition. To send out one veteran general of France to take the command of the forces at Batavia, might be a much more noxious act than the conveyance of a whole regiment. The consequences of such assistance are greater; and, therefore, it is what the belligerent has a stronger right to prevent and punish. In this instance the military persons are three, and there are, besides, two other persons, who were going to be employed in civil capacities in the government of Batavia. Whether the principle would apply to

<sup>1</sup> Part of the statement of facts is omitted and only extracts from the opinion are given.

them alone, I do not feel it necessary to determine. I am not aware of any case in which that question has been agitated; but it appears to me, on principle, to be but reasonable that, whenever it is of sufficient importance to that enemy that such persons should be sent out on the public service, at the public expense, it should afford equal ground of forfeiture against the vessel that may be let out for a purpose so intimately connected with the hostile operations.

It has been argued that the master was ignorant of the character of the service on which he was engaged, and that, in order to support the penalty, it would be necessary that there should be some proof of delinquency in him, or his owner. But, I conceive, that is not necessary. It will be sufficient if there is an injury arising to the belligerent from the employment in which the vessel is found. In the case of the Swedish vessel<sup>2</sup> there was no *mens rea* in the owner, or in any other person acting under his authority. The master was an involuntary agent, acting under compulsion put upon him by the officers of the French government, and, so far as intention alone is considered, perfectly innocent. In the same manner, in cases of *bona fide* ignorance, there may be no actual delinquency, but if the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from being done, or at least repeated, by enforcing the penalty of confiscation. If imposition has been practiced, it operates as force; and if redress in the way of indemnification is to be sought against any person, it must be against those who have, by means either of compulsion or deceit, exposed the property to danger. If, therefore, it was the most innocent case on the part of the master, if there was nothing whatever to affect him with privity, the whole amount of this argument would be that he must seek his redress against the freighter; otherwise such opportunities of conveyance would be constantly used, and it would be almost impossible, in the greater number of cases, to prove the knowledge and privity of the immediate offender.

It has been argued throughout, as if the ignorance of the master alone would be sufficient to exempt the property of the owner from confiscation. But may there not be other persons, besides the master, whose knowledge and privity would carry with it the same consequences? Suppose the owner himself had knowledge of the engagement, would not that produce the *mens rea*, if such a thing is necessary? or if those who had been employed to act for the owner, had thought fit to engage the ship in a service of this nature, keeping the master in profound ignorance, would it not be just as effectual, if the *mens rea* is necessary, that it should reside in those persons, as in the owner? The observations which I shall have occasion to make on the remaining parts of this case will, perhaps, appear to justify such a supposition, either that the owner himself, or those who acted for him in Lisbon or in Holland, were connusant of the nature of the

<sup>2</sup> The Carolina. 4 C. Rob. 256 (1802).



whole transaction. But I will first state distinctly, that the principle on which I determine this case is, that the carrying military persons to the colony of an enemy, who are there to take on them the exercise of their military functions, will lead to condemnation, and that the court is not to scan with minute arithmetic the number of persons that are so carried. If it has appeared to be of sufficient importance to the government of the enemy to send them, it must be enough to put the adverse government on the exercise of their right of prevention; and the ignorance of the master can afford no ground of exculpation in favour of the owner, who must seek his remedy in cases of deception, as well as of force, against those who have imposed upon him. \* \* \* On every view which I take of the case, on the principle of law, or on the evidence of the facts, I have no hesitation in pronouncing that this vessel is liable to be considered as a transport, let out in the service of the government of Holland, and that it is as such, subject to condemnation.<sup>3</sup>

### THE ATALANTA.

(High Court of Admiralty, 1808. 6 C. Rob. 440.)

Sir W. Scott.<sup>4</sup> This ship, or rather that of which the present vessel is the representative, sailed from Bremen, with a cargo of dry goods and provisions, part of which had been brought from Amsterdam on the 23d of July, 1805. She touched at the Cape of Good Hope,

<sup>3</sup> See *The Carolina*, 4 C. Rob. 256 (1802), and *The Friendship*, 6 C. Rob. 420 (1807).

In a note to the latter case, the learned reporter, Dr. Robinson, said:

"The act of carrying the soldiers of the enemy has been in former wars assimilated to contraband, by public proclamation and instructions, and has been declared to render the ship liable to condemnation. The declaration of war, 25th March, 1744, concludes with the following clause: 'And we do hereby command our own subjects, and advertise all other persons of what nation soever, not to transport or carry any soldiers, arms, powder, ammunition, or other contraband goods, to any of their territories, lands, plantations, or countries of the said French king, declaring, that whatsoever ship or vessel shall be met withal transporting or carrying any soldiers, arms, powder, ammunition, or other contraband goods, to any of the territories, lands, plantations, or countries of the said French king, the same being taken shall be condemned as good and lawful prize.' The same declaration is also inserted in the second article of the instruction to cruisers of the same date; also in the second article of the instructions in the war with Spain, 20th Dec., 1718."

In *The Svithiod*, L. R. [1920] App. Cas., 718 (1920), it appeared that a Swedish ship, on its voyage from Buenos Ayres to a Danish port, took on board at Pernambuco, in Brazil, a German stowaway, who was a qualified third officer of the German mercantile marine. This was done with the connivance of the captain of the Swedish steamer. The stowaway was discovered at Halifax, and although the captain had attempted to conceal the presence of the stowaway there was no evidence that he was carried at the expense of the German government, or that he intended to go to Germany. The Privy Council reversed the judgment of the lower court on the ground that no unneutral service was performed, and that therefore the *Svithiod* was improperly condemned.

<sup>4</sup> The statement of facts and parts of the opinion are omitted.

and from thence proceeded to Batavia, where the cargo was sold, and another cargo taken in for Tranquebar. From that place a returned cargo was again brought to Batavia, where the present cargo of coffee and sugar was purchased, with which the ship sailed, on her return to the river Jade, in December, 1806. It appears that the voyage was interrupted by a violent tempest or hurricane, which visited those seas at that time, and the vessel was driven, by distress, into the Isle of France, where she was sold, as not sea-worthy; and the present vessel was purchased, which sailed with the cargo that had been transhipped, on the 12th of May, 1807. The original master had died at Tranquebar, where the present master was appointed in his place by the two supercargoes, who were on board, and whose conduct will constitute the chief subject of observation in the present inquiry.

\* \* \*

The vessel sailed from the Isle of France, in May, \* \* \* The capture was made on the 14th of July by The Argo. \* \* \* The ship's papers were demanded in the usual manner; and again, afterwards, on the 5th September, there was a farther demand, on a supposition that the former had not been complied with. The mate and four men were put on board the Argo, who carried the vessel to St. Helena, where they met his Majesty's ship the Sir Edward Hughes, under the convoy of which ship they afterwards proceeded to England. In the course of the voyage, some apprehensions, \* \* \* led to a request that Mr. Meinen, the other supercargo, might be removed on board the Sir Edward Hughes, and that his baggage might be examined for concealed papers, though it is not explained what had given rise to a suspicion of this kind. On this search was found, in the possession of Mr. Meinen, in his trunk, a small tea-chest, at the bottom of which were discovered those papers, \* \* \* which are described, in the letter from the secretary of state's office, "to contain despatches from the governor of the Isle of France to the different departments of government in Paris, stating the distress of the colony, and requesting assistance to preserve the settlement from ruin." \* \* \*

On these grounds, \* \* \* I feel myself bound to pronounce, that there were papers received on board, as public despatches, and knowingly by those who are the agents of the proprietors, \* \* \* and that the fact of a fraudulent concealment and suppression is most satisfactorily demonstrated.

The question then is, what are the legal consequences attaching on such a criminal act? for that it is criminal and most noxious is scarcely denied. What might be the consequences of a simple transmission of despatches, I am not called upon by the necessities of the present case to decide, because I have already pronounced this to be a fraudulent case. That the simple carrying of despatches between the colonies and the mother country of the enemy, is a service highly injurious to the other belligerent, is most obvious. In the present state of the world, in the hostilities of European powers, it is an object of great impor-

tance to preserve the connection between the mother country and her colonies; and to interrupt that connection, on the part of the other belligerent, is one of the most energetic operations of war. The importance of keeping up that connection, for the concentration of troops, and for various military purposes, is manifest; and I may add, for the supply of civil assistance, also, and support, because the infliction of civil distress, for the purpose of compelling a surrender, forms no inconsiderable part of the operations of war. It is not to be argued, therefore, that the importance of these dispatches might relate only to the civil wants of the colony, and that it is necessary to show a military tendency; because the object of compelling a surrender being a measure of war, whatever is conducive to that event must also be considered in the contemplation of law, as an object of hostility, although not produced by operations strictly military.

How is this intercourse with the mother country kept up, in the time of peace? by ships of war or by packets in the service of the state. If a war intervenes and the other belligerent prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does, in fact, place himself in the service of the enemy-state, and is justly to be considered in that character. Nor let it be supposed that it is an act of light and casual importance. The consequence of such a service is indefinite, infinitely beyond the effect of any contraband that can be conveyed. The carrying of two or three cargoes of stores is necessarily an assistance of a limited nature; but in the transmission of dispatches may be conveyed the entire plan of a campaign, that may defeat all the projects of the other belligerent in that quarter of the world. It is true, as it has been said, that one ball might take off a Charles XII, and might produce the most disastrous effects in a campaign; but that is a consequence so remote and accidental, that in the contemplation of human events it is a sort of evanescent quantity of which no account is taken; and the practice has been accordingly, that it is in considerable quantities only that the offence of contraband is contemplated. The case of dispatches is very different; it is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences in the operations of the enemy. It is a service, therefore, which, in whatever degree it exists, can only be considered in one character, as an act of the most noxious and hostile nature. It has accordingly been so held in decided cases, that fully recognize the principle; for on this principle *The Constitution*,<sup>5</sup> *Tate*, was condemned. \* \* \*

In all these cases the principle was uniformly asserted, although the circumstances, under which the fact appeared, did not lead the court to consider it with that particularity which the nature of the present case requires. Unless, therefore, it can be said, that there must be

<sup>5</sup> *Lords*, 14th July, 1802.

a plurality of offences to constitute the delinquency, it has already been laid down by the Superior Court, in The Constitution, that the fraudulent carrying the dispatches of the enemy is a criminal act, which will lead to condemnation. Under the authority of that decision, then, I am warranted to hold, that it is an act which will affect the vehicle, without any fear of incurring the imputation, which is sometimes strangely cast upon this court, that it is guilty of interpolations in the laws of nations. If the court took upon itself to assume principles in themselves novel, it might justly incur such an imputation; but to apply established principles to new cases, cannot surely be so considered. All law is resolvable into general principles. The cases which may arise under new combinations of circumstances, leading to an extended application of principles, ancient and recognized, by just corollaries, may be infinite; but so long as the continuity of the original and established principles is preserved pure and unbroken, the practice is not new, nor is it justly chargeable with being an innovation on the ancient law; when, in fact, the court does nothing more than apply old principles to new circumstances. If, therefore, the decision, which the court has to pronounce in this case, stood on principle alone, I should feel no scruple in resting it on the just and fair application of the ancient law. But the fact is, that I have the direct authority of the Superior Court for pronouncing, that the carrying the dispatches of the enemy, brings on the confiscation of the vehicle so employed.

It is said, that this is more than is done even in cases of contraband; and it is true, with respect to the very lenient practice of this country, which, in this matter recedes very much from the correct principle of the law of nations, which authorizes the penalty of confiscation. This is rightly stated, by Bynkershoek, to depend on this fact, whether the contraband is taken on board with the actual or presumed knowledge of the owner. I say presumed knowledge, because the knowledge of the master is in law, the knowledge of the owner; "*si sciverit, ipse est in dolo, et navis publicabitur.*" Bynker. I, P. c. 12, 95. This country, which, however much its practice may be misrepresented by foreign writers, and sometimes by our own, has always administered the law of nations with lenity, adopts a more indulgent rule, inflicting on the ship only a forfeiture of freight in ordinary cases of contraband. But the offence of carrying dispatches is, it has been observed, greater. To talk of the confiscation of the noxious article, the dispatches, which constitutes the penalty in contraband, would be ridiculous. There would be no freight dependent on it, and therefore the same precise penalty cannot, in the nature of things, be applied. It becomes absolutely necessary, as well as just, to resort to some other measure of confiscation, which can be no other than that of the vehicle.

Then comes the other question, whether the penalty is not also to be extended further, to the cargo, being the property of the same proprietors—not merely *ob continentiam delicti*, but likewise because the

representatives of the owners of the cargo are directly involved in the knowledge and conduct of this guilty transaction? On the circumstances of the present case I have to observe, that the offence is as much the act of those who are the constituted agents of the cargo, as of the master, who is the agent of the ship. The general rule of law is, that where a party has been guilty of an interposition in the war, and is taken in delicto, he is not entitled to the aid of the court, to obtain the restitution of any part of his property involved in the same transaction. It is said that the term "interposition in the war" is a very general term and not to be loosely applied. I am of opinion, that this is an aggravated case of active interposition in the service of the enemy, concerted and continued in fraud, and marked with every species of malignant conduct. In such a case I feel myself bound, not only by the general rule, *ob continentiam delicti*, but by the direct participation of guilt in the agents of the cargo. Their own immediate conduct not only excludes all favourable distinction, but makes them pre-eminently the object of just punishment. The conclusion therefore is, that I must pronounce the ship and cargo subject to condemnation. \* \* \*

#### THE MADISON.

(High Court of Admiralty, 1810. Edwards, 224.)

This American ship had been captured on her former voyage, by a French privateer, and carried into Dieppe, from whence, after obtaining her liberation, she was proceeding in ballast to Baltimore. The compulsion, under which the vessel went into the blockaded port being sufficient to exempt her from the penalties of a breach of the blockade, the counsel for the captors now pressed for condemnation, on the ground that among the papers on board were some dispatches from the enemy's government, which the master had not delivered up. It was also objected that there were eight passengers and a small quantity of antimony on board; and, consequently, that the vessel must be considered as coming out with a cargo.

Sir WILLIAM SCOTT. Proceedings have been instituted against this ship on various grounds, and, among others, on the ground that she had sailed from a blockaded port with a cargo and a number of passengers on board; but it appears that the few articles which she carried do not deserve the name of a cargo, and the passengers are not of a description to affix any hostile character to the vessel conveying them. The only remaining objection to restitution is, that the ship was carrying dispatches from the government of the enemy to America; and the question is, in what manner this will operate upon the vessel. The court, in several instances, has had occasion to consider the effect of carrying papers of a public nature, and according to the different circumstances of the cases themselves its decisions have been governed. In some it has held, that the conveyance of dispatches

for the enemy did affix an hostile character to the ship; in others, attended with circumstances of a different description, it has held that the conveyance of them was not of a criminal nature, and that though the vessel was justly subject to the inconvenience of seizure and detention, it was not liable to confiscation. I have now to consider to which of these two classes the present case is to be assigned. The papers themselves had been transmitted to his Majesty's government, and an application has been made to the secretary of state for information respecting their real character. The manner in which they came on board is stated by the master, who says, in an affidavit, "that he received them from a person who is employed under Mr. Armstrong, the American ambassador at Paris, and that he understood they came from him." Certainly, if these papers are really of a hostile and illegal nature, it is not in the power of the American ambassador to sanction them, or to protect the conveyance of them. This court has held, in cases of convoy, that even the interposition of the sovereign of a neutral country will not take off the criminality of an illegal act; still less can an ambassador, acting only under a delegated authority from his sovereign, be permitted to assume a privilege so injurious to a belligerent whose rights it is his duty to respect.

But the matter turns in this case upon the character of the papers, as far as government has thought it proper to characterize them. The answer from the secretary of state's office is, that No. 3 contains a dispatch from the Danish government to the Danish consul general at Philadelphia; and I think I am to infer from this account, negatively, that all the other papers are of an innocent nature. Now I am of opinion, that a communication from the Danish government to its own consul in America, does not necessarily imply any thing that is of a nature hostile or injurious to the interests of this country. It is not to be so presumed; such communications must be supposed to have reference to the business of the consul general's office, which is to maintain the commercial relations of Denmark with America. If such communications were interdicted, the functions of the official persons would cease altogether. It has been said that this communication of the Danish government with one of its delegates in another country, through the medium of the American minister at Paris, is a matter in which the neutral government is not at liberty to interpose and carry on, and that the neutral government is not to concert measures with the enemy, for the purpose of assisting in communications relating solely to his own commerce. But I take this to be a correspondence in which the American government is itself interested. A Danish consul-general in America is not stationed there merely for the purpose of Danish trade, but of Danish-American trade; his functions relate to the joint commerce in which the two countries are engaged, and the case, therefore, falls within the principle which has been laid down in the case of *The Caroline*, in regard to dispatches from the enemy to his ambassador resident in a neutral country. In the transmission

of these papers America may have a concern and an interest also; and, therefore, the case is not analogous to those in which neutral vessels have lent their services to convey dispatches between an enemy's colony and the mother country. Here there is no such departure from neutrality as to subject the vessel to confiscation; yet I cannot help observing that the conveyance of papers of this description for the enemy, by American vessels, is a practice of which they would do well, for various reasons affecting their own safety and convenience, to be more abstemious in the indulgence than the observation of this court enables it to say they are.

In this case the favorable presumption arising from the papers is strengthened by the character of the person from whom they were received; for it is a presumption which I am bound to maintain, that as the neutral master received these dispatches from the hands of the American minister, there is in that circumstance a guaranty of the innocence of his conduct. This case is clearly not of a nature to call for serious judicial animadversion, and I shall, therefore, restore the ship, giving the captors their expenses.

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#### THE GAUNTLET.

(Privy Council, 1872. L. R. [1871-73], 4 P. O. App. Cas. 184.)

Their Lordships reserved judgment, which was now delivered by LORD JUSTICE JAMES:<sup>6</sup>

In this case the crown sought the condemnation of the respondent's ship, the Gauntlet, for a violation of the Foreign Enlistment Act. The learned judge of the Court of Admiralty found that there was no such violation, and dismissed the petition of the Queen's proctor with costs.

The crown, by the present appeal, complains of the finding and dismissal; and further, that if the decree in this respect were well founded, the Court of Admiralty had no jurisdiction to award costs against the crown.

The facts of the case are not in dispute, and may be briefly summarized. The respondent's steam-tug, under an agreement with the French consul, made by one of her owners and the master, left its anchorage near the Ryde Pier to go to a vessel called the Lord Brougham, lying a few miles off in British waters, for the purpose of towing her across to Dunkirk Roads, and did accordingly so tow her. The Lord Brougham was, and was (as their Lordships have no doubt) well known to all parties concerned to be, a German merchantship, which had been captured by a French cruiser, and then was French prize of war. She had on board a French officer and a French prize crew, with some of the original crew as prisoners. The crown contends that

<sup>6</sup> The statement of facts is omitted.

sending an English steam-tug expressly for the purpose of towing a prize to the captor's waters is dispatching a ship from the United Kingdom for the purpose of taking part in the naval service of the belligerent power, and is, therefore, within the words and plain meaning of the prohibition.

On the part of the respondent it is urged that, at all events, there was no conscious violation of the law; that the ship engaged in the transaction in the ordinary course of business, just as it would have towed any other ship across, and for the ordinary remuneration for such service; and that, in truth, the immediate cause of the hiring of the tug was the pressure of an English authority who insisted on the prize no longer remaining in British waters. The Solicitor General, on behalf of the crown, did not contest what may be called the moral innocence of the respondents, but insisted—and in their Lordships' opinion unanswerably—that parties knowing the facts constituting their act a legal offence cannot be heard in a court of law to allege that they were ignorant of, or had forgotten, or, what is more probable here, never thought of the law. These are matters for the indulgent consideration of the crown, but not matters which the Court of Admiralty or this board has any jurisdiction to deal with.

It was much pressed in the court below, and again before their Lordships, that the statute being a penal, or, as it was phrased, a highly penal one, it was to be construed strictly. It appears to their Lordships necessary to say a few words as to this topic, which is so often pressed in argument. No doubt all penal statutes are to be construed strictly, that is to say, the court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus misissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used, and the court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.

It was contended in the court below, but without success, that the words in the prohibitory clause were to be restricted by the words in the definition clauses, and that contention has been repeated here. In the court below that argument was used in support of a contention that "steam-tug" was not within the definition; here, in support of the contention, that the uses are limited to the uses specifically mentioned in the definition. The words, however (as was pointed out by the learned judge), are not "shall mean," but "shall include." In



some of the clauses in the same part of the act the other words "shall mean" are used, and in the other clauses in which the words "shall include" are used, the most absurd consequences would follow if the words "shall include" were construed as equivalent to "shall mean," e. g., the clause as to what shall be included under the words "United Kingdom." Indeed, as to this particular clause itself, consequences no less absurd would follow if the things included were to be considered as an exhaustive enumeration, and so as to be the only things comprised. Their Lordships have, therefore, no hesitation in concurring with the learned judge that the words in the definition can have no effect in restricting the meaning to be put on the words of the prohibitory section. And the whole question is really what is the meaning of the words in that section "naval service."

In the court below a good deal of the argument appears to have turned on, and a good deal of the judgment deals with, the question as to how far it is essential to the legal completion of a captor's title by formal judicial condemnation that the prize should be brought *infra præsidia* to give the Prize Court jurisdiction to pronounce such condemnation. It does not appear material to their Lordships to consider that question. It appears to have been considered that if it had been made out that it was essential, then the act of the steam-tug in going to tow the prize into French waters, and so *infra præsidia*, would be an act done in the naval service of the captor power.

But it appears to have been overlooked that that is not the only way in which, nor the only object for which, service can be rendered to a belligerent in connection with a prize. It would seem to be quite as important, to say the least, to complete a capture *de facto* by lodging it in a place of safety, as to complete it *de jure* by bringing it within the jurisdiction of the captors' Prize Court.

What was the position of the Lord Brougham when the Defendants' Vessel undertook the towing of her to French waters. She had (subject to the possibility of escape or recapture) ceased to be a German merchantman. She certainly had not become a French merchantman. She was in the actual possession of the French government. She was under the command of a French naval officer, with a crew of sailors of the French navy, temporarily detached from the French ship of war for that purpose. The officer and crew were still part of the ship's crew—entitled to share in any fresh prize made by the latter—bound to share any prizes which they themselves might have made, as they lawfully might, of any German ship coming in their way. They had in our waters the right of a French man-of-war, as against any action of our municipal law, in respect either of their prisoners or their booty. Their Lordships agree, therefore, with the contention on the part of the crown, that it is impossible to distinguish such a ship, because it had been a prize, from the case of a tender, or a pinnace, detached for any purpose from a ship of war, or any other vessel taken up by or for the belligerent power in the course of its naval operations.

The counsel of the respondents contended, that naval service must mean service in or directly connected with some warlike naval operation. In their Lordships' opinion, the detaching a prize crew after capture to take charge of the prize, and to bring it and the prisoners safely home, is essentially a warlike naval operation—as much and as important a warlike operation as the chase before the capture.

Their Lordships, therefore, have no doubt that sending an English steam-tug for the express purpose of taking the detached prize crew, its prisoners and booty, speedily and safely to French waters, where the prisoners, prize, and booty would be taken charge of by the French authorities, and the prize crew set free to rejoin and strengthen their own ship, was dispatching a ship for the purpose of taking part in the naval service of the belligerent, within the plain meaning, the words and spirit of the act of Parliament.

Their Lordships will, therefore, humbly recommend, that the decision of the Court of Admiralty be reversed, and that, in lieu thereof an order of condemnation be made as prayed by the queen's proctor.

On the subject of costs it is no longer the interest of the respondent to contest the proposition of the Solicitor General, who admits that his principle is to apply as well against as in favour of the crown, and their Lordships have, therefore, not had the assistance of the arguments on the other side, which they would have desired to hear if it had been necessary to pronounce any decision on the point.<sup>7</sup>

<sup>7</sup> In the case of *The International*, L. R., (1869-72), 3 Adm. & Ecc. 321 (1871), it appeared that a British vessel of that name was about to lay cables, in order to complete telegraphic communication between Dunkerque and Verdon, at the mouth of the Garonne. This was in 1870, during the war between France and Germany.

*The International* was seized when about to proceed from the port of London, to lay cables, on the ground that such action would be an unneutral service, contrary to the Foreign Enlistment Act of 1870. Sir Robert Phillimore held that the company was entitled to have the ship released.

"Although"—to quote the language of the headnote—"the court considered it probable that the line, when complete, would be partially used for effecting communication between the armies of France, it held that such probability was not sufficient to divest the line of its primary commercial character, or to clothe the service to be rendered by the ship with the character of a 'military or naval service' within the meaning of the Foreign Enlistment Act, 1870."

The learned judge intimated, as further stated in the headnote, that: "A ship employed in the service of a foreign belligerent state, to lay down a submarine cable, the main object of which is, and is known to be, the subserving of the military operations of the belligerent state, is employed in the military or naval service of that state within the meaning of the Foreign Enlistment Act, 1870."

The immense service which cables render to belligerents in the transmission of news has led to their being cut on the high seas; especially in the World War of 1914-18. Hitherto, cables had only been cut within the marine belt possessed by the belligerent cutting them.

On this subject, see the article by Professor A. Pearce Higgins, on "Submarine Cables and International Law," *British Year Book of International Law*, 1921-22, p. 27.

**YANGTSZE INS. ASS'N v. INDEMNITY MUTUAL MARINE  
ASSUR. CO.**

(Court of Appeal, King's Bench Division, 1908. L. R. [1908] 2 K. B. Div. 504.)

Appeal from the judgment of Bigham, J., reported [1908] 1 K. B. 910.

The action was by assured against underwriters on a policy of reinsurance. \* \* \*

Sir GORELL BARNES, President. \* \* \* The plaintiffs had underwritten a policy for £18,000. on the steamer *Nigretia* at and from Shanghai to Vladivostock, while there for not exceeding twelve days whilst discharging the cargo, and thence to one port in China in ballast. That policy contained a warranty "not to carry cargo other than kerosene oil," and covered "the risk of capture." The policy underwritten by the defendants was described as "being a reinsurance of the Yangtsze Insurance Association, Limited, subject to the same clauses and conditions as in the original policy, and to pay as may be paid thereon (but warranted free from particular average) and all clauses as in the original policy including war risk." The policy of reinsurance contained the following provision: "Warranted no contraband of war on basis of cable dated 31 October, 1904, copy of which attached hereto." The copy of telegram attached was of a telegram sent from the office of the plaintiffs at Shanghai to the plaintiffs' London office, which ran as follows: "*S. S. Nigretia*.—Cargo oil kerosene only. We will guarantee that consul for Japan has to-day written British consul that kerosene not regarded contraband by Japanese Government if shipped anywhere. Cannot give further guarantee."

At the time a state of war existed between Russia and Japan. The steamer sailed on the insured voyage to Vladivostock, and was, while on that voyage, captured by a Japanese cruiser and taken to the port of Sasebo, in Japan, where she was condemned by a Japanese prize court. The judgment of that Court found that two Russian naval officers, who had assumed German names, were received on board the *Nigretia* at Shanghai as passengers to Vladivostock. There was no proof that the captain or owners of the vessel knew that those two persons were Russian officers, but, on the other hand, the Japanese court found that there was no proof that they were ignorant of the fact, and the court held that the ship must be confiscated as having been engaged in transporting these persons. The plaintiffs paid on the original policy as for a total loss, and then brought the action on the reinsurance policy, claiming to be indemnified by the defendants. On the trial Bigham, J., gave judgment for the plaintiffs.

To my mind, this case does not really raise the broader question as to the meaning in general of the term "contraband of war." In my

view the particular warranty relied upon was inserted in the policy with the knowledge on the part of both parties and on the basis that they were dealing with a cargo of kerosene oil, there being a warranty in the original policy "not to carry cargo other than kerosene oil"; and the copy telegram was attached for the purpose of making it clear what the warranty with regard to that cargo was intended to be, the effect of it being that the defendants undertook the reinsurance with a warranty as to the cargo which only protected them to the extent indicated by the telegram. That warranty, in my opinion, related only to the cargo, and therefore there was no breach of the warranty in the sense in which I read it.

This view, if correct, would reduce any observations on the broader question as to the meaning in general of "contraband of war" to the position of obiter dicta; but, as that question has been discussed before us, I think it desirable that I should state my opinion with regard to it. The defendants' counsel has cited as being in his favour certain passages from text-books, in which the authors were dealing with the general topic of the effect of breaches of neutrality by reason of a ship carrying persons or things which she ought not to carry, and the carriage of which exposes her to the risk of capture and condemnation. But it is remarkable that no case has been cited in which, in the courts of this country, persons have ever been spoken of as being "contraband of war." Going back to old days, one of the leading cases on the subject is *The Jonge Margaretha*, (1799) 1 C. Rob. 189, which was a decision of Lord Stowell, and is included in *Tudor's Leading Cases on Mercantile Law* (3d Ed.) 981. The learned editor of that work, in discussing the question what is "contraband of war" in his note to that case, begins by saying that "one of the most important exceptions to the rule allowing neutrals to carry on commercial intercourse with the belligerents on both sides is that which forbids them to supply any of them with what is called contraband of war; under which term are comprehended all such articles as may serve a belligerent in the direct prosecution of his hostile purposes." I think it will be found, on looking at the numerous cases in which Lord Stowell and other learned judges have dealt with the question what is, and what is not "contraband of war," they all relate to things, and not to persons. In my opinion, when one is dealing, as in this case, with a commercial contract made between commercial men with regard to insurance, *prima facie* the correct view to take is that the expression "contraband of war" is used in the primary sense in which it is generally used, namely, as applicable to goods.

That this is the natural meaning of the term appears to be borne out by the definition of "contraband" given in the dictionaries. For instance, in the *Oxford English Dictionary*, edited by Murray, vol. 2, p. 912, I find the following meanings given under the word "contraband":

"1. Illegal or prohibited traffic; smuggling."

"2. Anything prohibited to be imported or exported; goods imported or exported contrary to law or proclamation; smuggled goods."

"3. (In full contraband of war.) Anything (esp., arms, stores, or other things available for hostile purposes) forbidden to be supplied by neutrals to belligerents in time of war, and liable by the law of nations to be captured and confiscated."

There are other meanings there given, the effect of the whole being as it seems to me, to shew that the term "contraband" in its primary and proper sense applies only to goods. Having regard to the considerations which I have mentioned, namely, that no case has been cited in which in an English court the term "contraband" has been used with regard to a person, and that the term is defined in well-known dictionaries as only relating to goods, and also to the fact that in the works of some text-writers, particularly Hall on International Law, pp. 640, 673, the term "contraband of war" is used as relating only to goods, and the expression "analogues of contraband" is employed by the author when dealing with the carriage of persons, I have no hesitation in saying that, in my opinion, if the decision of this case depended on the broader question which was dealt with by Bigham, J., it ought to be decided in accordance with his view of the matter. It is not without interest to notice that, in the declarations with regard to contraband which were made at the commencement of the Russo-Japanese War by the Japanese and Russian governments respectively, and which are to be found set out in the work of Messrs. F. E. Smith and N. W. Sibley on "International Law as interpreted during the Russo-Japanese War," the lists of matters declared to be contraband appear to be confined to things, and not to include persons. Again, in the Declaration appended to the Treaty of Paris, which was signed in 1856 by the plenipotentiaries of Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, respecting maritime law in time of war,<sup>8</sup> the term "contraband" is used in such a way as to indicate that only articles or goods were referred to, and not persons. I may perhaps be going beyond what is necessary for the decision of this particular case in making these observations on the broader question but, in my opinion, on the terms of this particular policy and also on the broader ground to which I have alluded, there was no breach of the warranty given, and the appeal must therefore be dismissed.<sup>9</sup>

Appeal dismissed.

<sup>8</sup> See Hertslet's *Commercial Treaties*, vol. X, p. 547; *Wheaton's International Law* (4th Ed.) p. 808; E. A. Whittuck, *International Documents*, London, p. 1 (1908).

<sup>9</sup> The concurring opinions of Lords Justices MOULTON and FARWELL are omitted.

## THE ERSTERN.

## DARBY et al. v. THE ERSTERN et al.

(Federal Court of Appeals of the United States, 1782. 2 Dall. 34, 1 L. Ed. 277.)

This was an appeal from the Admiralty of the State of Massachusetts Bay, where the brig and her cargo had been acquitted. The case was argued on the 28th, 29th and 30th of January; and, on the 5th February, 1782, the definitive sentence of the court was pronounced by Paca and Griffin, the presiding commissioners in the following terms:

BY THE COURT: Upon the evidence in this case, we are of opinion, that the brig, at the time of her capture, was the property of imperial subjects at Ostend, and that the cargo was British property, unprotected by the capitulation of Dominica.

It is objected, "the brig is not prize, because neutral property." Neutral property cannot be captured: For, while the character of neutrality is preserved, such property is the property of a friend, on which the rights of war cannot attach; but the owners of a ship may violate their neutrality, by taking a decided part with the enemy: In what light is such a ship then to be considered, and what is to be done with her? The law of nations says, that a ship under those circumstances, is in the predicament of enemy's property, and subject to seizure and confiscation.

But it is said, "the ordinance of Congress ascertains in what cases the rights of neutrality are forfeited; that the present case is not comprehended; and therefore, if not protected by the law of nations, yet it is protected by the ordinance of Congress."

We are of opinion, that Congress did not mean, by their ordinance, to ascertain in what cases the rights of neutrality should be forfeited, in exclusion of all other cases; for, the instances not mentioned are as flagrant as the cases particularized. The ordinance does not specify the case of a neutral vessel employed in carrying provision to a place which is besieged, and in want of bread: for, although one of the articles says, "You shall permit all neutral vessels freely to navigate on the high seas, or the coasts of America, except such as are employed in carrying contraband goods or soldiers, to the enemy;" yet another article says, that the term contraband shall be confined to the articles there enumerated, and provision is omitted. Were Congress asked, whether they meant to protect from capture a neutral ship loaded with provision, and destined for York and Gloucester, when besieged by the armies of the United States and France, no one could possibly doubt what their answer would be. The plain and obvious construction of the ordinance is, that while neutral vessels observe the rights of neutrality, they shall not be interrupted by

American captures. Congress meant to pay a regard to the rights, and not to the violations of neutrality.

But it is objected, "that in this case, if the brig has violated the rights of neutrality, it is because she intended a violation of the capitulation of Dominica; that the capitulation of Dominica can only be considered as a local law, of which there can be no breach, until the offending ship comes within the civil jurisdiction of the island; that the brig was captured before the arrival within the jurisdiction of Dominica; and that, therefore, she was captured before there was any violation of the rights of neutrality." If nothing could be objected against the brig, but an intentional violation of the capitulation, abstractedly from the consequences, with regard to the war between Great Britain, France and the United States, possibly such reasoning might be conclusive: but we are of opinion, that the brig has done more than a mere intentional offence, with regard to the capitulation.

The subjects of a neutral nation cannot, consistently with neutrality, combine with British subjects to wrest out of the hands of the United States and of France the advantages they have acquired over Great Britain by the rights of war; for this would be taking a decided part with the enemy. On the conquest of Dominica a capitulation took place, and by that capitulation, a commercial intercourse between Great Britain and that island was prohibited: the object was to weaken the power of Great Britain, by lessening her naval and commercial resources. But what has been the conduct of the brig, and the imperial subjects, her owners? Kender Mason, a British subject, establishes a plan at Ostend, by which the commerce of Great Britain with Dominica is to be kept up and preserved, through the intervention of that port. On this plan Liebert, Beas, Dardine, & Co., imperial subjects, purchase at London the brig *Erstern*: Kender Mason puts on board a cargo of British merchandise, the property of British subjects: the brig clears out from London, ostensibly for Ostend, and there arrives: Liebert, Beas, Dardine & Co. supply her with false and colorable papers, assume upon themselves the ownership of the cargo, and dress it up in the garb of neutrality, to screen it from detention and capture: the brig then clears out for Dominica, and sails for that island with the cargo she took on board at London.

Can such conduct consist with neutrality? Can there be a more flagrant violation of it? Does it not aim to wrest from France and the United States, the advantages they acquired by the conquest of Dominica? and does it not evince a fraudulent combination with British subjects, and a palpable partiality?

But "why shall the rights of neutrality be broke by works of supererogation? If the cargo was British property, unprotected by the capitulation, it was then the property of enemies, and as it did not consist of contraband articles, it was protected from capture by the

ordinance of Congress: the brig, therefore, needed not to employ fraud and stratagem to give it the garb of neutrality, in order to screen it from capture."

If the offence, which the brig has committed, consisted in employing fraud and stratagem, merely to protect property which belonged to an enemy, the objection might, in consequence of the ordinance of Congress, be of some force. But the offence is not of so limited a nature; it is far more extensive, and comprehends a flagrant violation of the rights of neutrality: it results from a fraudulent combination with British subjects, to give weight and energy to the arms of Great Britain, by the re-establishment of a commerce, and its emoluments, which she had lost by the conquest of Dominica.

But, it is objected, "the cargo is not prize, because it is not contraband, and all the other effects and goods, though the property of an enemy, are exempted from capture by the ordinance of Congress." If the *Erstern* had been employed in a fair commerce, such as was consistent with the rights of neutrality, her cargo, though the property of an enemy, could not be prize; because Congress have said, by their ordinance, that the rights of neutrality shall extend protection to such effects and goods of an enemy. But, if the rights of neutrality are violated, Congress have not said, that such a violated neutrality shall give such protection: nor could they have said so, without confounding all the distinctions between right and wrong.

Upon the whole, we are of opinion, that the decree below be reversed, and that the said brig and cargo be condemned, as prize, for the use of the captors, without costs.

### THE HEINA.

(French Prize Court, 1915. *Journal Officiel*, November 7, 1915, p. 8014.)

In the name of the French people, the Prize Court has rendered the following decision between:

On one hand, Mr. Th. Olsen, in his capacity of captain of the Norwegian steamer *Heina*, of the port of Bergen (Norway), captured on September 13, 1914, by a cruiser of the Republic, the *Condé*, and conducted to Fort-de-France, and the Norwegian joint-stock company, J. Ludwig Mowinckel Dampskibsselskap, situated at Bergen, proprietor of the said ship and represented by Mr. Ludwig Mowinckel;

On the other hand, the Minister of the Navy acting in behalf of the captors and the fund for disabled sailors. \* \* \*

THE COURT, after due deliberation:

Concerning the validity of the capture:

Whereas, on September 13, 1914, according to a report of the said day, the Norwegian steamer *Heina* was captured for transporting

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contraband of war and assisting the enemy, by the cruiser of the Republic, Condé, off the Danish island of Saint Thomas (Antilles);

Whereas, by a decision of the Minister of the Navy brought to the cognizance of the Court by letter dated March 28, 1915, the proprietor of the captured vessel was authorized to deposit with the fund for disabled sailors the sum of 675,000 francs, representing the value of the said vessel, which was again placed at his disposal, all rights reserved;

Whereas, it appears from the papers seized on board as well as from the documents produced at the pleadings, and especially from the declaration of the proprietor of the vessel and its captain that the steamer Heina after several successive charterings, sailed on September 13, 1914, in execution of a charter-party entered into on August 4, 1914, for the benefit of the German company Hamburg-Amerika Linie and applied itself, contrary to neutrality, to operations having as object the supply of fuel and provisions, under the directions of a German agent embarked for this purpose, to the German naval forces at the Antilles and in the Atlantic;

Whereas, these facts are sufficient to justify the capture and to call for the condemnation of the vessel and of its cargo for giving assistance to the enemy, in conformity with the principles stated in articles 37 and 46 of the Declaration of London of February 26, 1909;

Whereas, without disputing the facts which led to the capture, the proprietor of the vessel based his objections on the place where the capture was effected and concluded that it should be declared null as it was made in violation of the Danish territorial waters;

Whereas, according to the terms of article 2 of Convention XIII of The Hague of October 18, 1907: "All acts of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral power, constitute a violation of neutrality and are strictly forbidden"—whereas, the said Convention, duly ratified by the governments of France, of Norway and of Denmark, was promulgated by a decree dated December 2, 1910, and whereas, the instructions of the Minister of the Navy upon the application of international law in case of war, dated December 19, 1912, contained the following provisions: "You will conform strictly to the prohibitions imposed upon belligerents by Hague Convention XIII of October 18, 1907, concerning the rights and duties of neutral powers in case of maritime war. For the application of this Convention, you will consider territorial waters as never extending less than three miles at low tide from the coast or the islands and banks belonging to it, and never more than cannon-range. You will find in Annex 11 a table of the powers \* \* \* which have fixed the limit of their territorial waters, as to the law of war, at a distance from the coast exceeding three miles."

Whereas, although in the matter of fisheries police Denmark de-

parted from its traditional rules and admitted the three-mile limit for its territorial waters, in matters of prize the limit of four marine miles remained in force, as expressly stated by the annex cited above;

But whereas, from August 30, the Condé cruised at a distance of from 5 to 6 miles around St. Thomas, thus blocking three ships of the Hamburg-Amerika Linie, and also awaiting the steamer Heina, signaled as being directed toward this island with a cargo destined for supplying the German cruisers;

Whereas, on September 13, about 11 o'clock, it perceived the Heina and as this vessel did not stop after a cannon shot had been fired, the Condé put on speed for the purpose of blocking its route;

Whereas with regard to the degrees of latitude and longitude, the determination of which is necessary in order to place the capturing ship and the vessel captured, the information furnished by the account of the capture, by the state of the signals, by the letter of the captain of the Heina, and by the report of the commander of the Condé all differ;

Whereas the information of this last report dated January 22, 1915, is to be taken as the most approximately correct, and is confirmed by the report of July 10, 1915, according to the terms of which "the exact point of capture is well without the territorial waters, at 18° 19' north latitude and 67° 30' west longitude";

Whereas, this refers to the position of the steamer Heina which was thus at a distance of 4½ miles from the southern end of the island of Savanna. \* \* \*

Concerning the subsidiary conclusions of Mr. Mowinckel:

Whereas, it appears from the papers attached to the dossier and especially from the affidavit made October 16, 1914, at New York, that the Norwegian joint-stock company, J. Ludwig Mowinckel Dampskibsselskap, proprietor of the vessel Heina, and represented by Mr. J. Ludwig Mowinckel, chartered the said ship by charter-party of October 8, 1913, to the New York & Bermudez Company of Philadelphia, with an option to recharter at the risk of the charterers; that this company on July 14, 1914, rechartered the steamer Heina to the New York & Puerto Rico Steamship Company, which again rechartered the steamer on August 4, 1914, to the German company the Hamburg-Amerika Linie;

Whereas, Mr. J. L. Mowinckel did not know of these successive recharterings, which he could not have prevented in any case, and whereas, he had a right to surmise that, following the provisions of the original charter-party, the vessel could only be used "for the lawful transportation of merchandise";

But whereas, since the validity of the capture is recognized, as stated above, the State can not be sentenced to restore to Mr. Mowinckel the sum deposited by him in order to regain possession of the said ship;

Whereas, it is possible to accede only to the motion that acknowledg-

ment should be made of the fact that he (Mr. Mowinckel) was in ignorance of the illegal transportation which caused the capture:

**Decides:**

The capture of the steamer *Heina* and of its cargo is declared good and valid, and the value thereof adjudged the rightful claimants, in conformity with the laws and regulations.

All effects, money, nautical instruments and other personal objects belonging to the captain and crew are in justice left at the disposition of their rightful owners.

Official acknowledgment is made of the request of Mr. J. Ludwig Mowinckel, representative of the company J. Ludwig Mowinckel Dampskibsselskap, proprietor of the steamer *Heina*, that for all intents and purposes he be declared ignorant of the illicit transportation that caused the seizure of the said vessel and its cargo.

The remaining pleas of Mr. J. Ludwig Mowinckel are rejected.

Deliberated at Paris at the meeting of September 29, 1915. \* \* \*<sup>10</sup>

<sup>10</sup> The steamer *Alexandria*, belonging to the German company *Kosmos* and lying in the port of San Francisco, was transferred shortly after the outbreak of the World War to an American company and cleared for Valparaiso October 18, 1914, under the American flag, with a cargo to the order of the Valparaiso Electric Tramway Company, a German concern, under her new name the *Sacramento*. The steamer herself was consigned to the agent of the *Kosmos* company in Valparaiso. En route she was met by the German cruiser *Dresden*, which took her to a bay in the Juan Fernandez Islands, belonging to Chile. While there, most of her cargo of coal was taken by a squadron of German warships whose commandant, Count von Spee, gave the captain a certificate that the coal had been taken under the right of "pre-emption," adding that its value, with damages, would be eventually paid by the German government, and ordered him to proceed to Valparaiso. The captain of the *Sacramento* entered no protest on the log. On arrival at Valparaiso the captain filed a protest with the American vice consul. The Chilean government, after investigation, held that the *Sacramento* should be considered an auxiliary of the German squadron, and interned her, after a notice to leave the port of Valparaiso within 24 hours had remained unheeded. The American government concurred in this view. *Alexandro Alvarez, La grande guerre Européenne et la neutralité du Chili*, 1915, p. 266.

In *The Edna*, L. R. [1921] 1 A. C. 735, 742, 743 (1921), Lord Sumner said, on behalf of the Privy Council:

"It must be possible to draw a line between unneutral service and 'fleet auxiliaries' and between the cases in which neutrals can validly buy and take delivery of enemy ships and the cases in which they cannot; otherwise transactions which are expressly permitted to neutrals might be invalidated by circumstances of which they had no notice and could form no estimate."

His Lordship thereupon attempted to draw the line, saying on behalf of the Privy Council:

"That a vessel which is or has been a portion of the armed forces of a belligerent cannot by a mere private transaction be placed beyond the reach of capture on the high seas is well settled (*The Minerva*, 8 C. Rob. 396 [1807]; *U. S. v. The Etta*, 4 Am. Law Reg. [N. S.] 387, Fed. Cas. No. 15,060 [1864]; *The Georgia*, 7 Wall. 32, 19 L. Ed. 122 [1868], and there is authority for the proposition that while a vessel formally incorporated in the enemy forces is and continues to be, for this and cognate purposes, a public ship of war, her mere actual employment in that capacity without formal incorporation or commission will also bring upon her the like disability (*The Ceylon*, 1 Dod. 105 [1817]; and cf. *H. M. Submarine E. 14*, 36 *The Times* L. R. 119, [1920] A. C. 403). Various reasons have been given for this rule, as that transfer-

### THE FEDERICO.

(French Prize Court, 1915. *Journal Officiel*, May 10, 1915, p. 2995.)

In the name of the French people, the Prize Court has rendered the following decision between:

On one hand, the proprietor of the Spanish steamer *Federico* of Barcelona, captured at sea on October 10, 1914, by torpedo-boat 360;

And, on the other hand, the minister of the Navy, representing the captors and the fund for disabled sailors. \* \* \*

THE COURT, after due deliberation:

Concerning the regularity of the capture:

Whereas, it appears from the examination that on October 10, 1914, the date of the capture of the Spanish steamer *Federico* by torpedo-boat 360, the condition of the sea did not permit the staff of the torpedo-boat to proceed to a thorough visit of the *Federico*; whereas, under

ability is an exception granted to enemy property in favour of commerce and that ships of war are not articles of commerce, or that such transfers would enable a belligerent to rescue himself from the disadvantage into which he has fallen and so to shift the disadvantage to his opponent, or that the ship sold might afterwards find its way back into the service of the flag to which she had belonged. If a public man-of-war remains in a neutral port for more than the limited time permitted to her by recognized rules, she has to be interned, for otherwise the neutral state would be rendering an indirect service to a belligerent as such. If it were open to a subject of that state to buy her under such circumstances, the payment of the price would be a direct service to the belligerent of a very real character, for instead of a ship which he could not use, he would get cash, which he could. The precise foundation of the rule, however, need not now be determined.

"In the case of a ship which is not and never has been a part of the armed forces of a belligerent, other tests may be applicable. Ships which enlist in the service of such armed forces, though not armed themselves, may naturally be the subject of rules more stringent than those which govern ordinary merchantmen. The forces assisted may consist of single ships or of whole fleets. Assistance may be rendered when in company or when detached; it may consist in the supply of coal and stores, or in the collection and forwarding of information. An unarmed ship may be of service as a decoy or as a screen; the assistance may be rendered casually or on a system, voluntarily or under orders, gratuitously or for hire. Such service is not necessarily confined to ships of the country to which the fleet assisted belongs or of a country engaged in the war at all. Again, such a ship may be captured in delicto and while rendering the service or after the service has come to an end. In the latter case different considerations may well arise, unless she is to be clogged perpetually for a single transgression and be incapable of valid transfer however long she may have mended her ways.

"There seems to be no authority in point. Their Lordships considered the case of *The Alwina*, 34 *The Times* L. R. 189, [1918] A. C. 444, as one of the carriage of contraband only. The neutral vessel there was released and not treated as if she were a fleet auxiliary, although it was not disputed that the ship and her cargo had been dispatched with the object of succouring a German squadron at sea, and if no services were actually rendered this was due to circumstances equally unforeseen and unwelcome, so far as her Dutch owners were concerned. The case, however, at most throws light on the liability of such an assistant to be subsequently captured while in the same ownership, and does not purport to decide anything as to the validity of an intervening change of ownership."

these circumstances the right of visit could be regularly effected only at the port of Toulon where the vessel had been conducted;

Concerning the validity of the capture:

Whereas, the Naval Conference held at London in 1909 passed on February 26 a declaration that has not been ratified by France; but whereas, the decree of August 25, 1914, mentioned above, rendered the said declaration applicable during the war with reservation as to the additions and modifications it made at the same time;

Whereas, thus the provisions contained in the declaration and those in the decree together constitute a unilateral act of the French government, and it belongs to the Prize Court, charged with its application, to determine its sense and scope;

Whereas, according to the terms of article 45 of the Declaration of London, a neutral ship is to be confiscated when the special object of its voyage is to transport as passengers individuals belonging to the armed force of the enemy;

Whereas, it is proved from the inquiry that the steamer *Federico* is not a packet employed in the regular transportation of passengers;

Whereas, at the time of its capture at sea the special object of its voyage was the transportation from Barcelona to Genoa of numerous German and Austro-Hungarian passengers, the great majority of these belonging by their age to the classes mobilized by their respective governments and traveling in response to this call;

Whereas, under these circumstances, these passengers should be regarded as incorporated in the armed force of the enemy in the sense of article 45 cited above, and whereas the ship was thus, according to the terms of the said article, subject to confiscation:

Decides:

The capture of the Spanish steamer *Federico*, including its fittings, equipment and accessories, is declared good and valid, and the net value thereof is adjudged to the rightful claimants, in conformity with the laws and regulations in force.

Deliberated at Paris, March 15 and 16, 1915. \* \* \* 11

<sup>11</sup> "In the celebrated *Trent Case*, occurring in 1862, Messrs. Mason and Silldell [civilian commissioners from the Confederate States to Europe] were removed from a British private vessel by Commodore Wilkes of the *San Jacinto*, a public vessel of the United States. Great Britain insisted that the rights of a neutral vessel not only had been violated, for which she demanded apology, but she insisted that these persons should be replaced and returned on board a British ship. This was done, and they were actually placed on board a British vessel in or near the harbor of Boston. They were not British subjects, and their return could only have been demanded for the reason that they had been torn from British soil, and the sanctity of British soil, as represented by a British ship, had been violated. Citizenship or residence had no influence upon the question." Per Mr. Justice Hunt in *Crapo v. Kelly*, 16 Wall. 610, 631, 21 L. Ed. 430 (1872).

It may be said that Mr. Seward, at that time Secretary of State, admitted that these persons could not lawfully be taken from the *Trent* at sea, but contended that it might have been brought in as prize. See Lawrence's *Wheaton* (2d Ed. 1863) 939; Dana's *Wheaton*, 644 (1866); 3 Wharton's *Digest*, §§ 325,

### THE LEIF GUNDERSEN.

(French Prize Court, 1918. *Journal Officiel*, Jan. 18, 1919, p. 709.)

In the name of the French people, the Prize Court has rendered the following decision between:

On the one hand, the captain, owners, shippers and consignees of the Norwegian four-masted bark, *Leif Gundersen*, captured at sea on March 25, 1917, and declared seized on May 10, 1917, by the French naval authorities;

And, on the other hand, the Minister of the Navy, acting in the name of the state, and on behalf of the rightful claimants of the proceeds of prizes, according to the laws and regulations; \* \* \*

Having heard M. H. Fromageot, member of the Court, in his report, and M. Chardenet, Commissioner of the Government, in his statements in support of his aforementioned motions:

THE COURT, after having duly deliberated thereon:

Whereas, according to the report dated at Glasgow, Scotland, May 17, 1917, the Norwegian four-masted bark *Leif Gundersen*, from the port of Porsgrund, Norway, belonging to the firm *Leif Gundersen* of Porsgrund, laden with a cargo of 3,067 tons of Indian corn and previously seized on the high sea on March 25, 1917, in the course of a voyage from Baltimore, United States, to Odensee, Denmark, was declared captured by the French naval authorities as engaged contrary to neutrality in transporting enemy dispatches in the interest of the enemy;

Whereas, it appears from two affidavits of W. Knott and W. Parkinson, officers of the British customs service, under date of July 16 and 24, 1917, that in the course of the stay, after visit and search, of the *Leif Gundersen* at Stornoway and later at Greenock, Scotland, on

328, 374; Bernard, *A Historical Account of the Neutrality of Great Britain*, 187-225 (1870). For a conservative British view, see Hall, *Int. Law*, 705-708 (4th Ed. 1895).

In the *Manouba* Case, between France and Italy, decided by the Permanent Court of Arbitration at The Hague, in 1918, it was held, *inter alia*, that the Italian authorities had the right during their war with Turkey to demand and compel the surrender of Turkish passengers on the *Manouba*, and, upon the refusal of the demand, to detain the vessel until it was complied with. See George Grafton Willson's *Hague Arbitration Cases*, 826 (1915), and James Brown Scott's *Hague Court Reports*, 841 (1916).

In the interesting case of *The Iro-Maru*, *Journal Officiel*, December 25, 1918, pp. 11101, 11102, decided by the French Prize Council in 1916, the council, adopting the conclusions of Mr. Henri Fromageot, held that:

"According to international law, application of which is made by article 45 of the Declaration of London of February 26, 1909, declared applicable under certain reservations not pertinent to the case by the Decree of November 6, 1914, in force at the time of the capture, a vessel although of neutral or allied nationality [the *Iro-Maru* was a Japanese vessel, and therefore an ally of France in the World War], is a legal prize if it is engaged in a voyage the special object of which is to transport an agent of an enemy state charged with carrying letters or news in the interests of said state."

April 7 and 13, 1917, the presence on board of about 3700 enemy dispatches was declared and confirmed;

Whereas, these dispatches, destined for Germany, were not transmitted by a public postal service;

Whereas, it appears from the reports made by the French Postal Censorship Service at London that, among these dispatches several were addressed to the German Imperial Office of Foreign Affairs at Berlin, coming especially from the Minister of Germany at Habana, and from the German consul at Florianopolis, Brazil;

Whereas, others referred to the disabling, to the prejudice of French and allied interests, of the machines of certain German vessels which have taken refuge at Brazil and at Honolulu, Hawaii;

Whereas, others had as their object either enemy propaganda or the maintenance of the economic and commercial power of enemy enterprises in South America;

Whereas, the nature and the character of the dispatches thus seized are not disputed;

Whereas, it appears from the examination which was held that the said dispatches were allowed to accumulate for a certain length of time pending opportunities of sending them into Germany by evading the allied cruisers;

Whereas, the captain had received instructions from Leif Gundersen, the shipowner, to attempt to evade hailing by the allied cruisers, and whereas, in fact the Leif Gundersen was at the time it was hailed holding a course tending to make it possible to evade the provisions laid down by the allies to assure the control of neutral vessels destined for the neighboring ports of Germany;

Whereas, under the control of prize jurisdiction, every belligerent has the right, by virtue of the law of nations, to detain, by regular hailing followed by capture, neutral vessels from engaging in operations contrary to neutrality;

Whereas, in truth, the shipowners of the Leif Gundersen allege that they were ignorant of the service rendered by their vessel to the enemy interests;

Whereas, for his part the captain claims that he did not know of the presence of the said dispatches on board his vessel and that they were taken on and concealed without his knowledge;

But whereas, the court does not have to examine the foundation of these allegations which, even if they were considered correct, would not be of a nature to hinder the application of the principle which has just been recalled;

Whereas, in fact the above-described dispatches related to the war and whereas their transport on account or in the interest of the German Empire, the enemy of France, constituted a service contrary to neutrality and of a nature to assist the enemy in the conduct of the war;

Whereas, consequently, the capture of the Leif Gundersen for the aforementioned reasons is justified; and whereas, finally, in the register of the dossier nothing proves that the Leif Gundersen was in the service of the enemy state itself and should on this account be considered as having lost the character of a neutral vessel: \* \* \*

Decides:

The capture of the Norwegian four-masted bark Leif Gundersen, together with its rigging, fittings, equipment and supplies of every nature effected on May 10, 1917, by the French naval authorities, is declared good and valid and the value thereof shall be paid to the rightful claimants of the proceeds of prizes in conformity with the laws and regulations.

The objects and the effects being the personal property of the captain and the crew shall be restored to the rightful claimants. \* \* \*

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### THE INDUSTRIE.

(Sasebo Prize Court, 1905. 2 Hurst & Bray's Russian and Japanese Prize Cases [1913] 823.)

The Industrie, owned by a German subject, J. Block, was chartered by an American, R. R. MacDiarmid, the proprietor of the Chefoo Daily News, a paper expressing pro-Russian views. She sailed from Shanghai to Tsushima, returned to Shanghai, and then proceeded to cruise in the neighborhood of the Japanese fleet, where she was captured. She had on board a German subject purporting to act as correspondent of the Chefoo Daily News but both he and the master in their evidence before the court were disposed to accept the suggestion that the ship was under contract of sale to the Russian Government, and that any news obtained would be supplied to the Russian authorities.

The owner made a claim for the release of the ship, and the case came before the Sasebo Prize Court, which gave judgment condemning the ship on July 13, 1905. \* \* \*

The conclusion of the court is as follows:

To watch one of the belligerents and report military secrets to the other constitutes unneutral service, and International Law allows the condemnation of vessels employed for such a purpose. The claimant alleges that the Industrie was reporting for the Chefoo Daily News, that that newspaper was not under the patronage of the Russian government, and that the reporter on board the vessel was an ordinary newspaper correspondent, who watched impartially the movements of both the Japanese and the Russian fleets. But the Chefoo Daily News is a small paper which first appeared about the time of the outbreak of the Russo-Japanese War, and had not sufficient means to send out a ship for its own purposes. It is also notorious that the newspaper



advocated the Russian cause, and deliberately gave publicity in its columns to anything disadvantageous to Japan. Moreover, in answer to the question whether he did not think it true that the Chefoo Daily News was an organ of the Russian government, Bannier said, "I did not know that before but your question makes me think it is possible that the Chefoo Daily News is receiving the patronage of the Russian government, as it is a small paper. At any rate, I cannot affirm that the newspaper is not receiving patronage of the Russian government." He also answered another question as follows: "I think that my reports would be transmitted to the Russian consul at Chefoo or Shanghai and thence to the Russian government. I did not know that when I left Shanghai, and my intention was to report all that I saw, not only of the Japanese, but also of the Russian fleet. I think, therefore, that all my reports might assist the Russian government." From these statements of Bannier, from similar statements of Uddine, the master, and from the fact that there was no vessel of the Russian fleet to be seen in the Eastern seas at that time, it is reasonable to infer that the Russian government took advantage of the fact that the Chefoo Daily News was a neutral paper, subsidized it, and sent the vessel to watch the Japanese fleet and to report military secrets; whilst ostensibly collecting news for the paper, and that the claimant knew of the scheme. The ship must, therefore, be held to have been employed to watch the movements of the Japanese fleet and to report them to the enemy. Consequently, she must be condemned. The other arguments of the claimant need not be dealt with.

Decision is therefore given as above.<sup>12</sup>

<sup>12</sup> On appeal of the Higher Prize Court, the decision was affirmed, that tribunal saying:

"For the above reasons it is clear that this ship attempted to discover military secrets, and was employed by the enemy; and, therefore, the Prize Court was right in condemning her." Page 330.

The *Quang-Nam*, 2 *Hurst & Bray's Russian and Japanese Prize Cases*, 343 (1905, 1906), belonged to a French company and was therefore a neutral ship. It was captured in a locality where information might be had as to Japanese defences. The court found that the charter party was not on board, and that the movements previous to capture did not suggest an ordinary mercantile voyage.

The *Sasebo* Prize Court held on the facts as found, that the ship was employed by the enemy government, and was therefore liable to condemnation. "When a ship," the court said, "though neutral, has taken part in reconnoitering the defences and the movements of a squadron for the assistance of the enemy, as in this case, her condemnation is allowed by international law. For these reasons, this ship should be condemned."

On appeal, the Higher Prize Court held that: "The Prize Court was therefore right in holding that this vessel was engaged in the duty of reconnoitering the condition of our defences and the movements of our fleet in the interests of the enemy, and in condemning her accordingly."

In commenting upon these cases Mr. J. A. Hall says, in his *Law of Naval Warfare* (2d Ed., 1921) p. 244, note: "The same principles would apply in the case of neutral aircraft in private ownership."

## SECTION 2.—RELATIONS WITH INSURGENTS

## DE WUTZ v. HENDRICKS.

(Court of Common Pleas, 1824. 2 Bing. 314.)

The plaintiff had proposed to raise a loan for the Greeks in arms against the government of the Porte. For this purpose he lodged with the defendant, a stockbroker, an instrument which was alleged to be a power of attorney, signed abroad by the exarch of Ravenna, but which turned out to have been fabricated in London; and the defendant, at his request, procured to be engraved certain scrip receipts, bearing a stamp. Suspicions having arisen as to the accuracy of the plaintiff's representations, the project for a loan failed, and the defendant refused to return to the plaintiff these papers, except upon receiving commission for scrip; which commission the plaintiff offered to pay, provided the defendant would transfer to the plaintiff the scrip on which he claimed commission. No scrip, however, had ever been raised.

The plaintiff having in vain offered to comply with all other demands made by the defendant, sued in trover for the papers specified above, when the jury (at the trial before Best, C. J., London sittings after Trinity term last), being led to believe that the whole transaction was a fraud on the part of the plaintiff, found a verdict for the defendant.

Pell, Serjt., now moved for a new trial, on the ground that the circumstance of the plaintiff having been engaged in a fraudulent transaction (admitting such to have been the case) did not deprive him of property in his own papers. If, instead of papers, he had deposited a box of jewels with the defendant, could it be contended that the defendant would have any right to retain them on this pretence. The principle was the same with respect to the papers, however small their value; but in truth they were of some value, inasmuch as an allowance would have been made at the stamp-office for the useless stamps.

BEST, C. J. It occurred to me at the trial that it was contrary to the law of nations (which in all cases of international law is adopted into the municipal code of every civilized country), for persons in England to enter into engagements to raise money to support the subjects of a government in amity with our own, in hostilities against their government, and that no right of action could arise out of such a transaction. I stated my opinion to the counsel for the defendant, but he did not ask for a nonsuit, so I permitted the cause to proceed. In consequence of what I said, a note has since been sent me of a

case that occurred lately in chancery, in which the Lord Chancellor is reported to have said that English courts of justice will afford no assistance to persons who set about to raise loans for subjects of the king of Spain to enable them to prosecute a war against that sovereign. Had I been aware that my opinion was supported by such high authority (although the counsel for the defendant would not take the objection), I should have nonsuited the plaintiff.

On further consideration, I think that my opinion at the trial was right, and on that ground we ought not to grant a new trial. It appeared that placards had been stuck up in the city, stating that the plaintiff was not authorised by the Greek government to raise any money, and that he had been informed that on account of what was stated in these placards no money could be raised for him. The power of attorney, which it was pretended was sent from Greece, was proved to have been manufactured in this country, but by whom it was executed did not appear. I told the jury that, with respect to the power of attorney, there was no evidence that any instrument of that description had ever come to the hands of the defendant; for by power of attorney in the declaration, must be understood an instrument duly executed as a power of attorney. I further said, that if the plaintiff was attempting a fraud on the public by raising money on the false pretence of pledging the Greek government for its repayment, and in furtherance of that attempt delivered these papers to the defendant, he could maintain no action to recover them back. The jury, to my entire satisfaction, found for the defendant.

The rest of the court concurred, and Pell took nothing.

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#### KENNETT et al. v. CHAMBERS.

(Supreme Court of the United States, 1852. 14 How. 38, 14 L. Ed. 816.)

Mr. Chief Justice TANEY delivered the opinion of the court.<sup>18</sup>

This is an appeal from the decree of the District Court of the United States for the District of Texas.

The appellants filed a bill in that court against the appellee, to obtain the specific execution of an agreement which is set out in full in the bill; and which they alleged was executed at the city of Cincinnati, in the state of Ohio, on or about the 16th of September, 1836. Some of the complainants claim as original parties to the contract, and the others as assignees of original parties, who have sold and assigned to them their interest.

The contract, after stating that it was entered into on the day and year above mentioned, between General T. Jefferson Chambers, of the Texan army, of the first part, and Morgan Neville and six others,

<sup>18</sup> The statement of the case is omitted.

who are named in the agreement, of the city of Cincinnati, of the second part, proceeds to recite the motives and inducements of the parties in the following words:

"That the said party of the second part, being desirous of assisting the said General T. Jefferson Chambers, who is now engaged in raising, arming, and equipping volunteers for Texas, and who is in want of means therefor; and, being extremely desirous to advance the cause of freedom and the independence of Texas, have agreed to purchase of the said T. Jefferson Chambers, of his private estate, the lands hereinafter described."

And after this recital follows the agreement of Chambers, to sell and convey to them the land described in the agreement, situated in Texas, for the sum of twelve thousand five hundred dollars, which he acknowledged that he had received in their notes, payable in equal instalments of four, six, and twelve months, and he covenanted that he had a good title to this land, and would convey it with general warranty. There are other stipulations, on the part of Chambers, to secure the title to the parties, which it is unnecessary to state, as they are not material to the questions before the court.

After setting out the contract at large, the bill avers, that the notes given, as aforesaid, were all paid; and sets forth the manner in which the complainants, who were not parties to the original contract, had acquired their interest as assignees; and charges that, notwithstanding the full payment of the money, Chambers, under different pretexts, refuses to convey the land, according to the terms of his agreement.

It further states, that they are informed and believe that he received full compensation, in money, scrip, land, or other valuable property, for the supplies furnished by him, and in arming and equipping the Texan army referred to in the said contract, and which it was in part the object of the said parties of the second part to assist him to do, by the said advances made by them, as before stated, and which said advances did enable the said Chambers so to do.

To this bill the respondent (Chambers) demurred, and the principal question which arises on the demurrer is, whether the contract was a legal and valid one, and such as can be enforced by either party in a court of the United States. It appears on the face of it, and by the averments of the appellants in their bill, that it was made in Cincinnati, with a general in the Texan army, who was then engaged in raising, arming, and equipping volunteers for Texas, to carry on hostilities with Mexico; and that one of the inducements of the appellants, in entering into this contract and advancing the money, was to assist him in accomplishing these objects.

The District Court decided that the contract was illegal and void, and sustained the demurrer and dismissed the bill; and we think that the decision was right.

The validity of this contract depends upon the relation in which this country then stood to Mexico and Texas; and the duties which these relations imposed upon the government and citizens of the United States.

Texas had declared itself independent a few months previous to this agreement. But it had not been acknowledged by the United States; and the constituted authorities charged with our foreign relations regarded the treaties we had made with Mexico as still in full force, and obligatory upon both nations. By the treaty of limits, Texas had been admitted by our government to be a part of the Mexican territory; and by the first article of the treaty of amity, commerce, and navigation, it was declared, "that there should be a firm, inviolable, and universal peace, and a true and sincere friendship between the United States of America and the United Mexican States, in all the extent of their possessions and territories, and between their people and citizens respectively without distinction of persons or place." These treaties, while they remained in force, were, by the Constitution of the United States, the supreme law, and binding not only upon the government, but upon every citizen. No contract could lawfully be made in violation of their provisions.

Undoubtedly, when Texas had achieved her independence, no previous treaty could bind this country to regard it as a part of the Mexican territory. But it belonged to the government, and not to individual citizens, to decide when that event had taken place. And that decision, according to the laws of nations, depended upon the question whether she had or had not a civil government in successful operation, capable of performing the duties and fulfilling the obligations of an independent power. It depended upon the state of the fact, and not upon the right which was in contest between the parties. And the President, in his message to the Senate of December 22, 1836, in relation to the conflict between Mexico and Texas, which was still pending, says: "All questions relative to the government of foreign nations, whether of the old or the new world, have been treated by the United States as questions of fact only, and our predecessors have cautiously abstained from deciding upon them until the clearest evidence was in their possession, to enable them not only to decide correctly, but to shield their decision from every unworthy imputation." Senate Journal of 1836-37, p. 54.

Acting upon these principles, the independence of Texas was not acknowledged by the government of the United States until the beginning of March, 1837. Up to that time, it was regarded as a part of the territory of Mexico. The treaty which admitted it to be so, was held to be still in force and binding on both parties, and every effort made by the government to fulfil its neutral obligations, and prevent our citizens from taking part in the conflict. This is evident, from an official communication from the President to the Governor

of Tennessee, in reply to an inquiry in relation to a requisition for militia, made by General Gaines. The despatch is dated in August, 1836; and the President uses the following language: "The obligations of our treaty with Mexico, as well as the general principles which govern our intercourse with foreign powers, require us to maintain a strict neutrality in the contest which now agitates a part of that republic. So long as Mexico fulfils her duties to us, as they are defined by the treaty, and violates none of the rights which are secured by it to our citizens, any act on the part of the government of the United States, which would tend to foster a spirit of resistance to her government and laws, whatever may be their character or form, when administered within her own limits and jurisdiction, would be unauthorized and highly improper. Ex. Doc. 1836, 1837, Vol. 1, Doc. 2, p. 58.

And on the very day on which the agreement of which we are speaking was made (September 16, 1836), Mr. Forsyth, the Secretary of State, in a note to the Mexican minister, assured him that the government had taken measures to secure the execution of the laws for preserving the neutrality of the United States, and that the public officers were vigilant in the discharge of that duty. Ex. Doc. Vol. 1, Doc. 2, pp. 63, 64.

And still later, the President, in his message to the Senate of December 22, 1836, before referred to, says: "The acknowledgment of a new state as independent, and entitled to a place in the family of nations, is at all times an act of great delicacy and responsibility; but more especially so when such a state has forcibly separated itself from another, of which it formed an integral part, and which still claims dominion over it." And, after speaking of the policy which our government had always adopted on such occasions, and the duty of maintaining the established character of the United States for fair and impartial dealing, he proceeds to express his opinion, against the acknowledgment of the independence of Texas, at that time, in the following words:

"It is true, with regard to Texas, the civil authority of Mexico has been expelled, its invading army defeated, the chief of the republic himself captured, and all present power to control the newly organized government of Texas annihilated within its confines. But, on the other hand, there is, in appearance at least, an immense disparity of physical force on the side of Mexico. The Mexican republic, under another executive, is rallying its forces under a new leader, and menacing a fresh invasion to recover its lost dominion. Upon the issue of this threatened invasion, the independence of Texas may be considered as suspended; and, were there nothing peculiar in the relative situation of the United States and Texas, our acknowledgment of its independence at such a crisis would scarcely be regarded as consistent with that prudent reserve with which we have heretofore held ourselves bound to treat all similar questions."

The whole object of this message appears to have been to impress upon Congress the impropriety of acknowledging the independence of Texas at that time; and the more especially as the American character of her population, and her known desire to become a state of this Union, might, if prematurely acknowledged, bring suspicion upon the motives by which we were governed.

We have given these extracts from the public documents not only to show that, in the judgment of our government, Texas had not established its independence when this contract was made, but to show also how anxiously the constituted authorities were endeavoring to maintain untarnished the honor of the country, and to place it above the suspicion of taking any part in the conflict.

This being the attitude in which the government stood, and this its open and avowed policy, upon what grounds can the parties to such a contract as this, come into a court of justice of the United States and ask for its specific execution? It was made in direct opposition to the policy of the government, to which it was the duty of every citizen to conform. And, while they saw it exerting all its power to fulfil in good faith its neutral obligations, they made themselves parties to the war, by furnishing means to a general of the Texan army, for the avowed purpose of aiding and assisting him in his military operations.

It might indeed fairly be inferred, from the language of the contract and the statements in the appellants' bill, that the volunteers were to be raised, armed, and equipped within the limits of the United States. The language of the contract is: "That the said party of the second part (that is the complainants), being desirous of assisting the said General T. Jefferson Chambers, who is now engaged in raising, arming, and equipping volunteers for Texas, and is in want of means therefor." And as General Chambers was then in the United States, and was, as the contract states, actually engaged at that time in raising, arming, and equipping volunteers, and was in want of means to accomplish his object, the inference would seem to be almost irresistible that these preparations were making at or near the place where the agreement was made, and that the money was advanced to enable him to raise and equip a military force in the United States. And this inference is the stronger, because no place is mentioned where these preparations are to be made, and the agreement contains no engagement on his part, or proviso on theirs, which prohibited him from using these means and making these military preparations within the limits of the United States.

If this be the correct interpretation of the agreement, the contract is not only void, but the parties who advanced the money were liable to be punished in a criminal prosecution, for a violation of the neutrality laws of the United States. And certainly, with such strong

indications of a criminal intent, and without any averment in the bill from which their innocence can be inferred, a court of chancery would never lend its aid to carry the agreement into specific execution, but would leave the parties to seek their remedy at law. And this ground would of itself be sufficient to justify the decree of the District Court dismissing the bill.

But the decision stands on broader and firmer ground, and this agreement cannot be sustained either at law or in equity. The question is not whether the parties to this contract violated the neutrality laws of the United States or subjected themselves to a criminal prosecution; but whether such a contract, made at that time, within the United States, for the purposes stated in the contract and the bill of complaint, was a legal and valid contract, and such as to entitle either party to the aid of the courts of justice of the United States to enforce its execution.

The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the government is in amity and friendship. This principle is universally acknowledged by the laws of nations. It lies at the foundation of all government, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to the citizens of the United States. For as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the scope of their delegated authority. And when that authority has plighted its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our government is pledged by treaty to be at peace, without a breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation. And if he does so he cannot claim the aid of a court of justice to enforce it. The appellants say, in their contract, that they were induced to advance the money by the desire to promote the cause of freedom. But our own freedom cannot be preserved without obedience to our own laws, nor



social order preserved if the judicial branch of the government countenanced and sustained contracts made in violation of the duties which the law imposes, or in contravention of the known and established policy of the political department, acting within the limits of its constitutional power.

But it has been urged in the argument that Texas was in fact independent, and a sovereign state at the time of this agreement; and that the citizen of a neutral nation may lawfully lend money to one that is engaged in war, to enable it to carry on hostilities against its enemy.

It is not necessary, in the case before us, to decide how far the judicial tribunals of the United States would enforce a contract like this, when two states, acknowledged to be independent, were at war, and this country neutral. It is a sufficient answer to the argument to say that the question whether Texas had or had not at that time become an independent state, was a question for that department of our government exclusively which is charged with our foreign relations. And until the period when that department recognized it as an independent state, the judicial tribunals of the country were bound to consider the old order of things as having continued, and to regard Texas as a part of the Mexican territory. And if we undertook to inquire whether she had not in fact become an independent sovereign state before she was recognized as such by the treaty-making power, we should take upon ourselves the exercise of political authority, for which a judicial tribunal is wholly unfit, and which the Constitution has conferred exclusively upon another department.

This is not a new question. It came before the court in the case of *Rose v. Himely*, 4 Cranch, 272, 2 L. Ed. 608, and again in *Gelston v. Hoyt*, 3 Wheat. 324, 4 L. Ed. 381. And in both of these cases the court said, that it belongs exclusively to governments to recognize new states in the revolutions which may occur in the world; and until such recognition, either by our own government or the government to which the new state belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered.

It was upon this ground that the Court of Common Pleas in England, in the case of *De Wutz v. Hendricks*, 9 Moore's C. P. Reports, 586, decided that it was contrary to the law of nations for persons residing in England to enter into engagements to raise money by way of loan for the purpose of supporting subjects of a foreign state in arms against a government in friendship with England, and that no right of action attached upon any such contract. And this decision is quoted with approbation by Chancellor Kent, in 1 Kent's Com. 116.

Nor can the subsequent acknowledgment of the independence of Texas, and her admission into the Union as a sovereign state, affect the question. The agreement being illegal and absolutely void at the

time it was made, it can derive no force or validity from events which afterwards happened.

But it is insisted, on the part of the appellants, that this contract was to be executed in Texas, and was valid by the laws of Texas, and that the District Court for that state, in a controversy between individuals was bound to administer the laws of the state, and ought therefore to have enforced this agreement.

This argument is founded in part on a mistake of the fact. The contract was not only made in Cincinnati, but all the stipulations on the part of the appellants were to be performed there and not in Texas. And the advance of money which they agreed to make for military purposes was in fact made and intended to be made in Cincinnati, by the delivery of their promissory notes, which were accepted by the appellee as payment of the money. This appears on the face of the contract. And it is this advance of money for the purposes mentioned in the agreement, in contravention of the neutral obligations and policy of the United States, that avoids the contract. The mere agreement to accept a conveyance of land lying in Texas, for a valuable consideration paid by them, would have been free from objection.

But had the fact been otherwise, certainly no law of Texas then or now in force could absolve a citizen of the United States, while he continued such, from his duty to this government nor compel a court of the United States to support a contract no matter where made or where to be executed, if that contract was in violation of their laws, or contravened the public policy of the government, or was in conflict with subsisting treaties with a foreign nation.

We therefore hold this contract to be illegal and void, and affirm the decree of the District Court.

Mr. Justice DANIEL and Mr. Justice GRIER dissented.<sup>14</sup>

<sup>14</sup> In 1823, during the course of the Greek War of Independence, George Canning, then British Secretary of State for Foreign Affairs, submitted the following questions to the law officers of the crown:

"1. Whether subscriptions for the use of one of two belligerent states by individual subjects of a nation professing and maintaining a strict neutrality between them be contrary to the law of nations, and constitute such an offence as the other belligerent would have a right to consider as an act of hostility on the part of the neutral government?"

"2. If such individual voluntary subscriptions in favour of one belligerent would give such just cause of offence to the other, whether loans for the same purpose would give the like cause of offence?"

"3. And if not, where is the line to be drawn between a loan at an easy or mere nominal rate of interest, or a loan with a previous understanding that interest would never be exacted, and a gratuitous voluntary subscription?"

Under date of June 17, 1823, they replied as follows:

"In obedience to your commands we beg leave to report that we have taken the same into our consideration, and we are of opinion that subscriptions of the nature above alluded to, for the use and avowedly for the support of one of two belligerent states against the other, entered into by individual subjects of a government professing and maintaining neutrality, are inconsistent with that neutrality and contrary to the law of nations; but we conceive that the

## THE ITATA.

## UNITED STATES v. THE ITATA.

## SAME v. TWO THOUSAND CASES OF RIFLES.

(Circuit Court of Appeals of the United States, Ninth Circuit, 1888.  
56 Fed. 505.)

Appeal from the District Court of the United States for the Southern District of California.

In Admiralty. Libels against the steamship Itata and her cargo for alleged violations of the neutrality laws. The court below dismissed the libels (49 Fed. 646), and the United States appeal. Affirmed.

HAWLEY, District Judge.<sup>15</sup> These cases were tried together upon the evidence introduced in the district court in the case of *U. S. v. Trumbull*, 48 Fed. 99, so far as the same was applicable, and upon certain additional depositions. *U. S. v. The Itata*, 49 Fed. 647. A consideration of one case disposes of both.

On the 8th day of July, 1891, the United States attorney for the Southern district of California filed a libel of information against the steamship Itata, alleging, in substance: (1) That on the 8th of May, 1891, within the limits of the United States, and within the jurisdiction of the court, one Pedro Manzen and divers other persons "did unlawfully fit out and arm said steamship or vessel called the

other belligerent would not have a right to consider such subscriptions as constituting an act of hostility on the part of the Government, although they might afford just ground of complaint if carried to any considerable extent.

"With respect to loans, if entered into merely with commercial views, we think, according to the opinions of writers on the law of nations and the practice which has prevailed, they would not be an infringement of neutrality; but if, under colour of a loan, a gratuitous contribution was afforded without interest, or with mere nominal interest, we think such a transaction would fall within the opinion given in answer to the first question."

And on June 21, 1823, the law officers reaffirmed their opinion that "subscriptions in favour of one of two belligerent states, being inconsistent with the neutrality declared by the government of the country and with the law of nations, would be illegal," and advised the government that prosecutions against the persons concerned in subscriptions would be unsuccessful.

For the full text of these documents, see 3 Phillimore's Commentaries upon International Law (3d Ed., 1885), Appendix X, 928-930.

It is one thing for a neutral government "to make or promote or guarantee a loan of money to either belligerent," but it is quite another thing for citizens or subjects of a neutral state to do so. This latter case appears to be a matter of business with which the belligerents have nothing to do. It is for the neutral country to determine by municipal law whether it will forbid such transactions, or will not protect its citizens or subjects who have engaged in them.

A distinction has been drawn between loans to recognized and unrecognized insurgents. The former are said to be legal, the latter illegal, under international law.

For a careful and discriminating analysis of this subject, see Pitt Cobbett's Cases and Opinions on International Law (3d Ed., 1913), part II, 365-368.

<sup>15</sup> Parts of the opinions are omitted.

Itata, with intent that such steamship or vessel should be employed in the service of certain foreign people, viz. certain inhabitants and citizens of the republic of Chile, then organized and banded together in large numbers and in great force, and engaged in open, armed hostilities and attempted revolution against the republic of Chile, and the lawful government thereof, said insurgents being known as the 'Congressional Party,' to cruise and commit hostilities against the citizens and property of a foreign state, viz. the republic of Chile, with which republic the United States were then and now are at peace"; (2) that on the 8th of May, 1891, within the limits of the United States, and within about two miles from the island of San Clemente, said persons "were unlawfully concerned in the furnishing and fitting out" of said steamship with the intent alleged in the first count; (3) that on the 6th day of May, 1891, within the limits of the United States, at the port of San Diego, in the state of California, said persons "were unlawfully concerned in the fitting out and furnishing of" said steamship with the same intent. All of which acts are alleged to be contrary to the form of the statute in such case made and provided, and that by force of the statute the said steamship Itata, her tackle, apparel, and furniture, "became and are forfeited to the uses in said statute prescribed." In due time the Gobierno Provisorio de la Republica de Chile, as claimant of said steamship, filed an answer, specifically denying that the Itata was fitted out or armed, or furnished or fitted out, in any way as alleged in the libel or for any purpose. It admits that at the date alleged the said vessel was in the service of the Gobierno Provisorio de la Republica de Chile, or the provisional government of the republic of Chile, in said libel described as the "Congressional Party," and it avers that said government was and is the lawful government of said republic of Chile. It admits that said government was carrying on war, but it denies that said war was against the government or people of the republic of Chile. And it denies that the action of the said government, or said Pedro Manzen, or any person connected with said steamship, was or is against the form of the statute of the United States, or that by reason of any act of this respondent, or of said Manzen, or of any person connected with said steamship the same was or is forfeited. The statute in question reads as follows:

"Sec. 5283. Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming of any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, or who issues or delivers a commission within the territory or

jurisdiction of the United States for any vessel to the intent that she may be so employed, shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited—one-half to the use of the informer, and the other half to the use of the United States."

The facts found by the District Court are as follows:

"In January of 1891 the steamship *Itata* was an ordinary merchant vessel. Early in that month she was captured in the harbor of Valparaiso, Chile, by the people then known as the 'Congressional Party,' and who were then engaged in an effort to overthrow the then established and recognized government of Chile, of which Balmaceda was the head. The *Itata* was by the Congressional Party put in command of one of its officers, and was used in their undertaking as a transport to convey troops, provisions, and munitions of war, and also as a hospital ship, and one in which to confine prisoners. Four small cannon were also put upon her decks, and she carried a jack and pennant. Some time prior to the following April, one Trumbull came to the United States as an agent of the Congressional party, and about the month of April went to the city of New York, and there bought from one of the large mercantile firms of that city dealing in such matters 5,000 rifles and 2,000,000 cartridges therefor, with the intention and for the purpose of sending them to the Congressional party in Chile for use in their effort to overthrow the Balmaceda government. The sale and purchase of the arms and ammunition were made in the usual course of trade. Trumbull caused them to be shipped by rail to San Francisco, and engaged one Burt to accompany them, which he did. Arrangements had been made by Trumbull with his principals in Chile by which they were to send a vessel to the United States to get the arms and ammunition, and convey them to Chile for the use of the Congressional party there. The *Itata* was dispatched by that party for that purpose, and was accompanied as far as Cape San Lucas by the *Esmeralda* a warship then in the service of the Congressional party. Before leaving Chile, the *Itata* discharged the four small cannon, with the ammunition therefor, that she had theretofore carried, but she retained one small brass gun, which she had always carried and used as a signal gun, and also eight or ten old muskets, and one small iron cannon, for which there was no ammunition. At one of the Chilean ports the *Itata* took on board some soldiers, with their arms, not exceeding 12 in number; but they were taken, not to be used as soldiers, but for passing coal, and as stokers. At San Lucas the captain of the *Esmeralda* took command of the *Itata*, and the captain of the latter was left there in command of the *Esmeralda*. The *Itata*, then proceeded to San Diego,

really in command of the Esmeralda's captain, but ostensibly in command of another, who represented to the customs officers at the port that she was an ordinary merchantman, and was bound to some port on the northern coast.

"Before coming into the port of San Diego, or into the waters of the United States, the Itata hauled down her jack and pennant; the brass and iron cannon were removed from her deck, and stowed in her hold, as were also the arms of the soldiers she carried; and their uniforms, as well as those of the officers, were removed, and all appeared in civilian's dress. At that port she laid in stores of coal and provisions, all of which were bought in the open market, and some of which were marked 'Esmeralda.' Meanwhile Trumbull had chartered a schooner, called the Robert and Minnie, in San Francisco, to take the arms and ammunition from there to a point in this judicial district, then expected to be near the island of Catalina, where she could meet the Itata, and deliver them on board of her, to be conveyed to Chile for the purposes already stated. The schooner Robert and Minnie accordingly took on board the arms and ammunition at the port of San Francisco, and, in charge of Burt, proceeded to the neighborhood of Catalina island, where she expected to meet the Itata. In the meantime the suspicion of some of the officers of the United States that the neutrality laws were being violated was aroused, and the marshal of this district was directed by the attorney general to detain the Itata if such was found to be the case; and, acting upon those and certain instructions from the district attorney of this judicial district, he went on board the ship at San Diego, and put a keeper in charge of her, and then went in search of the Robert and Minnie, which he did not find in the waters of the United States. Communication was, however, had between the Itata and the schooner, and a point near San Clemente island was fixed upon as the place of meeting for the purpose of transferring the arms and ammunition from the schooner to the ship. Accordingly, the Itata, on the 6th of May, 1891, without obtaining clearance papers, and against the protest of the person left on board, and in charge of her by the marshal, weighed anchor, and steamed out of the harbor of San Diego, with him on board, to meet the Robert and Minnie, and receive the arms and ammunition. The marshal's keeper was, however, put ashore at Point Ballast, before leaving the harbor. While steaming out of it, one or both of the Itata's cannon were brought on deck, and some of the soldiers on board of her appeared in uniform. On the 9th of May the Itata and Robert and Minnie came together about a mile and a half southerly of San Clemente island, in this judicial district, and there the arms and ammunition in question were taken from the schooner and put on board the ship in original packages, and the latter at once left with them for Chile.

"On September 4, 1891, the Congressional party was recognized by

the government of the United States as the established and only government of Chile. Prior to that time there had been no recognition of that party by this government, other than that on March 4th the secretary of the navy cabled Admiral McCann 'to proceed to Valparaiso, and observe strict neutrality, and take no part in troubles between parties, further than to protect American interests.' On March 26th the Secretary of the Navy cabled Admiral Brown, who had superseded Admiral McCann, 'to abstain from proceedings in nature of assistance to either—that is, the Balmaceda or Congressional party; that the ships of the latter were not to be treated as piratical so long as they waged war only against the Balmaceda government.' On April 25th, Secretary of State Blaine cabled the American minister: 'You can act as mediator with Brazilian minister and French charge d'affaires.' On May 5th, Minister Egan cabled this government: 'Government of Chile and revolutionists have accepted mediation of the United States, Brazil, and France most cordially; those of England and Germany declined.' On May 7th, Acting Secretary of State Wharton acknowledged the dispatch of Minister Egan, and 'expressed hope that, through combined efforts of governments in question, the strife which has been going on in Chile may be speedily and happily terminated.' On May 14th, Acting Secretary of State Wharton cabled Minister Egan that 'French minister reports threats to shoot the insurgent envoys by Balmaceda,' and directed that they should have ordinary treatment under flag of truce."

The contention of appellee is (1) that the *Itata* was not fitted out and armed, or furnished and fitted out, to cruise or commit hostilities, but, on the contrary, she was a merchant vessel, engaged at the times referred to in the libel in the exercise of a lawful pursuit; (2) that if the *Itata* was fitted out and armed, or furnished and fitted out, such acts were not done with intent that she should be "employed in the service of any foreign prince or state, or of any colony, district, or people, to commit hostilities"; (3) that the case made by the evidence is not within the statute; (4) that the subsequent recognition by the United States of the provisional government as the lawful government of Chile was, in legal effect, a recognition of all its prior governmental acts as the acts of a sovereign government.

It was conceded in the oral argument by the special counsel for the appellants, and we do not understand the Attorney General, in his brief, to deny it, that Trumbull, acting as an agent for the Congressional party in Chile, had the lawful right to purchase the arms and ammunition in the United States; that this was purely a commercial transaction recognized by law. But it is claimed that, notwithstanding the fact that the purchase of the arms and ammunition was legal, yet the shipment of them for the purpose of being conveyed to Chile, there to be surrendered to the Congressional party for the purpose of being used by that party in a war against the Balmaceda gov-

ernment of Chile, which at that time was recognized by the United States as the lawful government of Chile, was an unlawful act, which justified the libel, and warranted a decree of court for the forfeiture of the vessel. If this contention is correct, it settles the controversy, for there can be no doubt but what the intent and purpose of the *Itata*, and of the persons having her in charge, was to convey the arms and ammunition out of the United States and to Chile, there to be delivered to the Congressional party for the purpose above stated.

If the Congressional party, as insurgents, are to be treated as belligerents, they not only had the right to buy the arms and ammunition in the United States, but they also had the right to ship them at their risk, subject only to the penalties of confiscation which the laws of war authorize. Commercial dealings or transactions are not proscribed by the laws of nations as violations of neutral territory simply because they are contraband of war. "It was contended on the part of the French nation, in 1796, that neutral governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent powers. But it was successfully shown on the part of the United States that neutrals may lawfully sell, at home, to a belligerent purchaser, or carry themselves to the belligerent powers, contraband articles, subject to the right of seizure in transitu. This right has since been explicitly declared by the judicial authorities of this country." 1 Kent, Comm. 142; *The Santissima Trinidad*, 7 Wheat. 283, 5 L. Ed. 454; *The Bermuda*, 3 Wall. 514, 18 L. Ed. 200; *Richardson v. Insurance Co.*, 6 Mass. 113, 4 Am. Dec. 92. \* \* \*

In 1871, Attorney General Ackerman, in a letter to the Secretary of State,<sup>18</sup> replying to a communication which had been received from the Spanish minister in relation to the expedition of the *Hornet* to the coast of Cuba, said: "Assuming the credibility of the sworn statements which he has transmitted, I do not think that they prove against the *Hornet* any violation of the neutrality laws of the United States. They show that the *Hornet* conveyed from Aspinwall to the coast of Cuba men, arms, and munitions of war, destined to aid the Cuban insurgents. This proof, by itself, does not bring the vessel within the third section of the neutrality act of April 20, 1818." 3 Stat. 448. See, also, letter of Mr. Pickering, Secretary of State, to the minister of France, 1 Amer. St. Papers, 649; Letter of Attorney General Rush to the President in 1816, 1 Op. Atty. Gen. 190; letter of Attorney General Speed to the Secretary of State in 1865, 11 Op. Atty. Gen. 408; 3 Whart. Int. Law Dig. § 391, p. 515.

But the argument of the Attorney General in support of his contention is to the effect that, the United States not having done any act tending to accredit the rebellion in Chile, the Congressional party had

<sup>18</sup> 18 Op. Atty. Gen. 541.



no belligerent rights; that all warlike acts conducted by them "upon the ocean bore the legal character of piracy, and upon land that of robbery"; that it was not the duty of the United States, under the rules of international law, to accord to them the same privileges as to the recognized government of Chile; and that there could not be any legitimate trade or commerce with such people until the government of the United States had recognized the insurgents as belligerents. The law is well settled that it is the duty of the courts to regard the status of the Congressional party in the same light as they were regarded by the executive department of the United States at the time the alleged offenses were committed. *Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381; *U. S. v. Palmer*, 3 Wheat. 610, 4 L. Ed. 471; *Kennett v. Chambers*, 14 How. 51, 14 L. Ed. 316; *The Ambrose Light* (D. C.) 25 Fed. 409. It being admitted that the government of the United States, at the time of the commission of the alleged unlawful acts, had not recognized the congressional party as being entitled to any belligerent rights, it would seem to follow that it was within the power of the government, at its option, to treat the party as pirates if the facts warranted it, and justice and policy so required. 3 Whart. Int. Law Dig. § 381, p. 466.

This view of the case presents the question whether section 5283 of the Revised Statutes has any application to persons or vessels whom it is optional with the United States to treat as pirates. If the statute was only intended to apply to cases of neutrality between two recognized belligerent countries, it would not, under the theory advanced by appellant's counsel, have any application to this case, because, as they contend, there is "no question of neutrality, as that term is known in international law, which only exists between the belligerents,—a status composed of a rightful belligerent power or a de facto belligerent force, made so by recognition." We do not deem it necessary to decide the question as to the meaning of the statute in relation to this particular subject, but we do consider it proper that a reference should be made to the authorities in relation to this matter, as shedding some light, and making clearer the principles that will be discussed in relation to other questions upon which our decision will be based.

In the oral argument of counsel there was an extended discussion as to the proper meaning of the word "people" as used in the statute. This word is a comprehensive one, and is, of course, subject to many different meanings, depending always upon the connection in which it is used, and the subject-matter to which it relates. \* \* \*

The causes which led up to the passage of the act "for the punishment of certain crimes against the United States" (1 Stat. 381), generally called the "Neutrality Act," are set forth at great length in note 215 to section 439, Wheat. Int. Law. The third section, as originally enacted June 5, 1794, had the words: "With intent that

such ship or vessel shall be employed in the service of any foreign prince or state, to cruise or commit hostilities upon the subjects, citizens, or property of another foreign prince or state with whom the United States are at peace." In 1818, from a suggestion of the Spanish minister that the South American provinces in revolt, and not recognized as independent, might not be included in the word "state," the words "colony, district, or people" were added. The discussions which were had were in reference to the better preservation of neutrality, and in furtherance of the obligation of the United States as a neutral power.

In *Gelston v. Hoyt*, 3 Wheat. 323, 4 L. Ed. 381, the court discussed the meaning of the third section of the statute as originally enacted. "The evidence offered and rejected was to prove that the ship was attempted to be fitted out and armed, and was fitted out and armed, with intent that she should be employed in the service of that part of the island of St. Domingo which was then under the government of Petion, to cruise and commit hostilities upon subjects, citizens, and property of that part of the island of St. Domingo which was then under the government of Christophe," and the court held that no forfeiture could be incurred unless Petion and Christophe "were foreign princes, within the purview of the statute," and sustained the action of the court below in rejecting the evidence offered, upon the ground that "neither the government of Petion nor Christophe have ever been recognized as a foreign state by the government of the United States or of France."

In *U. S. v. Quincy*, 6 Pet. 467, 8 L. Ed. 458, the court, in construing the provisions of the third section, as amended April 20, 1818 (section 5283, Rev. St. U. S.), said: "The word 'people,' as here used, is merely descriptive of the power in whose service the vessel was intended to be employed; and it is one of the denominations applied by the act of Congress to a foreign power."

In *The Carondelet* (D. C.) 37 Fed. 800, Brown, J., said: "Section 5283 is designed in general to secure our neutrality between foreign belligerent powers. But there can be no obligation of neutrality except towards some recognized state or power, *de jure* or *de facto*. Neutrality presupposes at least two belligerents; and, as respects any recognition of belligerency; i. e., of belligerent rights, the judiciary must follow the executive. To fall within the statute the vessel must be intended to be employed in the service of one foreign prince, state, colony, district, or people, to cruise or commit hostilities against the subjects, citizens or property of another with which the United States are at peace. The United States can hardly be said to be at peace, in the sense of the statute, with a faction which they are unwilling to recognize as a government; nor could the cruising or committing of hostilities against such a mere faction well be said to be committing hostilities against the subjects, citizens, or property of a district or

people, within the meaning of the statute. So, on the other hand, a vessel, in entering the service of the opposite faction of Hippolyte, could hardly be said to enter the service of a foreign prince or state, or of a colony, district, or people, unless our government had recognized Hippolyte's faction as at least constituting a belligerent, which it does not appear to have done."

Opposed to these authorities is the letter of Attorney General Hoar to the Secretary of State, December 16, 1869, wherein he said: "Undoubtedly the ordinary application of the statute is to cases where the United States intends to maintain its neutrality in wars between two other nations, or where both parties to a contest have been recognized as belligerents; that is, as having a sufficiently organized political existence to enable them to carry on war. But the statute is not confined in its terms, nor, it seems to me, in its scope and proper effect, to such cases. Under it, any persons who are insurgents, or engaged in what would be regarded under our law as levying war against the sovereign power of the nation, though few in number, and occupying however small a territory, might procure the fitting out and arming of vessels with intent to cruise or commit hostilities against a nation with which we were at peace, and with intent that they should be employed in the service of a colony, district, or people not waging a recognized war." 13 Op. Atty. Gen. 179.

In *The Salvador*, L. R. 3 P. C. 218, cited by appellants, the language of the Foreign Enlistment Act (59 Geo. III, c. 69, § 7), referred to in the opinion, is much broader in its terms than is the language of section 3 of the Neutrality Act of the United States. That act reads: "In the service of any foreign prince, state, or potentate, or of any foreign colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign state, colony, province, or part of any province or people." It was held that the case of *The Salvador* came within the alternative of section 7, "because their lordships found these propositions established beyond all doubt. There was an insurrection in the island of Cuba. There were insurgents who had formed themselves into a body of people, acting together, undertaking and conducting hostilities. These insurgents, beyond all doubt, formed part of the province or people of Cuba, and beyond all doubt the ship in question was to be employed, and was employed, in connection with and in the service of this body of insurgents."

With this review of the authorities we proceed to a consideration of what we deem to be the controlling question in this case, viz.: Is the evidence sufficient to sustain the libel? \* \* \* All the facts, which are clearly and fully presented in the findings of the District Court, show that the arms and ammunition were put on board the *Itata* with the intent, object, and purpose to have them transported to Chile for the use of the Congressional party, and not with any in-

tent that the Itata as a war vessel should in any manner be employed to cruise or commit hostilities against the government of Chile, with whom the United States were then at peace. \* \* \*

Having reached the conclusion that the evidence in this case is not sufficient to justify a decree of forfeiture against the Itata, it is unnecessary to discuss the effect of the subsequent recognition by the United States of the provisional government as the lawful government of Chile, and upon that question we express no opinion.

The judgment of the District Court, in both cases, is affirmed.

HANFORD, District Judge (concurring). \* \* \* While the case is founded upon a municipal law, it requires consideration of international relations and comity. The purpose of the statute is to maintain peace between other countries and ours on terms of fairness and justice by prohibiting the preparation within this country of hostile expeditions against other nations. Section 5283, Rev. St., does not make the fitting out and arming of a vessel at a port of the United States unlawful unless it be coupled with specified intents or purposes, one of which is that the vessel, after being so fitted out and armed, "shall be employed \* \* \* to cruise or commit hostilities against the subjects, citizens, or property of" a foreign prince, state, colony, district, or people. The libel of information in this case charges that certain persons did unlawfully fit out and arm the Itata with intent that she should be employed to cruise and commit hostilities against the republic of Chile. On this point there is an issue, and a finding of the truth of the charge is indispensable to a sufficient basis for a lawful decree in favor of the United States. It is a strange anomaly of the case that this issue is made by the republic of Chile. The acts whereby the vessel has become forfeited, as the libel of information alleges, if criminal at all, are so because designed to do harm to the government of Chile; and in the very suit in which it is sought to have the forfeiture adjudged for said cause that government has intervened, claiming a right of property in the vessel, and by its answer has assumed responsibility for the acts alleged to be criminal, and avows that all the persons who participated in said acts, instead of being enemies, are and were its faithful defenders. The bond given for the release of the vessel which is now held in place of the vessel was given in its behalf, so that the penalty in case of a decree in favor of the United States must fall upon an independent nation, and that nation the one for the sake of whose friendship our government has taken the pains to arrest the Itata and now prosecute this case.

It is said that the case should be determined according to the facts existing at the time of the occurrences, and that, if the Itata was then in the hands of insurgents, whose purpose was to employ her as a transport in making war upon the established government of Chile, acts of the insurgent forces in violation of a statute of the

United States do not become purged of criminality by the subsequent success of the insurrectionary enterprise. It is unnecessary to admit or controvert the soundness of this proposition, because it does not fit the facts of the case. It is not applicable, for the reason that the Congressional party, instead of being an organization of rebels against the government of Chile, was in fact composed of and controlled by the legislative branch of the national government, and was supported by a considerable part of its military and naval forces. The object of the Congressional party was not revolution, but the preservation of the government by deposing President Balmaceda for maladministration of his office. Balmaceda was not the government. He was merely the highest officer and head of the government. The struggle, therefore, was not between the government and a faction, but between the different departments of the government. While it continued the condition of affairs in Chile was similar to what might have been brought about in the United States if a sufficient number of senators had voted for the impeachment of President Andrew Johnson, and the vote had been followed by an attempt on his part to forcibly resist removal from office. The right to determine finally every question involved in that struggle belonged to the people of Chile, and their decision must be accepted everywhere as conclusive. It is now an historical fact that the Congressional party, in whose service the Itata was employed, represented the will and sovereignty of the Chilean people. This court is bound, in deciding the case, to take notice of the important facts of history. We cannot be expected to attempt a retrial of the question of right or wrong in what the people in Chile have done for themselves.

By the foregoing considerations I have been led to the conclusion that the accusation against the Itata has not been sustained. The contrary is established, and I think that the decision of this court affirming the judgment of dismissal rendered by the District Court ought to be placed upon the ground that the vessel was not intended for service against the republic of Chile.

**CHAPTER XVII**  
**NEUTRAL TRADE WITH BELLIGERENTS**

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**SECTION 1.—GENERAL PRINCIPLE**

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Ex parte CHAVASSE.

In re GRAZEBROOK.

(Court of Appeal in Bankruptcy, 1865. 34 L. J. R. (N. S.) 17.)

This was an appeal from an order of Mr. Commissioner Perry, of the Liverpool District Court of Bankruptcy, dismissing with costs a petition by which the petitioners sought to obtain a share of the proceeds of certain cotton, the result of a successful running of the blockade of the ports of the Confederate States of North America.

The circumstances were as follows: William Joshua Grazebrook, the bankrupt, for some years prior to his bankruptcy carried on the business of a merchant and commission-agent at Liverpool; and in 1862 he arranged with Horace Chavasse, a sword-manufacturer of Birmingham, for the purchase, on their joint account, of large quantities of arms and ammunition, to be consigned to Mr. Thomas Barrett Power, then carrying on business as a merchant in the Confederate States to be sold by him for the joint benefit of Messrs. Chavasse and Grazebrook. Chavasse was to purchase the arms and ammunition on the joint account, and to draw bills on Grazebrook for a portion of the price, such bills to be from time to time renewed until remittances should be received from Power. The goods were purchased in the individual name of Chavasse, and were sent and consigned by him to Messrs. Lawrence & Co., the charterers, from Messrs. Pearson & Co. of Hull, the owners of the steamer *Modern Greece*, then lying at that port, for shipment on board that vessel bound for any port in the Confederate States which the supercargo of the vessel might think it safe to enter.

The goods were duly shipped on board the *Modern Greece*, and she sailed from Hull about the 20th of April, 1862. The ship was wrecked off Wilmington in North Carolina, and a considerable portion of her cargo was totally lost; such portions, however, of the joint property of Chavasse and Grazebrook as were saved from the wreck were cleared and sold. About £2,000, part of the money realized by the

sale, was remitted to Grazebrook, and the residue was invested in the purchase of cotton.

None of the bills drawn by Chavasse upon and accepted by Grazebrook were honoured at maturity. Grazebrook was adjudicated bankrupt on the 17th of June, 1863; and on the 19th of February, 1864, Chavasse executed a statutory deed of assignment for the benefit of his creditors, which was duly registered under the 192d section of the Bankruptcy Act, 1861.

No part of the money produced by the sale, or of the cotton in which part of the money was invested, was ever paid or remitted to Chavasse, and the trustees of his deed of assignment presented their petition seeking to have the same apportioned. The petition was dismissed with costs by the commissioner, on the ground of the illegality of the contract. Hence the present appeal. \* \* \*

The LORD CHANCELLOR [WESTBURY]. In the view of international law, the commerce of nations is perfectly free and unrestricted. The subjects of each nation have a right to interchange the products of labour with the inhabitants of every other country. If hostilities occur between two nations, and they become belligerents, neither belligerent has a right to impose, or to require a neutral government to impose, any restrictions on the commerce of its subjects. The belligerent power certainly acquires certain rights which are given to it by international law. One of these is the right to arrest and capture, when found on the sea, the high road of nations, any munitions of war, which are destined and in the act of being transported in a neutral ship to its enemy. This right, which the laws of war give to a belligerent for his protection, does not involve as a consequence that the act of the neutral subject in so transporting munitions of war to a belligerent country is either a personal offence against the belligerent captor, or an act which gives him any ground of complaint either against the neutral trader personally or against the government of which he is a subject. The title of the belligerent is limited entirely to the right of seizing and condemning as lawful prize the contraband articles. He has no right to inflict any punishment on the neutral trader, or to make his act a ground of representation or complaint against the neutral state of which he is a subject. In fact, the act of the neutral trader in transporting munitions of war to the belligerent country is quite lawful, and the act of the other belligerent in seizing and appropriating the contraband articles is equally lawful. Their conflicting rights are co-existent, and the right of the one party does not render the act of the other party wrongful or illegal.

There is, however, much incorrectness of expression in some writers on the subject, who, in consequence of this right of the belligerent to seize in transitu munitions of war while being conveyed by a neutral to his enemy, speak of this act of transport by the neutral as un-

lawful and prohibited commerce. But this commerce, which was perfectly lawful for the neutral with either belligerent country before the war, is not made by the war unlawful or capable of being prohibited by both or either of the belligerents; and all that international law does is to subject the neutral merchant who transports the contraband of war to the risk of having his ship and cargo captured and condemned by the belligerent power for whose enemy the contraband is destined. That the act of the neutral merchant is in itself innocent is plain from the circumstance that the belligerent captor cannot visit it with any penal consequences beyond his judicial condemnation of the ship and cargo, nor can he make it the subject of complaint. This is well explained by Vattel in the following passage. Speaking as a belligerent power, he says: "*Quand j'ai notifié aux nations neutres ma déclaration de guerre à tel ou tel peuple, si elles veulent s'exposer à lui porter des choses qui servent à la guerre, elles n'auront pas sujet de se plaindre au cas que leurs marchandises tombent dans mes mains, de même que je ne leur déclare pas la guerre pour avoir tenté de les porter. Elles souffrent, il est vrai, d'une guerre à laquelle elles n'ont point dû part, mais c'est par accident. Je ne m'oppose point à leur droit—j'use seulement du mien, et si nos droits se croisent et se nuisent réciproquement, c'est par l'effet d'une nécessité inévitable. Ce conflit arrive tous les jours dans la guerre.*" Liv. 3, c. 7, § 111. Vattel must here be considered as speaking of the acts of the subjects of a neutral power, and not of the neutral government itself, for the supplying of warlike stores to a belligerent by a neutral state would clearly be a breach of neutrality.

The same doctrine as to the freedom of the commerce of the neutral subject is more explicitly stated by Mr. Chancellor Kent, in the first volume of his Commentaries, p. 142, and was most distinctly affirmed in a celebrated decision—*The Santissima Trinidad*—of the Supreme Court of the United States. The language of Chancellor Kent is clear and comprehensive: "It is a general understanding, grounded on true principles, that the powers at war may seize and confiscate all contraband goods, without any complaint on the part of the neutral merchant, and without any imputation of a breach of neutrality in the neutral sovereign himself. It was contended on the part of the French nation in 1796, that neutral governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent powers. But it was successfully shewn on the part of the United States that neutrals may lawfully sell at home to a belligerent purchaser, or carry themselves to the belligerent powers, contraband articles, subject to the right of seizure in transitu. This right has since been explicitly declared by the judicial authorities of this country. The right of the neutral to transport, and of the hostile power to seize, are conflicting rights, and



neither party can charge the other with a criminal act." The material passage of the judgment in the case of the *Santissima Trinidad* which affirms this, as given in 7 Wheat. 340, 5 L. Ed. 454, is the following: "There is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation."

I take this passage to be a very correct representation of the present state of the law of England also. For if a British ship-builder builds a vessel of war in an English port, and arms or equips her for war bona fide on his own account, as an article of merchandise, and not under or by virtue of any agreement, understanding or concert with a belligerent power, he may lawfully, if acting bona fide, send the ship, so armed and equipped, for sale as merchandise in a belligerent country, and will not in so doing violate the provisions or incur the penalties of the Foreign Enlistment Act.

It is true that, under the provisions of the act of the 16 & 17 Vict. c. 107, Her Majesty has power by proclamation or Order in Council to prohibit the exportation of certain goods, including arms, ammunition, gunpowder, naval and military stores, but no Order in Council or proclamation was made in the terms or under the special authority of this statute. Great reliance, however, was placed by the counsel for the respondents on the Queen's Proclamation of the 13th of May, 1861. Although it was admitted that it could not be treated as made under the authority of the last mentioned statute, I need not observe that it is the object of a proclamation to make known the existing law, and that it can neither make nor unmake law. But in truth the proclamation of 1861 is directed, and very properly, to two objects: first, to declare that the provisions of the Foreign Enlistment Act would be strictly enforced; and, secondly, not to prohibit the exportation of warlike stores, but to warn the subjects of the realm that if any subject carried contraband of war to either belligerent he would incur the penal consequences of the law of nations, and would receive no protection or relief from these consequences (that is, from capture and condemnation) at the hands of Her Majesty. The proclamation has no effect whatever on the legality of this adventure.

I am of opinion, therefore, that this adventure between the bankrupt and the petitioner was a lawful contract, and that the ordinary rights of property result from it. Consequently, I am of opinion that the goods in which the proceeds of the adventure were invested belong to the petitioner and the bankrupt, according to their several interests in that adventure and their contributions to the same, and I shall remit the case to the Commissioner with this declaration: Reverse the order of the Commissioner; declare that there was a valid partnership between the bankrupt and the petitioner in the adventure

described in the petition, and that the accounts of the partnership ought to be taken, the partnership property sold or otherwise disposed of, the proceeds applied in payment of the debts of the partnership, and the surplus divided according to the interests of the petitioner and the bankrupt respectively.

### THE HELEN.

(High Court of Admiralty, 1865. L. R. [1865-67] 1 Adm. & Ecc. Cas. 1.)

In this case, the master sued for wages upon an agreement entered into between himself and the defendants, the owners of the *Helen*.

The defendants, in the fourth article of their answer, alleged that "the agreement was made and entered into for the purpose of running the blockade of the Southern ports of the United States of America, or one of them, and was and is contrary to law, and cannot be recognized or enforced by this honourable court." \* \* \*

The facts and the cases cited are fully reviewed in the judgment. Cur. adv. vult.

Dr. LUSHINGTON. This is a motion by the plaintiff to reject the fourth article of the defendant's answer. The parties in this cause are John Andrews Wardell, formerly the master of the *Helen*, plaintiff, and the Albion Trading Company, the owners of the ship, defendants. The master sues for wages (with certain premiums added) alleged to have been earned between July, 1864, and March, 1865. The answer states that according to the agreement as set forth by the defendants, the plaintiff has been paid all that was due to him. This part of the answer is not objected to. The fourth and last article is the one objected to. It alleges that the agreement was entered into for the purpose of breaking the blockade of the Southern States of America: that such an agreement is contrary to law, and cannot be enforced by this court. In the course of the argument, the judgment in *Ex parte Chavasse re Grazebrook*, 11 Jurist (N. S.) 400, 34 L. J. (Bkr.) 17, was cited as governing the case; a judgment recently delivered by Lord Westbury whilst he was Lord Chancellor. The law there laid down is briefly stated, that a contract of partnership in blockade-running is not contrary to the municipal law of this country; and by the decree the partnership was declared valid, and the accounts ordered accordingly. It was admitted that this decision is directly applicable to the present case, a suit to recover wages according to a contract with respect to an intended adventure to break the blockade.

That a decision of the Lord Chancellor is to be treated by this court with the greatest respect there can be no doubt, but is it absolutely binding? There are three tribunals whose decisions are absolutely binding upon the Court of Admiralty: 1. The House of Lords. 2. The Privy Council. 3. The Courts of Common Law when deciding upon the construction of a statute. If a decision of any of these

tribunals is cited, all that the Court of Admiralty can do is to inquire if the decision is applicable to the case. If so, then it is the duty of the court to obey, whatever may be its own judgment.

No other decisions are, I believe, absolutely binding on the court. On the present occasion, no decision has been cited from the House of Lords or Privy Council. Whatever, therefore, may be the effect of the decisions of other tribunals, I am not relieved from the duty of reconsidering the whole question.

An intimation has been given that this case will be carried to the Judicial Committee; if so, I apprehend that tribunal might be inclined to consider me remiss in my duty if I had omitted to form an independent judgment on the case, and to state it with my reasons. It is, I conceive, admitted on all hands, that the court must enforce the agreement with the master, unless it is satisfied that such agreement is illegal by the municipal law of Great Britain. In order to prove this proposition, the defendants say that the agreement to break the blockade by a neutral ship is, on the part of all persons concerned, illegal according to the law of nations, and that the law of nations is a part of the municipal law of the land—ergo, this contract was illegal by municipal law.

Now a good deal may depend on the sense in which the word "illegal" is used. I am strongly inclined to think that the defendants attach to it a more extensive meaning than it can properly bear, or was intended to bear by those who used it. The true meaning, I think, is that all such contracts are illegal so far, that if carried out, they would lead to acts which might, under certain circumstances, expose the parties concerned to such penal consequences, as are sanctioned by international law, for breach of blockade, or for the carrying of contraband. If so, the illegality is of a limited character. For instance, suppose a vessel after breaking the blockade completes her voyage home, and is afterwards seized on another voyage, the original taint of illegality—whatever it may have been—is purged, and the ship cannot be condemned; yet if the voyage was, *ab initio*, wholly and absolutely illegal, both by the law of nations and the municipal law, why should its successful termination purge the offence? Let me consider the relative situation of the parties. A neutral country has a right to trade with all other countries in time of peace. One of these countries becomes a belligerent, and is blockaded. Why should the right of the neutral be affected by the acts of the other belligerent? The answer of the blockading power is: "Mine is a just and necessary war," a matter which, in ordinary cases, the neutral cannot question, "I must seize contraband, I must enforce blockade, to carry on the war." In this state of things there has been a long and admitted usage on the part of all civilized states—a concession by both parties, the belligerent and the neutral—a universal usage which constitutes the law of nations. It is only with reference to this usage that

the belligerent can interfere with the neutral. Suppose no question of blockade or contraband, no belligerent could claim a right of seizure on the high seas of a neutral vessel going to the port of another belligerent, however essential to his interest it might be so to do.

What is the usage as to blockade? There are several conditions to be observed in order to justify the seizure of a ship for breach of blockade. The blockade must be effectual and (save accidental interruption by weather) constantly enforced. The neutral vessel must be taken in delicto. The blockade must be enforced against all nations alike, including the belligerent one. When all the necessary conditions are satisfied, then, by the usage of nations, the belligerent is allowed to capture and condemn neutral vessels without remonstrance from the neutral state. It never has been a part of admitted common usage that such voyages should be deemed illegal by the neutral state, still less that the neutral state should be bound to prevent them; the belligerent has not a shadow of right to require more than universal usage has given him, and has no pretence to say to the neutral: "You shall help me to enforce my belligerent right by curtailing your own freedom of commerce, and making that illegal by your own law which was not so before." This doctrine is not inconsistent with the maxim that the law of nations is part of the law of the land. The fact is, the law of nations has never declared that a neutral state is bound to impede or diminish its own trade by municipal restriction. Our own Foreign Enlistment Act is itself a proof that to constitute transactions between British subjects, when neutral and belligerents, a municipal offence by the law of Great Britain, a statute was necessary. If the acts mentioned in that statute were in themselves a violation of municipal law, why any statute at all? I am now speaking of fitting out ships of war, not of levying soldiers, which is altogether a different matter. Then how stands the case upon authority? I may here say, that in principle, there is no essential difference whether the question of breach of municipal law is raised with regard to contraband or breach of blockade.

Mr. Duer is the only text-writer who maintains an opinion contrary to what I have stated to be the law. He maintains it with much ability and acuteness, but he stands alone. He himself admits that an insurance of a contraband voyage is no offence against municipal law of a neutral country, according to the practice of all the principal states of continental Europe. Duer on Marine Insurance, vol. 1, lect. vii. In the American courts the question has been more than once agitated, but with the same result. In the case of *The Santissima Trinidad*, 7 Wheat. 340, 5 L. Ed. 454, Mr. Justice Story says: "It is apparent that, though equipped as a vessel of war, she (*The Independencia*) was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war during the voyage, she would

have been justly condemned as good prize, and for being engaged in a traffic prohibited by the law of nations. But there is nothing in our law or in the law of nations that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation." \* \* \* "There is no pretence for saying that the original outfit on the voyage was illegal." Again, in *Richardson v. The Marine Insurance Company*, 6 Mass. 112, 4 Am. Dec. 92, Parsons, C. J., observes: "The last class we shall mention is the transportation by a neutral of goods contraband of war to the country of either of the belligerent powers. And here, it is said, that these voyages are prohibited by the law of nations, which forms a part of the municipal law of every state, and, consequently, that an insurance on such voyages made in a neutral state is prohibited by the laws of that state, and therefore, as in the case of an insurance on interdicted commerce, is void. That there are certain laws which form a part of the municipal laws of all civilized states, regulating their mutual intercourse and duties, and thence called the law of nations, must be admitted: as, for instance, the law of nations affecting the rights and the security of ambassadors. But we do not consider the law of nations, ascertaining what voyages or merchandise are contraband of war, as having the same extent and effect. It is agreed by every civilized state that, if the subject of a neutral power shall attempt to furnish either of the belligerent sovereigns with goods contraband of war, the other may rightfully seize and condemn them as prize. But we do not know of any rule established by the law of nations that the neutral shipper of goods contraband of war is an offender against his own sovereign, and liable to be punished by the municipal laws of his own country. When a neutral sovereign is notified of a declaration of war, he may, and usually does, notify his subjects of it, with orders to decline all contraband trade with the nations at war, declaring that, if they are taken in it, he cannot protect them, but not announcing the trade as a violation of his own laws. Should their sovereign offer to protect them, his conduct would be incompatible with his neutrality. And as, on the one hand, he cannot complain of the confiscation of his subjects' goods, so, on the other, the power at war does not impute to him these practices of his subjects. A neutral merchant is not obliged to regard the state of war between other nations, but if he ships goods prohibited *jure belli*, they may be rightfully seized and condemned. It is one of the cases where two conflicting rights exist, which either party may exercise without charging the other with doing wrong. As the transportation is not prohibited by the laws of the neutral sovereign, his subjects may lawfully be concerned in it; and, as the right of war lawfully authorizes a belligerent power to seize and condemn the goods, he may lawfully do it." Lastly, in *Seton*,

*Maitland & Co. v. Low*, 1 Johns. Cas. (N. Y.) 5, Mr. Justice Kent says: "I am of opinion that the contraband goods were lawful goods, and that whatever is not prohibited to be exported by the positive law of the country is lawful. It may be said that the law of nations is part of the municipal law of the land, and that by that law contraband trade is prohibited to neutrals, and, consequently, unlawful. This reasoning is not destitute of force; but the fact is that the law of nations does not declare the trade to be unlawful. It only authorizes the seizure of the contraband articles by the belligerent powers."

Then as to the text-books, I need only give the references to them: Arnould, pp. 763, 764; 766-773; Kent's Comm. iii, 367; Marshall on Marine Insurance, p. 37; Maud and Pollock, p. 309; Twiss, ii, 297; Parson's Maritime Law, ii, 95; Phillips on Insurance, c. 3, § 2, p. 163.

In the English courts the only case in which the point has been actually decided is the recent case before the Lord Chancellor, which I have already adverted to. With regard to the cases in Mr. Duer's book, *Naylor v. Taylor*, 9 B. & C. 718, *Medeiros v. Hill*, 8 Bing. 231, it is enough to say that, in the view which the court eventually took of the facts, the question of law did not arise. It is in these two cases impossible to say with certainty what was the opinion of the judges at nisi prius.

I cannot entertain any doubt as to the judgment I ought to pronounce in this case. It appears that principle, authority, and usage unite in calling on me to reject the new doctrine that, to carry on trade with a blockaded port, is or ought to be a municipal offence by the law of nations. I must direct the 4th article of the answer to be struck out. I cannot pass by the fact that the attempt to introduce this novel doctrine comes from an avowed particeps criminis, who seeks to benefit himself by it. As he has failed on every ground, he must pay the cost of his experiment.

#### PEARSON et al. v. PARSON et al.

(Circuit Court of the United States, E. D. Louisiana, 1901. 106 Fed. 461.)

In Equity. On motion for preliminary injunction.

The complainants are Samuel Pearson, a citizen of the South African Republic, Edward Van Ness, a citizen of the state of New York, and Charles D. Pierce, consul general of the Orange Free State, whose citizenship is not set forth. In their original bill herein they aver, in substance: That the United States are at peace with the South African Republic and the Orange Free State, and that Great Britain is at war with the same. That complainants are owners of property situated in the South African Republic and the Orange Free

State. That Great Britain, by means of armies, seeks to destroy, and is now destroying, the property of complainants. That, for the purpose of carrying on the war, the steamship Anglo-Australian, of which J. Parson is master, now lies in the port of New Orleans, and is being loaded with 1,200 mules, worth \$150,000, by Parson, and by Elder, Dempster & Co., who are the agents for the ship, her owners and charterers, and who are represented by Robert Warriner and Mathew Warriner. All of the defendants are averred to be British subjects. That the steamship Anglo-Australian is employed in the war in the military service of Great Britain by her owners and charterers and by the defendants. That for some time past the defendants, in aid of the war, have loaded ships at New Orleans with munitions of war, viz. mules and horses, and have equipped ships with fittings for the purpose of carrying military supplies and munitions of war for Great Britain, and have dispatched the ships, well knowing that the munitions of war and the ships are in the military service of Great Britain, and would be employed in the war. That the steamship Anglo-Australian is about to be dispatched by the defendants, loaded with mules and horses, being munitions of war, which are the property of the government of Great Britain, and the same are to be employed in the military service of Great Britain. That the defendants are making the port of New Orleans the basis of military operations in aid of Great Britain in the war, and are using the port for the purpose of renewal and augmentation of the military supplies and arms of Great Britain in the war. That the defendants have caused and are causing complainants irreparable injury, in that their acts enable Great Britain to carry on the war with the South African Republic and Orange Free State, wherein are found the property of complainants, and that the army of Great Britain is enabled, by the means furnished by the defendants, to lay waste and destroy the farms and homes of complainants, and to hold as prisoners of war the wife and children of the complainant Pearson. That the complainant Pearson has already suffered loss of property to the amount of \$90,000, and is now threatened with further loss of \$100,000, by the acts complained of and the continuation of the war. That the war is only carried on by the renewal and augmentation of the military supplies of Great Britain from the ports of the United States and especially the port of New Orleans, and that when this ceases the war will end. That the defendants have conspired with certain agents and servants of Great Britain, whose names are unknown, to aid in the carrying on of the war, in the renewal and augmentation of the supplies of Great Britain, and in the equipping with munitions of war and the dispatching of the ship Anglo-Australian and other vessels for the purpose of slaying the citizens of the South African Republic and the Orange Free State, and destroying their property, and more particularly to injure and destroy the property and rights of complainants, all in vio-

lation of and against the rights, privileges, and immunities granted and secured to complainants by the law of nations and the constitution and laws of the United States. The prayer of the original bill is, in substance, for an injunction prohibiting the defendants, their agents, servants, etc., from loading on the ship *Anglo-Australian*, or other vessels, munitions of war, viz. mules and horses destined for use by Great Britain in the war. \* \* \*

PARLANGE, District Judge (after stating the facts).<sup>1</sup> It was conceded on the argument that the court has no jurisdiction of this cause *ratione personarum*. The complainants sought to maintain the jurisdiction *ratione materię* by a claim of right under the treaty of Washington of May 8, 1871, between Great Britain and the United States relative to the "Alabama claims," in which treaty it is declared that: "A neutral government is bound \* \* \* not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men."

The complainants contend that, by reason of this declaration of the treaty, they are entitled to invoke the equity powers of this court for the protection of their property. If the complainants could be heard to assert here rights personal to themselves in the treaty just mentioned, and if the mules and horses involved in this cause are munitions of war, all of which is disputed by the defendants, it would become necessary to determine whether the United States intended by the above declaration of the treaty to subvert the well-established principle of international law that the private citizens of a neutral nation can lawfully sell supplies to belligerents. It is almost impossible to suppose, *a priori*, that the United States would have done so, and would have thus provided for the most serious and extensive derangement of and injury to the commerce of our citizens whenever two or more foreign nations should go to war; and it would seem that there is nothing in the treaty, especially when its history and purposes are considered, which would warrant the belief that the United States insisted upon inserting therein a new principle of international law, from which the greatest damage might result to the commerce of this country, and which was absolutely different from and antagonistic to the rule and policy which the government of this country had theretofore strenuously and invariably followed.

The principle that neutral citizens may lawfully sell to belligerents has long since been settled in this country by the highest judicial authority. In the case of *The Santissima Trinidad*, 7 Wheat. 340, 5 L. Ed. 454, Mr. Justice Story, as the organ of the Supreme Court, said: "There is nothing in our laws or in the law of nations that for-

<sup>1</sup> The statement of facts is abridged.



**bids** our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation." See, also, the case of *The Bermuda*, 3 Wall. 551, 18 L. Ed. 200.

16 Am. & Eng. Enc. Law (2d Ed.) p. 1161, verbis "International Law," citing cases in support of the text, says: "A neutral nation is, in general, bound not to furnish munitions of war to a belligerent, but there is no obligation upon it to prevent its subjects from doing so; and neutral subjects may freely sell at home to a belligerent purchaser, or carry to a belligerent power, arms and munitions of war, subject only to the possibility of their seizure as contraband while in transit." Numerous other authorities on this point could be cited, if it was not deemed entirely unnecessary to do so.

The principle has been adhered to by the executive department of the government from the time when Mr. Jefferson was Secretary of State to the present day. Mr. Jefferson said in 1793: "Our citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means, perhaps, of their subsistence—because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal derangement in their occupation." To the same effect are numerous other expressions and declarations of the executive department of the government from the earliest period of the country to the present time. See 3 Whart. Int. Law Dig. par. 391, tit. "Munitions of War."

Affidavits in the cause purport to show that the vessels which make the exportations of mules and horses of which the bills complain are private merchant vessels; that they are commanded by their usual officers, appointed and paid by the owners; that they are manned by their usual private crews, which are also paid by the owners; that they are not equipped for war; that they are not in the military service of Great Britain, nor controlled by the naval authorities of that nation; that they carry the mules and horses as they would carry any other cargo; and that the mules and horses are to be landed, not on the territory of the South African Republic or the Orange Free State, but in Cape Colony, which is territory belonging to Great Britain. If these affidavits set out the facts truly, it is difficult to see how a cause of complaint can arise. If a belligerent may come to this country and buy munitions of war, it seems clear that he may export them as freight in private merchant vessels of his own or any other nationality, as cargo could be exported by the general public.

Another consideration in this cause is whether the allegations of

threatened injury to the property rights of the complainants would in any case warrant the interposition of a court of equity. The theory of the complainants is that, if the injunction issues in this cause, the war will cease, but that, if these horses and mules are allowed to go to South Africa, the war will be carried on, and one of the results of its further prosecution will be the destruction of the complainants' property in South Africa. It is not claimed, of course, that the horses and mules are to be used specially to destroy the property of the complainants. In such cases as the present one, where the aid of equity is invoked to protect property rights, the injury apprehended must be a clear and reasonable one, proximately resulting from the act sought to be enjoined. The injury apprehended by the complainants from the shipping of the mules and horses seems to be remote, indistinct, and entirely speculative. It seems clear that, even if this cause were within the cognizance of this court, there is herein no such connection of cause and effect between the shipment of the animals and the destruction of complainants' property as could sustain an averment of threatened irreparable injury, and that the averment that the war would cease if the shipments are stopped, which, in the nature of things, can only be an expression of opinion and hope concerning a matter hardly susceptible of proof, could not be made the basis for judicial action.

It may be well to notice that there is nothing in this cause upon which could be founded a charge that the neutrality statutes of the United States are being violated. A citation of authorities on this point is deemed unnecessary. While I apprehend fully that the complainants are not claiming through or because of the neutrality statutes, still it would seem that there exists at least a presumption that the United States have been careful to provide in those statutes for the punishment of every breach of neutrality recognized by this country.

But the nature of this cause is such that none of the considerations hereinabove set out need be decided, for the reason that a view of this case presents itself which is paramount to all its other aspects, and leads irresistibly to the conclusion that the rule nisi must be denied. That view is that the case is a political one, of which a court of equity can take no cognizance, and which, in the very nature of governmental things, must belong to the executive branch of the government. No precedent or authority has been cited to the court which, in its opinion, could even remotely sustain the cause of the complainants. No case has been cited, nor do I believe that any could have been cited, presenting issues similar to those of this cause. The three complainants are private citizens. It is true that the complainant Pierce avers that he is consul-general of the Orange Free State; but his demand is exclusively a personal one, and he must be deemed to be suing in his personal capacity. One of the complainants is an alien

and a citizen of the Orange Free State. Only one of the complainants is alleged to be a citizen of the United States. They own property in the South African Republic and the Orange Free State, foreign countries now at war with Great Britain. They fear that the war, if continued, will result in the destruction of their property. They believe that, if the shipments of mules and horses from this port are stopped, the war will cease. They claim that, by virtue of a declaration of international law contained in an international treaty to which the foreign countries in which their property is situated were not parties, they have the personal right to enjoin the shipments for the purpose of stopping the war, and thus saving their property from the destruction which they apprehend will result to it from a continuation of the war.

When complainants' cause is thus analyzed, and the nature of the alleged right under the treaty is considered, it is obvious that a court of equity cannot take cognizance of the cause. The main case relied on by the counsel for the complainants is the case of *Emperor of Austria v. Day*, 3 De Gex, F. & J. 217 (English Chancery Reports), in which the emperor of Austria sought and obtained an injunction to restrain the manufacture in England of a large quantity of notes purporting to be receivable as money in, and to be guaranteed by, Hungary. That action was brought by the emperor of Austria as the sovereign and representative of his nation, and the case turned and was decided on considerations entirely different from, and in no manner resembling, those presented in this cause. It may be worth noticing that the counsel for the emperor of Austria freely conceded in the argument of the case that the exportation of munitions of war could not be enjoined. I am clearly of opinion that this case is not within the cognizance of this court, and for that reason the rule nisi must be denied.

BOARMAN, District Judge, who sat in this cause with PARLANCE, District Judge, concurs in the opinion.<sup>2</sup>

<sup>2</sup> For an elaborate restatement of the right of a neutral to trade with one or other of the belligerents, see *Samuel Pearson v. Allis-Chalmers Company*, decided by the circuit court of Milwaukee county, Wisconsin, in 1915. The text of this important judgment is to be found in 11 *American Journal of International Law*, 888 (1917).

Samuel Pearson, at the time of the principal case, was a citizen of the South African Republic. He subsequently became a naturalized citizen of the United States, and as an American citizen, sought to enjoin the Allis-Chalmers Company from furnishing and transporting munitions to the enemies of Germany for the reasons stated in the following extract from his affidavit:

"That the plaintiff is a citizen of the United States of America, and that he has valuable property interests located within the boundaries of the German Empire; that he is the owner of securities issued by the German Government; that the German Empire is and for some time past has been engaged in war with the countries of Great Britain, France, Serbia, Montenegro, Russia and Japan; that great quantities of ammunition have been and will be consumed, and that one type of ammunition indispensable to the belligerents is a projectile known as shrapnel shell, which is designed for but one purpose,

## SECTION 2.—RULE OF 1756

## THE EMANUEL.

(High Court of Admiralty, 1799. 1 C. Rob. 296.)

Sir W. SCOTT.\* This is the case of a ship sailing under Danish colors, and taken with a cargo of salt, on a voyage from Cadiz to Castropol in Galicia. The ship has been restored, reserving the question of freight and expenses. The cargo has been condemned as the property of the King of Spain, and the question now is, under these circumstances, Whether freight and expenses shall be allowed in this case?

I shall, first, consider this case upon principle; and secondly, upon the foundation of authorities.

First. Where a capture is made of a cargo, the property of an enemy, carried in a neutral ship, the neutral ship-owner obtains against the captor those rights which he had against the enemy. At the same time this principle is not so universal as not to be liable to some exceptions; as, for instance, in the known case of contraband goods.<sup>†</sup>

\* \* \*

Now the ground upon which it is contended that the freight is not due to the proprietors of this vessel, is, that she is a Danish ship employed in the transmission of Spanish goods, from one Spanish port to another, and so carrying on the coasting-trade of that country. In our own country it has long been the system, that the coasting-trade should only be carried on by our own navigation. I observe, that in all the rage of novel experiment that has dictated the commercial regulations of France in its new condition, this policy is held sacred; it stands enacted, by a decree 21st September 1793, that no goods, the growth or manufacture of France, shall be carried from one French port to another in foreign ships under pain of confiscation. The same policy has directed the commercial system of other European countries; in the ordinary state of affairs, no indulgence is generally

and that is the destruction of human life and property, and 'that the intent of the war now being conducted by said, aforementioned countries against the German Empire is to so cripple said empire by the destruction of the lives of its citizens and its property, both public and private, as to compel the submission of said empire to the future disposition of its national domain or to surrender of its sovereign life as said allies, if victorious, may dispose.' Page 884.

In an elaborate opinion, Hon. W. J. Turner, Circuit Judge, refused to issue the injunction.

\* Statement of facts and parts of the opinion are omitted.

† The *Mercurius*, 1 C. Rob. 288 (1799); The *Jonge Jacobus Bauman*, 1 C. Rob. 243 (1799); The *Ringende Jacob*, 1 C. Rob. 89 (1798); The *Neptunus*, 3 C. Rob. 108 (1800).

permitted to the ships of most other countries to carry on the coasting trade. I think therefore the onus probandi does at least lie on that side; and always makes it necessary to be shown by the claimants, that such a trade was not a mere indulgence, and a temporary relaxation of the coasting system of the state in question; but that it was a common and ordinary trade, open to the ships of any country whatever.

Applying that principle to the present case (if I am right in the presumption), I am to infer, that this vessel is carrying on a commerce which, according to the general trading system of Spain, she could not pursue, in consequence of the pressure to which the commerce of Spain has been reduced by the arms of this country; if so, upon what ground is it that she claims freight against the captor on a voyage undertaken for the peculiar accommodation and relief of the enemy, under the distress to which the successful hostilities of the captor's country had reduced him? Is there nothing like a departure from the strict duties imposed by a neutral character and situation, in stepping in to the aid of the depressed party, and taking up a commerce which so peculiarly belonged to himself, and to extinguish which was one of the principal objects and proposed fruits of victory? Is not this, by a new act, and by an interposition neither known nor permitted by that enemy in the ordinary state of his affairs, to give a direct opposition to the efforts of the conqueror, and to take off that pressure which it is the very purpose of war to inflict, in order to compel the conquered to a due sense and observance of justice? Is this so clearly within the limits of impartial and indifferent conduct, that if a neutral ship is taken in an office of this kind, she is entitled to claim against the captor, whom she is thus counteracting and almost defrauding, the very same rights which she possessed against the claimant, to whom she is giving this extraordinary and irregular assistance? \* \* \*

As to the coasting trade (supposing it to be a trade not usually opened to foreign vessels), can there be described a more effective accommodation that can be given to an enemy during a war than to undertake it for him during his own disability? Is it nothing that the commodities of an extensive empire are conveyed from the parts where they grow and are manufactured, to other parts where they are wanted for use? It is said that this is not importing any thing new into the country, and it certainly is not; but has it not all the effects of such an importation? Suppose that the French navy had a decided ascendant, and had cut off all British communication between the northern and southern parts of this island, and that neutrals interposed to bring the coals of the north for the supply of the manufactures, and for the necessities of domestic life, in this metropolis; is it possible to describe a more direct and a more effectual opposition to the success of French hostility, short of an actual mili-

tary assistance in the war? What is the present case? It is still more—it is the direct conveyance of a commodity belonging immediately to the king of Spain, for the purpose of public revenue. The vessel is employed not merely in the private traffic of individuals, but in the revenue service of the State. The king of Spain, disabled from employing Spanish vessels in the collection of his revenues, enlists foreign vessels under this necessity. Salt is a royal monopoly in Spain, as it formerly was in France; and it is distributed on the government account to the various provinces. This foreign ship is employed in the distribution, and by the employment becomes an actual revenue cutter of the king of Spain. It should seem to be no very harsh treatment of such a vessel, if, on the capture, she is restored, and is only left to pursue her demand of freight against her original employers.<sup>5</sup> \* \* \*

### THE IMMANUEL.

(High Court of Admiralty, 1799. 2 C. Rob. 186.)

This was the case of an asserted Hamburg ship, taken 14th August, 1799, on a voyage from Hamburg to St. Domingo, having in her voyage touched at Bordeaux, where she sold part of the goods brought from Hamburg, and took a quantity of iron stores and other articles for St. Domingo. A question was first raised as to the property of the ship and cargo; 2dly, supposing it to be neutral property, whether a trade from the mother country of France to St. Domingo, a French Colony, was not an illegal trade, and such as would render the property of neutrals engaged in it liable to be considered as the property of enemies, and subject to confiscation? It was denied that St. Domingo was to be considered in its present state as a French colony. After various observations on these points, farther proof was directed to be made of the property; and permission was given to both parties to produce information as to the state and condition of St. Domingo at that time.

On the 5th of August, 1800, the cause was heard on farther proof.  
\* \* \*

Sir W. Scott:<sup>6</sup> This is the case of a ship taken on a voyage originally from Hamburg, first to Bordeaux, where she discharged part of her cargo, and, having taken on board other goods, proceeded to the

<sup>5</sup> "A neutral ship was chartered during the war by a Russian company, who acted in so doing with the permission of the Russian Government, for the purpose of carrying on a trade which was closed in time of peace to foreign vessels. Held that these facts were sufficient to constitute her a ship sailing with a special license from the enemy. Ship and cargo condemned." *The Montara*, 2 Hurst and Bray's Russian and Japanese Prize Cases (1913) 408. headnote (1906).

<sup>6</sup> The statement of facts is abridged and parts of the opinion are omitted.

colony of St. Domingo, and was taken in this period of the voyage.

\* \* \*

Upon the mere question of property, as it respects all the goods as well as the ship, I see no reason to entertain a legal doubt. Considering them as neutral property, I shall proceed to the principal question in the case, namely, whether neutral property, engaged in a direct traffic between the enemy and his colonies, is to be considered by this court as liable to confiscation. And first, with respect to the goods.

Upon the breaking out of a war, it is the right of neutrals to carry on their accustomed trade, with an exception of the particular cases of a trade to blockaded places, or in contraband articles (in both which cases their property is liable to be condemned), and of their ships being liable to visitation and search; in which case however they are entitled to freight and expenses. I do not mean to say that in the accidents of a war the property of neutrals may not be variously entangled and endangered; in the nature of human connections it is hardly possible that inconveniences of this kind should be altogether avoided. Some neutrals will be unjustly engaged in covering the goods of the enemy, and others will be unjustly suspected of doing it; these inconveniences are more than fully balanced by the enlargement of their commerce; the trade of the belligerents is usually interrupted in a great degree, and falls in the same degree into the lap of neutrals. But without reference to accidents of the one kind or other, the general rule is, that the neutral has a right to carry on, in time of war, his accustomed trade to the utmost extent of which that accustomed trade is capable.

Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in times of peace, and which, in fact, can obtain in war by no other title, than by the success of the one belligerent against the other, and at the expense of that very belligerent under whose success he sets up his title; and such I take to be the colonial trade, generally speaking.

What is the colonial trade generally speaking? It is a trade generally shut up to the exclusive use of the mother country, to which the colony belongs, and this to a double use—that, of supplying a market for the consumption of native commodities, and the other of furnishing to the mother country the peculiar commodities of the colonial regions; to these two purposes of the mother country, the general policy respecting colonies belonging to the states of Europe, has restricted them. With respect to other countries, generally speaking, the colony has no existence; it is possible that indirectly and remotely such colonies may affect the commerce of other countries.

The manufactures of Germany may find their way into Jamaica or Guadaloupe, and the sugar of Jamaica or Guadaloupe into the interior parts of Germany; but, as to any direct communication or advantage

resulting therefrom, Guadaloupe and Jamaica are no more to Germany than if they were settlements in the mountains of the moon; to commercial purposes, they are not in the same planet. If they were annihilated, it would make no chasm in the commercial map of Hamburg. If Guadaloupe could be sunk in the sea, by the effect of hostility, at the beginning of a war, it would be a mighty loss to France, as Jamaica would be to England, if it could be made the subject of a similar act of violence. But such events would find their way into the chronicles of other countries as events of disinterested curiosity, and nothing more.

Upon the interruption of a war, what are the rights of belligerents and neutrals respectively regarding such places? It is an indubitable right of the belligerent to possess himself of such places, as of any other possession of his enemy. This is his common right, but he has the certain means of carrying such a right into effect, if he has a decided superiority at sea: Such colonies are dependent for their existence, as colonies, on foreign supplies; if they cannot be supplied and defended they must fall to the belligerent of course—and if the belligerent chooses to apply his means to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution? No existing interest of his is affected by it; he can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent; and say: "True it is, you have, by force of arms forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and by sharing its benefits prevent its progress. You have in effect, and by lawful means, turned the enemy out of the possession which he had exclusively maintained against the whole world, and with whom we had never presumed to interfere; but we will interpose to prevent his absolute surrender, by the means of that very opening, which the prevalence of your arms alone has affected; supplies shall be sent and their products shall be exported; you have lawfully destroyed his monopoly, but you shall not be permitted to possess it yourself; we insist to share the fruits of your victories, and your blood and treasure have been expended, not for your own interest, but for the common benefit of others."

Upon these grounds, it cannot be contended to be a right of neutrals, to intrude into a commerce which had been uniformly shut against them, and which is now forced open merely by the pressure of war; for when the enemy, under an entire inability to supply his colonies and to export their products, affects to open them to neutrals, it is not his will but his necessity that changes his system; that change is the direct and unavoidable consequence of the compulsion of war, it is a measure not of French councils, but of British force.

Upon these and other grounds, which I shall not at present enumer-



ate, an instruction issued at an early period for the purpose of preventing the communication of neutrals with the colonies of the enemy, intended, I presume, to be carried into effect on the same footing, on which the prohibition had been legally enforced in the war of 1756; a period when, Mr. Justice Blackstone observes, the decisions on the law of nations proceeding from the Court of Appeals, were known and revered by every state in Europe. \* \* \*

Upon the whole view of the case as it concerns the goods shipped at Bordeaux, I am of opinion that they are liable to confiscation. I do not know that any decision has yet been pronounced upon this subject; but till I am better instructed by the judgment of a superior tribunal, I shall continue to hold that I am not authorized, either by general legal principles applying to this commerce, or by the letter of the king's instructions, to restore goods, although neutral property, passing in direct voyages between the mother country of the enemy and its colonies. I see no favorable distinction between an outward voyage and a return voyage. I consider the intent of the instruction to apply equally to both communications, though the return voyage is the only one specifically mentioned.

The only remaining question respects the ship; it belongs to the same proprietors, and if the goods could be considered as properly contraband, would on that account be liable to confiscation, for in the case of clear contraband this is the clear rule. I incline to apply a more favorable one in the present case. It is a case in which a neutral might more easily misapprehend the extent of his own rights; it is a case of less simplicity, and in which he acted without the notice of former decisions upon the subject. The ship came from Hamburg in the commencement of the voyage; she was not picked up for this particular occasion, but was intended to be employed in her owner's general commerce. Attending to these considerations, I shall go no further than to pronounce for a forfeiture of freight and expenses, with a restitution of the vessel.

Cargo, taken in at Bordeaux, condemned. Ship restored, without freight.<sup>7</sup>

<sup>7</sup> The *Atlas*, 3 C. Rob. 299 (1801), was an American ship carrying a cargo of tobacco from America to Vigo, in Spain, or a market, consigned to the master for sale; at Vigo it was sold to the administration of the revenue of tobacco, under a contract of the master to deliver it at Seville, at his own risk, and there to receive payment. The ship was taken in the voyage from Vigo to Seville.

The cargo was condemned as Spanish property. The ship was restored, but freight was refused "as on a voyage in the coasting trade of the enemy."

In *The Rendsborg*, 4 C. Rob. 121 (1802), Sir William Scott found that foreign ships had been permitted to import and export from Batavia during the war between Great Britain and Holland. He held contracts illegal by which the trade of the Dutch East India Company, in whole or in large part, was transferred to neutrals. In the course of his opinion he said:

"It is not the case of an individual merchant, nor of a company going to trade on the general permission, in an ordinary character, or on a common

## SECTION 3.—BLOCKADE.\*

## THE BETSEY.

(High Court of Admiralty, 1798. 1 C. Rob. 93.)

This was a case of a ship and cargo, taken by the English, at the capture of Guadaloupe, April 13, 1794, and retaken, together with that island, by the French, in June following. The ship was claimed for Mr. Patterson of Baltimore, and the cargo as American property. The captors, being served with a monition to proceed to adjudication,

footing. It is a trade carried on to an enormous extent, invested with particular privileges, secured by peculiar contracts, and transferred from the public company to which it exclusively belonged, to these individuals, upon an express acknowledgment understood and acted upon, on both sides, that it was so transferred, in order to relieve the goods which were confined there by the pressure of war, and could not be delivered by any other practicable mode. The question is, Whether a commerce formed with such views, and so conducted, can be entitled to a neutral character? I will take it that there is no difficulty upon the particular facts of the adventure, and that there is no objection to the sufficiency of the proofs of property. Taking the goods to be the property of De Coninck, is the commerce neutral? It is a possible thing that the commerce may not be neutral, although the property is: and if that is the case, the mere neutral ownership will not be a sufficient title to restitution." Pages 123, 124.

This is one of Sir William Scott's very elaborate and closely reasoned opinions, and although affirmed on appeal, in 1808, it has not had the good fortune of almost all of his judgments. Thus, in *The Ariel*, 11 Moore, P. C. 119, 139 (1857), Sir John Patteson delivering the judgment of the Privy Council, questioned and refused to be bound by that decision, saying:

"One other argument was pressed, arising from the number of vessels bought by the claimant, and the magnitude of the transaction was insisted on; and the case of *The Rendsborg*, 4 Rob. 121 (1802), was particularly adverted to. That case was such, that Lord Stowell held it to amount to an adhering to and assisting the enemy, and it was of a very peculiar character. Their Lordships are unable to see why, if the transfer of one ship was legal under the circumstances which have here occurred, if it had stood alone, such transfer should be rendered illegal because six other ships were purchased under similar circumstances, at the same time; unless, indeed, as affording ground to believe that all the purchases were fraudulent and collusive."

\* Regarding intent coupled with delictum, Chief Justice Marshall, speaking for the unanimous court in the case of *Fitzsimmons v. Newport Insurance Company*, 4 Cranch, 185, 199 (1808), said:

"Neither the law of nations nor the treaty admits of the condemnation of the neutral vessel, for the intention to enter a blockaded port, unconnected with any fact. Sailing for a blockaded port, knowing it to be blockaded, has been, in some English cases, construed into an attempt to enter that port, and has, therefore, been adjudged a breach of the blockade, from the departure of the vessel. Without giving any opinion on that point, it may be observed, that in such cases, the fact of sailing is coupled with the intention, and the sentence of condemnation is founded on an actual breach of blockade."

In the World War, 1914-1918, the belligerents did not resort to blockade in the technical sense of the word, as in past wars. Changes in the method of warfare through mines, submarines, and air-craft made it difficult for vessels to maintain position within the blockaded areas.

By the British Order in Council of March 11, 1915, and the French Decree of March 18, 1915, all neutral vessels destined to an enemy port or neutral

appeared under protest, and the cause now came on upon the question, Whether the claimants were entitled to demand of the first British captors, restitution in value, for the property which had passed from them to the French recaptors? The first seizure was defended on a suggestion that The Betsey had broken the blockade at Guadaloupe.

Sir W. Scott.<sup>9</sup> This is a case which it will be proper to consider under two heads. I shall first dispose of the question of blockade; and then proceed to inquire on whom the loss of the recapture by the French ought to fall, under all the circumstances of the case.

On the question of blockade three things must be proved: 1st, the existence of an actual blockade; 2dly, the knowledge of the party; and, 3dly, some act of violation, either by going in, or by coming out with a cargo laden after the commencement of blockade. The time of shipment would on this last point be very material, for although it might be hard to refuse a neutral liberty to retire with a cargo already laden, and by that act already become neutral property; yet, after the commencement of a blockade, a neutral cannot, I conceive, be allowed to interpose in any way to assist the exportation of the property of the enemy. After the commencement of the blockade, a neutral is no longer at liberty to make any purchase in that port.<sup>10</sup>

It is necessary, however, that the evidence of a blockade should be clear and decisive; but in this case there is only an affidavit of one of the captors, and the account which is there given is, "that on the arrival of the British forces in the West Indies, a proclamation issued, inviting the inhabitants of Martinique, St. Lucie, and Guadaloupe to

port in Europe, and all neutral vessels sailing from such an enemy or neutral port, on or after March 1, 1915, could be stopped; conducted to an Allied port, and their cargoes sequestered or requisitioned, unless they received a pass enabling them to proceed. Both vessels and cargoes might be confiscated for other offenses, but they were not confiscated under these orders or decrees. The vessels and cargoes, or proceeds thereof, were to be returned at the end of the war.

On the law as it stood at the time, the belligerents were not entitled thus to treat vessels or cargoes destined to neutral ports, unless they fell within the rule of continuous voyage, and they did not possess the right thus to treat property of enemy origin exported from a neutral port, except by a rule which necessity suggested, and force maintained.

For the text of the Order in Council of March 11, 1915, and of that of February 16, 1917, in pari materia, see Appendix, post, pp. 1175, 1179.

In The Pericles, the Italian Prize Commission held, in 1916, according to the headnote of the report of the case, that:

"A neutral vessel with its cargo cannot legally be seized for violation of blockade and should be released, although it has passed the line of blockade without having provided with the obligatory safe-conduct, if it is proved as a fact that the conditions of weather and sea, as well as damages suffered by the ship, that is to say cases of force majeure, have not permitted it to stop in the port where it should have called to obtain the necessary safe-conduct." Paul Fauchille, *Jurisprudence italienne en matière de prises maritimes* (1918) 152.

<sup>9</sup> Part of the opinion is omitted.

<sup>10</sup> See the *Vrow Judith*, 1 C. Rob. 152, note (1799).

put themselves under the protection of the English; that on a refusal, hostile operations were commenced against them all;" but it cannot be meant that they began immediately against all at once; for it is notorious that they were directed against them separately and in succession. It is farther stated, "that in January, 1794 (but without any more precise date), Guadaloupe was summoned, and was then put into a state of complete investment and blockade."

The word "complete" is a word of great energy; and we might expect from it to find, that a number of vessels were stationed round the entrance of the port to cut off all communication; but, from the protest, I perceive that the captors entertained but a very loose notion of the true nature of a blockade; for it is there stated, "that on the 1st of January, after a general proclamation to the French islands, they were put into a state of complete blockade." It is a term, therefore, which was applied to all those islands at the same time, under the first proclamation.

The Lords of Appeal have determined that such a proclamation was not in itself sufficient to constitute a legal blockade. It is clear, indeed, that it could not in reason be sufficient to produce the effect, which the captors erroneously ascribed to it; but from the misapplication of these phrases in one instance, I learn that we must not give too much weight to the use of them on this occasion; and, from the generality of these expressions, I think, we must infer, that there was not that actual blockade which the law is now distinctly understood to require.

But it is attempted to raise other inferences on this point, from the manner in which the master speaks of the difficulty and danger of entering; and from the declaration of the municipality of Guadaloupe, which states "the island to have been in a state of siege." It is evident that the American master speaks only of the difficulty of avoiding the English cruisers generally in those seas; and as to the other phrase, it is a term of the new jargon of France, which is sometimes applied to domestic disturbances; and certainly is not so intelligible as to justify me in concluding, that the island was in that state of investment, from a foreign enemy, which we require to constitute blockade. I cannot, therefore, lay it down, that a blockade did exist, till the operations of the forces were actually directed against Guadaloupe in April.

It would be necessary for me, however, to go much farther, and to say that I am satisfied also that the parties had knowledge of it; but this is expressly denied by the master. He went in without obstruction. Mr. Ingleton's statement of his belief of the notoriety of the blockade is not such evidence as will alone be sufficient to convince me of it. With respect to the shipment of the cargo, it does not appear exactly under what circumstances or what time it was taken in. I shall therefore dismiss this part of the case. \* \* \*

## THE NEPTUNUS.

(High Court of Admiralty, 1799. 2 C. Rob. 110.)

This was a case of a vessel sailing on a voyage from Dantzick to Havre, 26th October, 1798, and taken in attempting to enter that port on 26th November. \* \* \*

Sir WM. SCOTT. This is a case of a ship and cargo seized in the act of entering the port of Havre in pursuance of the original intention under which the voyage began. The notification of the blockade of that port was made on the 23d February, 1798, and this transaction happened in November in that year. The effect of a notification to any foreign government would clearly be to include all the individuals of that nation; it would be the most nugatory thing in the world, if individuals were allowed to plead their ignorance of it. It is the duty of foreign governments to communicate the information to their subjects, whose interests they are bound to protect. I shall hold, therefore, that a neutral master can never be heard to aver against a notification of blockade, that he is ignorant of it. If he is really ignorant of it, it may be a subject of representation to his own government, and may raise a claim of compensation from them, but it can be no plea in the court of a belligerent. In the case of a blockade de facto only, it may be otherwise, but this is the case of a blockade by notification; another distinction between a notified blockade and a blockade existing de facto only, is that in the former the act of sailing to a blockaded place is sufficient to constitute the offence.<sup>11</sup> It is to be presumed that the notification will be formally revoked, and that due notice will be given of it; till that is done, the port is to be considered as closed up, and from the moment of quitting port to sail on such a destination, the offence of violating the blockade is complete, and the property engaged in it subject to confiscation. It may be different in a blockade existing de facto only; there no presumption arises as to the continuance, and the ignorance of the party may be admitted as an excuse for sailing on a doubtful and provisional destination. But this is a case of a vessel from Dantzick after the notification, and the master cannot be heard to aver his ignorance of it. He sails. Till the moment of meeting Admiral Duncan's fleet, I should have no hesitation in saying, that, if he had been taken, he would have been taken in delicto, and have subjected his vessel to confiscation; but he meets Admiral Duncan's fleet, and is examined and liberated by the captain of an English frigate belonging to that fleet, who told him that he might proceed on his destination, and who, on being asked whether Havre was under a blockade? said, "It was not blockaded," and wished him a good voyage. The question is, In what light he is to

<sup>11</sup> Provided it is with the intention to break the blockade on getting there. *Medeiros v. Hill*, 8 Bing. 281 (1832).

be considered after receiving this information? That it was bona fide given cannot be doubted, as they would otherwise have seized the vessel. The fleet must have been ignorant of the fact; and I have to lament that they were so. When a blockade is laid on, it ought by some kind of communication to be made known not only to foreign governments, but to the King's subjects, and particularly to the King's cruisers; not only to those stationed at the blockaded port, but to others, and especially considerable fleets, that are stationed in itinere, to such a port from the different trading countries that may be supposed to have an intercourse with it.

Perhaps it would have been safer in the English captain to have answered, that he could not say anything of the situation at Havre; but the fact is (and it has not been contradicted), that the British officer told the master "that Havre was not blockaded." Under these circumstances, I think that after this information he is not taken in delicto. I do not mean to say that the fleet could give the man any authority to go to a blockaded port. It is not set up as an authority, but as intelligence affording a reasonable ground of belief; as it could not be supposed, that such a fleet as that was, would be ignorant of the fact.

From that time I consider that a state of innocence commences. The man was not only in ignorance, but had received positive information that Havre was not blockaded. Under these circumstances, I think it would be a little too hard to press the former offence against him; it would be to press a pretty strong principle rather too strongly. I think I cannot look retrospectively to the state in which he stood before the meeting with the British fleet, and, therefore, I shall direct this vessel and cargo to be restored.

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### THE OCEAN.

(High Court of Admiralty, 1801. 3 C. Rob. 297.)

This was a question arising on the blockade of Amsterdam, respecting a cargo shipped for America at Rotterdam. It appeared that the persons ordering the shipment had ordered it of their agents at Amsterdam, as a shipment to be made there, subsequent to the date of the blockade of that place, but previous to the blockade of the ports of Holland. It was argued that in the intention of the claimants it was to be an exportation actually from Amsterdam, and that in effect, the trade was the same, as the goods were ordered and purchased at Amsterdam, and were to be considered as part of the commerce of that place.

Sir W. SCOTT. I am inclined to consider this matter favourably, as an exportation from Rotterdam only, the place in which the cargo becomes first connected with the ship. In what course it had travelled

before that time, whether from Amsterdam at all, and if from Amsterdam, whether by land carriage or by one of their inland navigations, Rotterdam being the port of actual shipment, I do not think it material to inquire. On this view of the case it would be a little too rigorous to say, that an order for a shipment to be made at Amsterdam should be construed to attach on the owner, although not carried into effect. It has been said from the letter of the correspondent at Amsterdam, that the agents there had informed their correspondents in America that the blockade was not intended to prevent exportation. The representation of the enemy shipper could not have availed to exonerate the neutral merchants, if otherwise liable. Were this to be allowed, it would be in the power of the enemy to put an end to the blockade as soon as he pleased. If the general law is, that egress as well as ingress is prohibited by blockade, the neutral merchant is bound to know it; and if he entertains any doubt, he must satisfy himself by applying to the country imposing the blockade, and not to the party who has an interest in breaking it.

It happens in this case, that the intended exportation did not take place. The only criminal act, if any, must have been the conveyance from Amsterdam to Rotterdam. It would be a little too much to say, that by that previous act, the goods shipped at Rotterdam are affected. The legal consequences of a blockade must depend on the means of blockade; and on the actual or possible application of the blockading force. On the land side Amsterdam neither was nor could be affected by a blockading naval force. It could be applied only externally. The internal communications of the country were out of its reach, and in no way subject to its operation. If the exportation of goods from Rotterdam was at this time permitted, it could in no degree be vitiated by a previous inland transmission of them from the city of Amsterdam.

Restored.<sup>12</sup>

<sup>12</sup> See also other early cases before. Sir Wm. Scott: *The Stert*, 4 C. Rob. 65 (1801); *The Jonge Pieter*, 4 C. Rob. 79 (1801); *The Maria*, 6 C. Rob. 201 (1805); *The Lisette*, 6 C. Rob. 387 (1807); *The Julia*, 1 Dod. 169, note (1811).

"In *The Prize Cases*, 2 Black, 635, 17 L. Ed. 459 (1862), it was held that it is a settled rule that a vessel in a blockaded port is presumed to have notice of a blockade as soon as it commences. See also *The Vrouw Judith*, 1 C. Rob. 150 (1799). In this case a de facto blockade may be broken without notice, by egress. But persons entering a place under de facto blockade are entitled to warning.

"The French rule in respect of a violation of blockade differs essentially from that of the United States and England. Notwithstanding that a blockade has been publicly proclaimed, a ship sailing for a blockaded port is entitled to a warning, entered upon her papers, and is only liable to seizure and condemnation when she subsequently attempts to enter or leave a blockaded port. See the cases of *La Louisa*, 1 Pistoye et Duverdy, 382 (1847); and *The Elisa Cornish*, Id. 387 (1850).

"As to the blockades established by the orders in council during the wars with Napoleon I, see Edwards' *Admiralty Reports*, 381-418, and the appendix to that volume. See also in the same volume, pages 249-251, and 311-326;

## THE FORTUNA.

(High Court of Admiralty, 1803. 5 C. Rob. 27.)

This was a case of a ship bound ostensibly from Stettin to Bremen but seized and proceeded against for a violation of the blockade of the Weser.

Sir W. SCOTT. In this case it is admitted that the master was apprised of the blockade. The excuse offered is, that he had taken a pilot on board to carry him into the Eems, but that owing to want of provisions, and a strong westerly wind, he was compelled to make for the Weser. The want of provisions is an excuse which will not on light grounds be received; because an excuse, to be admissible, must show an imperative and overruling compulsion to enter the particular port under blockade, which can scarcely be said in any instance of mere want of provisions. It may induce the master to seek a neighboring port, but it can hardly ever force a person to resort exclusively to the blockaded port. What is stated, respecting the wind is of a different nature. It is said "that there had been a strong westerly wind blowing for nine days together, which prevented the master from making his course to the Eems." This is a fact that may admit of specific evidence, and, therefore, I shall admit affidavits to be offered on that point. In some late cases, I have seen enough to induce me not to admit affidavits on mere matters of conversation, asserted to have passed between the parties at the time of capture. All that is offered from such sources is generally represented so vaguely, and with so much fluctuation, as to disable the court from extracting any precise information from it. Where a specific fact is relied on, which may be capable of proof, it is a different thing. Considering the reference that has been made to the particular state of the winds, in the present case, to be of that nature, I shall admit evidence to be introduced on this point.

This ship was finally restored.

## THE HOFFNUNG.

(High Court of Admiralty, 1805. 6 C. Rob. 112.)

This was a case of a Swedish vessel, which had sailed, the 17th of July, from Nantes, with a cargo of corn or flour for the port of Seville, which was claimed under his Majesty's instructions, 1st February, 1805. \* \* \*

Sir W. SCOTT.<sup>18</sup> There had been a very humane order issued by the British government, in consideration of the distress to which the

Tudor, *Mercantile Cases* (3d Ed.) 1019-1040." *Freeman H. Snow's Cases and Opinions on International Law*, 496 (1893).

<sup>18</sup> Part of the opinion is omitted.



kingdom of Spain was reduced by famine, to permit cargoes of corn to be carried to that country, without exception as to the property, but with a reservation, "that it should not be carried to blockaded ports." This was, unquestionably, a very beneficent and liberal relaxation of the rights of war, since an enemy has a right to avail himself of the exigency produced by famine, as well as by any other distress. There can be no doubt that this relaxation was received by Spain with suitable impressions; and it was incumbent on the government of that country to take care that their orders were properly carried into effect, and that they should not be abused to cover fraudulent attempts to violate a blockade that was imposed on any of the ports of Spain.

It appears that the ports of Cadiz and St. Lucar were put under blockade by a notification of the 25th of April; but it unfortunately happened that the notification issued at a time when it became equally notorious that no blockade actually existed, since the British squadron had been recently driven off by a superior force. In a former case,<sup>14</sup> a question was raised, whether the notification which had issued, was not still operative, at least for the purpose of sustaining the effect of these instructions. But the court was of opinion that it could not be so considered, and that a neutral power was not obliged, under such circumstances, to presume the continuance of a blockade, nor to act upon a supposition that the blockade would be resumed by any other competent force.

It was argued on that occasion, that neutrals were bound to act upon such presumptions, and on the same principle on which it has been held that when a blockading squadron is driven off by adverse winds they are bound to presume that it will return, and that there is no discontinuance of the blockade. But certainly the two cases are very different. When a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade, there is no reason to suppose that such a circumstance would create a change of system, since it could not be expected that any blockade would continue many months without being liable to such temporary interruptions. But when a squadron is driven off by a superior force, a new course of events arises, which may tend to a very different disposition of the blockading force, and which introduces, therefore, a very different train of presumptions in favor of the ordinary freedom of commercial speculations. In such a case, the neutral merchant is not bound to foresee or to conjecture that the blockade will be resumed, and, therefore, if it is to be renewed, it must proceed *de novo*, by the usual course, and without reference to the former state of facts, which has been so effectually interrupted. On this principle it was that the court held the former

<sup>14</sup> *The Christina Margaretha*, 6 C. Rob. 62 (1806).

blockade to have become extinct, and intimated an opinion that there should be a repetition of the same measures, on its recommencement, to bring it to the knowledge of neutral states, either by public declaration, or by the notoriety of the fact.

It is not now contended that any new declaration has issued, and the court has already determined that the former notification had become extinct. It remains, therefore, to be considered, whether there has been that notoriety of the fact, from the operation of time or from other circumstances, which must be taken to have brought the existence of the blockade to the knowledge of the parties.

Among other modes of ascertaining that fact, a prevailing consideration undoubtedly is, the length of time, in proportion to the distance of the country from which the vessel sails. What I have to lament in this instance is, that we labor under an ignorance of the true terminus a quo, not having the necessary information as to the time when Admiral Collingwood returned to that station. Although something is to be collected from the letters, to which a reference has been made, they do not, I think, supply sufficient information, or with such precision as can enable me to found a judicial sentence upon it.

With regard to the ship, I am bound to advert to the situation of hardship in which Swedish vessels were placed by the embargo which was imposed upon them in the ports of France. It was a material object with the French government, to have the ports of Spain supplied with articles of provision. To effect this purpose, it was not unlikely that means of imposition and force would be employed, more especially against Swedish vessels, who were, in a particular manner, *inopes concilii*, owing to the cessation of all diplomatic correspondence between their own government and France. They had been put under an embargo, and were released, it appears, for the purpose of being made the instruments of conveying these supplies to the ports of Spain. It is natural to suppose, that any information that might have reached the government of France, as to the actual state of the ports of Spain, would be withheld from them. Unless it is shown, therefore, in the clearest manner, that the knowledge of the actual blockade of Cadiz and Saint Lucar, which is said to have existed, had reached the masters of these vessels, I shall think myself bound to act towards them with great indulgence, and with due consideration of the difficulties under which they were placed.

Their case is very different from that of the proprietors of the cargo. For who are they? The Spanish government; who were bound to observe the most perfect candor and good faith. They could not but know the fact, if Cadiz was actually blockaded. It was their duty to have transmitted the earliest information to their agents in France, and to have altered the destination of their cargoes to other ports, to which they might go without infringing the instructions which had issued in their favor. There is, therefore, a material distinction

between the ship and the cargo. Unless it is proved in the most unequivocal manner, that the master was affected with the knowledge of the alleged blockade, I shall hold the vessel to be exonerated. With respect to the cargo, if it is shown that the blockade did exist, and that there had been time for communication from Spain, those interests will not be entitled to the same indulgence. I shall, therefore, at present, make no other order, but to require the recommencement of the blockade to be distinctly ascertained, meaning to apply the inferences that may arise from the interval of time, very differently to the case of the ship and of the cargo.

On a subsequent day,<sup>18</sup> this case came before the court again on the information required to be produced, of the time when Lord Collingwood resumed the blockade of Cadiz. No farther information was exhibited, but only the certificate of the admiralty, stating "that Lord Collingwood arrived off Cadiz on the 8th of June." The cause was argued on the sufficiency of that act, and the inferences deducible from it, whether they were such as could be held to reestablish the blockade, so as to impose on the government of Spain an obligation of counteracting this shipment, previous to the sailing of the vessel.

Sir W. SCOTT. What the court has already decided, on the best consideration, is, that the raising of the former blockade, by a superior force, was a total defeasance of that blockade and its operations. Whether that is a sound opinion or not, must be left to the determination of the Superior Court. My persuasion is, that there could not be a more effectual raising of the blockade; and that it should be renewed again by notification, before foreign nations could be affected with an obligation of observing it as a blockade of that species still existing. Under this view I have already intimated my opinion that the mere appearance of another squadron would not restore it, but that the same measures would be necessary for the recommencement that had been required for the original imposition of the blockade, and that foreign merchants were not bound to act on any presumption that it would be de facto resumed. \* \* \*

Restored on payment of the captor's expenses.

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### THE NANCY.

(Privy Council, 1809. 1 Act. 57.)

This was a leading case of several appeals from Vice Admiralty Courts in America and the West Indies, condemning the ships and cargoes for a breach of the blockade of the island of Martinique, in the year 1804.

The attestation of the master, who was the claimant of the vessel for himself and other American citizens, and of the cargo as the property

<sup>18</sup> July 24, 1808.

of John Juhel, also of New York, in America, proved that he had, under charter-party, agreed to sail with a cargo from New York to the port of St. Pierre's, in Martinique, unless the same should be blockaded, and to bring from thence a return cargo of the produce of the island, for the sole account and risk of Juhel and other American citizens. That in case the island should be blockaded he had agreed to proceed to St. Thomas's, from whence he had orders to procure a return cargo from the proceeds of the outward. In pursuance of this agreement he arrived off Martinique on the 29th of March, and finding no ships of war there, and not being given to understand that there existed any blockade at that time, he, in consequence of the vessel's having sprung a leak, repaired to the port of Trinity in that island to refit, from whence he set sail, and arrived at that of St. Pierre's on the 3d of April. That while in the island he was informed the blockade had been removed, and the squadron had gone on an expedition to Trinidad. No vessel of war, whatever, had appeared off the island during his stay; nor was there any notice given of a blockade then existing. Having completed his cargo on the 15th, he sailed for New York, in which voyage he was captured and carried into Halifax, in Nova Scotia, when the vessel and cargo were condemned as prize. This statement was supported by the evidence of a passenger on board the vessel, by some of the crew, and by the tenor of a correspondence between persons in France, New York, and Martinique, which proved that the blockade was at that time removed, or at least so far relaxed that no armed vessels had been seen off these ports during the period the vessel remained in the island.

For the captors it was contended—that although the blockading fleet had been despatched to Surinam, a force had been left off the island to continue the blockade, and apprise vessels of its existence. This appeared even by the correspondence exhibited by the claimants, one of the letters admitting, that a British fifty gun ship continued off the island, and was now and then seen by the inhabitants.

JUDGMENT. The court held that, to constitute a blockade, the intention to shut up the port should not only be generally made known to vessels navigating the seas in the vicinity, but that it was the duty of the blockaders to maintain such a force as would be of itself sufficient to enforce the blockade. This could only be effected by keeping a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the island. In the present instance no such measures had been resorted to, and this neglect necessarily led neutral vessels to believe these ports might be entered without incurring any risk. The periodical appearance of a vessel of war in the offing could not be supposed a continuation of a blockade, which the correspondence mentioned had described to have been previously maintained by a number of vessels, and with such unparalleled rigour, that no vessel what-

ever had been able to enter the island during its continuance. Their Lordships were therefore pleased to order that the ship should be restored, the proof of property being sufficient, but directed further proof as to the cargo claimed for the American citizens mentioned.

### THE JOHANNA MARIA.

(Privy Council, 1855. 10 Moore, P. C. 70.)

The Right Hon. T. PEMBERTON LEIGH.<sup>16</sup> This vessel entered Riga on the 20th of May, after all difficulty arising from the Order in Council of the 15th of April had been removed. She came out again on the 24th of May, having taken on board a cargo, with a full knowledge of the existence of the blockade at the time of loading, and in the expectation, as it is said, that the worst that could happen would be that she would be sent back by the British ships forming the blockade, to unload her cargo.

The only ground upon which she could ask to be relieved from condemnation would be, that the letter of Sir Charles Napier, of the 27th of May, 1854 (10 Moo. P. C. 65), and the subsequent announcement by the British government in the London Gazette, of the 14th of August, would be sufficient to annul all that has previously taken place, and, in the principles laid down by Lord Stowell, in *The Rolla*, 6 Rob. 368, to postpone all penalties for breach of blockade till after the 28th of May.

Their Lordships, however, are of opinion that such a judgment would carry the doctrine referred to further than either the decision itself or sound principle would warrant. In that case, Lord Stowell observed that the blockade had been very lax; that several vessels had been permitted by the blockading squadron to enter, and the observations relied on must be understood with regard to the circumstances out of which they arose. In this case, from the 5th of May, there had been an uninterrupted blockade; no single instance has been produced in which any vessel had been permitted by any of the blockading ships to enter the port; nor had any been permitted to come out after the 15th of May, with cargoes subsequently loaded. There is clear proof of a *de facto* blockade; full knowledge of it by the master, and nothing which could mislead him as to its extent or effect. The usual consequences must, therefore, follow, and the sentence below be affirmed, but without costs of the appeal.

By respective Orders in Council the sentences in these cases, as well as the sentences relating to the condemnation of their cargoes, were reversed, and simple restitution decreed.<sup>17</sup>

<sup>16</sup> The statement of the case is omitted.

<sup>17</sup> In addition to *The Rolla*, 6 C. Rob. 364 (1807), the following cases were referred to in the argument: *The Neptunus*, 2 C. Rob. 110 (1799); *The Jurfrow Maria Schroeder*, 3 C. Rob. 147 (1800).

## THE FRANCISKA.

(Privy Council, 1855. 10 Moore, P. C. 87.)

On the 15th of April, 1854, the commander of the Baltic fleet blockaded, de facto, the coast of Courland, but his notice to the British Ministers, including the British Minister at Copenhagen, was of that character, that the impression was that all the Russian ports in the Baltic were blockaded. The English government also on that date issued an Order in Council, giving permission up to the 15th of May, for Russian vessels to discharge their cargoes from Russian ports in the Baltic and White Sea to their port of destination, even though those ports were in a state of blockade. A similar permission was granted by the French government. And the Russian government by a ukase allowed the same indulgence to English and French ships. On the 14th of May, 1854, a neutral vessel, under Danish colours, sailed from Copenhagen for Riga, and was captured off Riga by an English ship of war on the 22d of that month, for a breach of the blockade of that port. From Dr. Lushington's decree of condemnation an appeal was taken to the Privy Council.<sup>18</sup>

The Right Hon. T. PEMBERTON LEIGH.<sup>19</sup> As regards export, therefore, from the Baltic ports, by the effect of these several ordinances all restriction up to the 15th of May, on the conveyance of cargoes in Russian vessels to British and French ports, was removed; and though British and French vessels would, by the general law of nations, be liable to confiscation for breach of blockade, by sailing from blockaded ports with cargoes taken on board after notice of the blockade, and the permission to export is, by the orders, in terms, confined to Russian vessels, it seems improbable that the Allied Powers could intend to deprive their subjects of the indulgence granted to them by the Russian government, or to subject their property to confiscation for doing what the enemy was permitted to do with impunity.

In effect, therefore, neutrals only would be excluded from that commerce which belligerents might safely carry on; and the question is, whether by the law of nations such exclusion be justifiable; and, if not, in what manner and to what extent neutral powers are entitled to avail themselves of the objection.

That such exclusion is not justifiable is laid down in the clearest and most forcible language in the following passage of the judgment now under review: "The argument stands thus: by the law of nations a belligerent shall not concede to another belligerent, or take for himself, the right of carrying on commercial intercourse prohibited to neutral nations; and, therefore, no blockade can be legitimate that admits to either belligerent a freedom of commerce denied to the subjects of

<sup>18</sup> This statement is taken from the head-note of the case.

<sup>19</sup> Only a part of the elaborate opinion of this very learned judge is given.

states not engaged in the war. The foundation of the principle is clear, and rooted in justice; for interference with neutral commerce at all is only justified by the right which war confers of molesting the enemy, all relations of trade being by war itself suspended. To this principle I entirely accede; and I should regret to think if any authority could be cited from the decisions of any British court administering the law of nations, which could be with truth asserted to maintain a contrary doctrine."

The learned judge, after discussing the question how far licences to enter blockaded ports would invalidate a blockade, and pointing out the important distinctions between blockades according to the ordinary law of nations, and the blockades introduced during the last war by the Berlin and Milan decrees on the one hand, and the British Orders in Council on the other, and between special licences granted for a particular occasion and licences granted indiscriminately, proceeds, "I think that if the relaxation of a blockade be, as to belligerents, entire, the blockade cannot lawfully subsist; if it be partial, and such as to exceed special occasion, that, to the extent of such partial relaxation, neutrals are entitled to a similar benefit." And he concludes his able discussion of this part of the case, in these words: "With respect to the present question I, therefore, have come to the conclusion, that as Russian vessels might have left the ports of Courland up to the 15th of May, the subjects of neutral states ought to be entitled to the same advantages, and if there be any vessel so circumstanced I should hold her entitled to restitution. I think the remedy should be commensurate with the grievance." The learned judge holds that such relaxation does not affect the general validity of the blockade.

In order to judge how far this conclusion can be maintained, it is necessary to consider upon what principles the right of a belligerent to exclude neutrals from a blockaded port rests. That right is founded, not on any general unlimited right to cripple the enemy's commerce with neutrals by all means effectual for that purpose, for it is admitted on all hands that a neutral has a right to carry on with each of two belligerents during war all the trade that was open to him in times of peace, subject to the exceptions of trade in contraband goods and trade with blockaded ports. Both these exceptions seem founded on the same reason, namely, that a neutral has no right to interfere with the military operations of a belligerent either by supplying his enemy with materials of war, or by holding intercourse with a place which he has besieged or blockaded.

Grotius expresses himself upon the subject in these terms:—"Si juris mei executionem rerum subvectio impedierit, idque scire potuerit, qui advexit, ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax expectabatur, tenebitur ille mihi de damno culpâ dato." *De Jure Belli ac Pacis*, lib. III, c. I, s. V.

Bynkershoek's commentary on this passage is to the effect that it is unlawful to carry anything, whether contraband or not, to a place thus circumstanced, since those who are within may be compelled to surrender, not merely by the direct application of force, but also by the want of provisions and other necessities. "*Sola obsidio in causâ est, cur nihil obsessis subvehere liceat, sive contrabandum sit, sive non sit, nam obsessi non tantum vi coguntur ad deditionem, sed et fame, et alia aliarum rerum penuria.*" *Quæ. Jur. Pub.*, lib. I. c. 11.

Wheaton in his *Elements of International Law*, Vol. II, p. 228-230, justly observes that this passage in Bynkershoek goes too far, and that a blockade is not confined to the case where there is a siege or blockade with a view to the capture of a place or the expectation of peace. But these passages seem to point to the reason on which this interference with the ordinary rights of neutrals was originally justified.

Vattel lays down the same doctrine: "*Quand je tiens une place assiégée, ou seulement bloquée, je suis en droit d'empêcher que personne n'y entre, et de traiter en ennemi quiconque entreprend d'y entrer sans ma permission, ou d'y porter quoi que ce soit; car il s'oppose à mon entreprise, il peut contribuer à la faire échouer, et par là me faire tomber dans tous les maux d'une guerre malheureuse.*" B. III, c. VII, s. 1, 17.

These passages refer only to ingress and the importation of goods, but it is clear that the operations of the siege or blockade may be interrupted by any communication of the blockaded or besieged place with foreigners; and Lord Stowell, when he defines a blockade, always speaks of it as the exclusion of the blockaded place from all commerce, whether by egress or ingress. In *The Frederick Molke*, 1 Rob. 87, he says: "What is the object of a blockade? not merely to prevent an importation of supplies; but to prevent export as well as import; and to cut off all communication of commerce with the blockaded place." In *The Betsey*, 1 Rob. 93: "After the commencement of a blockade a neutral cannot, I conceive, be allowed to interpose in any way to assist the exportation of the property of the enemy." In *the Vrouw Judith*, 1 Rob. 151: "A blockade is a sort of circumvallation round a place by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place; and a neutral is no more at liberty to assist the traffic of exportation than of importation." In *The Rolla*, 6 Rob. 372: "What is a blockade but a uniform universal exclusion of all vessels not privileged by law?" In *The Success*, 1 Dods. 134: "The measure which has been resorted to, being in the nature of a blockade, must operate to the entire exclusion of British as well as of neutral ships; for it would be a gross violation of neutral rights, to prohibit their trade, and to permit the subjects of this

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country to carry on an unrestricted commerce at the very same ports from which neutrals are excluded."

It is contended that the objection of a neutral to the validity of a blockade, on the ground of its relaxation by a belligerent in his own favour, is removed if a court of admiralty allows to the neutral the same indulgence which the belligerent has reserved to himself or granted to his enemy. But their lordships have great difficulty in assenting to this proposition. In the first place, the particular relaxation, which may be of the greatest value to the belligerents, may be of little or no value to the neutral. In the instance now before the court it may have been of the utmost importance to Great Britain that there should be brought into her ports cargoes which, at the institution of the blockade, were in Riga; and it may have been for her advantage, with that view, to relax the blockade. But a relaxation of the blockade to that extent, and a permission to neutrals to bring such cargoes to British ports may have been of little or no value to neutrals.

The counsel on both sides at their Lordships' bar understood that the learned judge in this case intended thus to limit the rights of neutrals, and to place neutral vessels only in the same situation as Russians, under the Order in Council. Their Lordships would be inclined to give a more liberal interpretation to the language of the judgment; yet if this be done, the allowance of a general freedom of commerce, by way of export, to all vessels and to all places from a blockaded port, seems hardly consistent with the existence of any blockade at all.

Again, it is not easy to answer the objections a neutral might make, that the condition of things which alone authorizes any interference with his commerce does not exist, namely, the necessity of interdicting all communication by way of commerce with the place in question; that a belligerent, if he inflicts upon neutrals the inconvenience of exclusion from commerce with such place, must submit to the same inconvenience himself; and that if he is to be at liberty to select particular points in which it suits his purpose that the blockade should be violated with immunity, each neutral, in order to be placed on equal terms with the belligerent, should be at liberty to make such selection for himself.

But the ambiguity in which all these questions are left by the Order in Council of the 15th of April; the doubt whether the liberty accorded to enemies' vessels extends to neutrals, and, if so, whether such liberty is subject to the same restrictions, or to any other and what restrictions, affords, in the opinion of their Lordships, another strong argument against the legality of the blockade in this case. If a partial, modified blockade is to be enforced against neutrals, justice seems to require that the modifications intended to be introduced should be notified to neutral states, and that they should be fully apprized what acts their subjects may or may not do. They cannot reasonably be

exposed to the hardship of either abstaining from all commerce with a place in such a state of uncertain blockade, or of having their ships seized and sent to the country of the belligerent, in order to learn there, from the decision of its Court of Admiralty, whether the conduct they have pursued is, or is not, protected by an equitable interpretation of an instrument in which they are not expressly included.

If these views of the law be correct, this ship cannot be considered to have had notice of any blockade of Riga at the time when she sailed for that port; for, in truth, no legal blockade was then in existence, and it would be hard to require a neutral to speculate on the probability, however great, of a legal blockade *de facto* being established at a future time, when he is not permitted to speculate on the chance of its discontinuance after he has once had notice of its existence. \* \* \*

Supposing, however, the blockade in this case to be open to no objections in point of law during the interval between the 15th of April and the 15th of May, it remains to be inquired whether the notice which this ship received of its existence was of such a character as to subject her to the penalty of confiscation for disregarding it. Notice has been imputed to the claimant in the court below from the alleged notoriety of the blockade on the 14th of May, at Elsinore, where the ship touched, and at Copenhagen, where the owner resided.

It is contended by the appellant that in a case of ingress of a port subject to a blockade only *de facto* of which there has not been any official notification, guilty knowledge cannot be inferred in an individual from general notoriety, and that a ship is always entitled under such circumstances to warning from the blockading squadron before she is exposed to seizure.

To this proposition their Lordships are unable to accede. If a blockade *de facto* be good in law without notification, and a wilful violation of a known legal blockade be punishable with confiscation—propositions which are free from doubt—the mode in which the knowledge has been acquired by the offender, if it be clearly proved to exist, cannot be of importance. Nor does there seem for this purpose to be much difference between ingress, in which a warning is said to be indispensable, and egress, in which it is admitted to be unnecessary.

The fact of knowledge is capable of much easier proof in the one case than in the other; but when once the fact is clearly proved, the consequences must be the same. The reasoning of the learned judge of the court below in this case, and the language of Lord Stowell in *The Adelaide*, reported in the note to *The Neptunus*, 2 Rob. 111, and *The Hurtig Hane*, 3 Rob. 324, are conclusive upon this point.

But while their Lordships are quite prepared to hold that the existence and extent of a blockade may be so well and so generally known, that knowledge of it in an individual may be presumed without distinct proof of personal knowledge, and that knowledge so acquired may supply the place of a direct communication from the blockading squadron,

yet the fact, with notice of which the individual is so to be fixed, must be one which admits of no reasonable doubt. "Any communication which brings it to the knowledge of the party," to use the language of Lord Stowell in *The Rolla*, 6 Rob. 367, "in a way which could leave no doubt in his mind as to the authenticity of the information."

Again, the notice to be inferred from general notoriety, must be of such a character that if conveyed by a distinct intimation from a competent authority it would have been binding. The notice cannot be more effectual because its existence is presumed, than it would be if it were directly established in evidence. The notice to be inferred from the acts of a belligerent, which is to supply the place of a public notification; or of a particular warning, must be such as, if given in the form of a public notification or of a particular warning, would have been legal and effectual.

For this purpose the notice of the blockade must not be more extensive than the blockade itself. A belligerent cannot be allowed to proclaim that he has instituted a blockade of several ports of the enemy, when in truth he has only blockaded one; such a course would introduce all the evils of what is termed a paper blockade, and would be attended with the grossest injustice to the commerce of neutrals. Accordingly a neutral is at liberty to disregard such a notice, and is not liable to the penalties attending a breach of blockade, for afterwards attempting to enter the port which really is blockaded.

This was distinctly laid down by Lord Stowell in the case of *The Henrick and Maria*, 1 Rob. 148, where an officer of the blockading squadron had informed a neutral that all the Dutch ports were in a state of blockade, whereas the blockade was confined to Amsterdam. The ship was afterwards captured for an alleged attempt to enter Amsterdam, and Lord Stowell, in decreeing restitution, observed: "The notice is, I think, in point of authority, illegal; at the time when it was given there was no blockade which extended to all Dutch ports. A declaration of blockade is a high act of sovereignty; and a commander of a king's ship is not to extend it. The notice is, also, I think, as illegal in effect as in authority: it cannot be said that such a notice, though bad for other ports, is good for Amsterdam. It takes from the neutral all power of election as to what other port of Holland he should go, when he found the port of his destination under blockade. A commander of a ship must not reduce a neutral to this kind of distress; and I am of opinion, that if the neutral had contravened the notice, he would not have been subject to condemnation."

The authority of this case is fully recognized by Dr. Lushington in the present case, who observes that such an administration of the law, in protecting the party misled, was most just.

Applying these principles to the evidence before them, their Lordships can have no doubt that the master and owner in this case are to be fixed with notice of all that was publicly known at Copenhagen on

the 14th of May, on the subject of the blockade; that it was known there that merchant vessels had been turned back from ports on the coast of Courland, and that a general impression prevailed that vessels seeking to enter Russian ports ran great risk of seizure; and that the owner in this case shared that impression, and that to this cause are to be attributed the want of proper ships' papers, which has been already alluded to, and the absence, on the further proof, of any affidavit on the part of the owner denying knowledge of the blockade.

But it is contended by the appellant that the impression which thus prevailed at Copenhagen (if, in fact, there existed any general impression) on the 14th of May was, and of necessity from the acts of the belligerent powers must have been, not that the ports of Libau, Windau, and the gulf of Riga were blockaded (which they really were), but that all the Russian ports in the Baltic were blockaded, which they certainly were not; and that a notice to be gathered from such erroneous impressions, was, on the principles already referred to, of no effect.<sup>20</sup> \* \* \*

It is clear, therefore, that the real state of the blockade could not have been known at Copenhagen on the 14th of May, and that the only notice which the master could receive at that port, at that time, would be, that he must not sail for any of the Russian ports; a notice which, if he had received it from a British officer, he could not, on the principles already stated, be punished for disregarding. \* \* \*

The view which their Lordships have taken of this part of the case makes it unnecessary for them to advert to the many other important points which were argued at their bar. They must advise a restitution of the ship (or rather of the proceeds, for it appears to have been sold) and of the freight, but certainly without any costs or damages to the claimant. There will be simple restitution, without costs or expenses to either party.

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#### THE GERASIMO.

(Privy Council, 1857. 11 Moore, P. C. 88.)

See ante, p. 696, for a report of the case.

<sup>20</sup> The learned judge's examination of the evidence of knowledge in Copenhagen of the blockade in question is omitted.

## THE PANAGHIA RHOMBA.

(Privy Council, 1858. 12 Moore, P. C. 168.)

**The Right Hon. T. PEMBERTON LEIGH.**<sup>21</sup> This case involves a general principle of so much importance that their lordships thought it desirable to take time for its consideration, although they had a strong impression at the hearing as to the decision at which they must arrive.

The Panaghia Rhomba took in a cargo of wheat at Galatz, in the month of September, 1855, to be conveyed to the Piraeus or Syra, on the joint account of Signor Cuppa, an Ionian merchant, resident in Constantinople, and of Messrs. Baltazzi, British merchants, resident in London.

In the month of November following, the vessel was captured by her Majesty's ship *Dauntless*, for an attempt to violate the blockade of the port of Odessa, which had subsisted from the month of February, 1855, and was then continuing.

The ship has been condemned by the court below upon evidence which quite satisfies their Lordships of the propriety of the sentence; and the question now raised is, whether it is competent to the claimants of the cargo to protect their property from condemnation by showing their innocence in the transaction; or whether, under the circumstances of this case, the owners of the cargo are concluded by the illegal act of the master, though it may have been done without their privity, and even contrary to their wishes.

It has been held by the court below, that the owners are so concluded, and that the rule upon the subject is established by authority not now to be questioned.

The first case to which we have been referred is *The Mercurius*, 1 Rob. 80, which came before Lord Stowell in 1798. There a cargo had been put on board the *Mercurius* in America, at a time when it could not have been known in that country that a blockade of the Texel had been established. The master, after warning, attempted to enter the Texel, and the ship was condemned, because the owner was bound by the act of the master; but the cargo was restored, because, as Lord Stowell observes, the shippers at the time of shipment could not have known of the blockade, and the master, though he was the agent of owner of the vessel, and could bind him by his contract or his misconduct, was not the agent of the owners of the cargo, unless expressly so constituted by them; Lord Stowell, in that case, addressed himself to the argument of the captors, that to exempt the cargo from condemnation would open a door to fraud, if neutrals were allowed to trade with blockaded ports with impunity, by throwing the blame upon the carrier-master; and, in answer to that objection, he observed, that "if such an artifice could be proved, it would establish that *mens rea* in the

<sup>21</sup> Facts omitted, as the judgment sufficiently states the case.

neutral merchant which would expose his property to confiscation, and it would be at the same time sufficient to cause the master to be considered in the character of agent, as well for the cargo as for the ship."

In that case Lord Stowell seems to have thought that the owners of the cargo were not bound by the act of the master without their authority, and the judgment seems rather to warrant the marginal note which the very learned reporter has stated as the effect of it, namely, "Violation of blockade by the master affects the ship, but not the cargo, unless the property of the same owner, or unless the owner is cognizant of the intended violation."

Now, in the present case, Dr. Lushington has stated his conviction that the owners of the cargo were innocent of all knowledge of the intended violation; and if, therefore, the law remained as it is to be collected from the case of the *Mercurius*, 1 Rob. 80, their Lordships would have great difficulty in assenting to the decision now under review.

But the subsequent cases appear to have carried the rule much further, and to have established, that when the blockade was known, or might have been known, to the owners of the cargo at the time when the shipment was made, and they might, therefore, by possibility be privy to an intention of violating the blockade, such privity shall be assumed as an irresistible inference of law, and it shall not be competent to them to rebut it by evidence; that in cases of blockade, for the purpose of affecting the cargo with the rights of the belligerent, the master shall be treated as the agent for the cargo as well as for the ship. This is the result of the cases cited by Dr. Lushington in his judgment, and the additional authorities mentioned at the bar.

In the case of *The Alexander*, 4 Rob. 94, which occurred in 1801, Lord Stowell held that, in cases of breach of blockade, the court must infer "that a ship going in fraudulently, is going in the service of the cargo, with the knowledge and by the direction of the owner."

In the case of *The Adonis*, 5 Rob. 259, which occurred in 1804, he went a step further, and held not only that such inference must be made, but that (with the exception to which we have already referred) the owners could not be let in to prove a contrary intention. This case was affirmed upon appeal, and it possesses, therefore, all the authority which the decisions of the tribunal of a single country can give in a law in which all civilized countries are concerned.

The same doctrine is laid down by the same great judge in the case of *The Exchange*, 1 Edwards Rep. 42, in 1808, and in *The James Cook*, 1 Edwards, 261, in 1810.

We find, therefore, a series of authorities establishing a general rule, which, like all general rules, may in its application to particular cases be occasionally attended with hardship, but which, nevertheless, may be necessary to prevent fraud, and may, on the whole, promote the purposes of justice. It is a rule not applicable exclusively to neutrals,

but applies with equal force to all persons attempting to violate a blockade, though they may be the subjects or the allies of the country which has established it. In the present case, indeed, Messrs. Baltazzi, the claimants, are British subjects.

The propriety, or rather the necessity, of acting upon these rules, is rested by Lord Stowell on the notoriety of the fact that in almost all cases of breach of blockade, the attempt is made for the benefit and with the privity of the owners of the cargo; that if they were at liberty to allege their innocence of the act of the master, it would always be easy to manufacture evidence for the purpose, which the captors would have no means of disproving; and that, in order to make a blockade effectual, it is essential to hold the cargo responsible to the blockading power for the act of the master, to whom the control over it has been entrusted, leaving the owners to seek their remedy against the master or the owners of the ship, if, in reality, the penalty was incurred without any privity on their part.

It is impossible not to feel the force of this reasoning; it rests on the same grounds with another rule of the Prize Courts, which treats as invalid the sale of a ship in transitu, a point upon which we have had very recently to examine the law (in *The Baltica*, 11 Moore's P. C. Cases, 141).

Against a rule, acted upon and promulgated to the world for so many years, the counsel for the appellants, though challenged to do so by the respondents, have not produced a single decision or dictum by any one judge or jurist in any part of the world. Under these circumstances, their Lordships must consider it as a settled principle of prize law by which they are bound.

Holding themselves to be precluded by the rule of law from looking into the evidence in this case in order to judge of the guilt or innocence of the claimants, they can express no opinion upon this subject. But they think that, as the learned judge in the court below has declared his conviction of their entire innocence, and his reluctance to pronounce the sentence complained of, the claimants may fairly be considered to have been invited to bring this appeal, and that in affirming the sentence, her Majesty should be advised to make the order without awarding costs against the appellants.<sup>22</sup>

<sup>22</sup> The gist of blockade is to prevent trade with the enemy. Where this feature is wanting, courts are not over stringent in applying the strict rule of condemnation. Thus, in *U. S. v. Guillem*, 11 How. 47, 13 L. Ed. 599 (1850), a Frenchman was permitted to leave Vera Cruz, a blockaded port, on board a French vessel, for France. Mr. Chief Justice Taney, in a brief and careful opinion, made the following points: (1) That a neutral leaving a belligerent country, in which he was domiciled at the beginning of the war, is entitled to the rights of a neutral in his person and property, as soon as he sails from the hostile port; (2) the property he takes with him is not liable to condemnation for a breach of blockade by the vessel in which he embarks, when entering or departing from the port, unless he knew of the intention of the vessel to break it in going out.

Neutral vessels, lying in the enemy harbor at the outbreak of war, are legal-

## THE WREN.

(Supreme Court of the United States, 1867. 6 Wall. 582, 18 L. Ed. 371)

Appeal from the District Court for the Southern District of Florida, condemning as prize of war *The Wren*. \* \* \*

Mr. Justice NELSON delivered the opinion of the court.<sup>23</sup>

The court below condemned the vessel on the ground that she was the property of the enemies of the United States. And this is the only question in the case. For, although it was insisted on the argument that the condemnation might have been placed on the ground that the vessel was taken in contemplation of law in delicto, for violating the blockade of the port of Galveston, Texas, the position is founded in a clear misapprehension of the law. The doctrine on this subject is accurately stated by Chancellor Kent.<sup>24</sup> "If a ship," he observes, "has contracted guilt by a breach of blockade, the offence is not discharged until the end of the voyage. The penalty never travels on with the vessel further than to the end of the return voyage; and, if she is taken in any part of that voyage, she is taken in delicto. This is deemed reasonable, because no other opportunity is afforded to the belligerent force to vindicate the law." And the modern doctrine is now well settled, that the only penalty annexed to the breach of a blockade is the forfeiture of vessel and cargo when taken in delicto. The earlier doctrine was much more severe, and inflicted imprisonment and other personal punishment on the master and crew.

As respects the ownership. \* \* \*

Our conclusion is, that the decree below must be reversed, and the vessel restored, but without costs.<sup>25</sup>

ly and innocently there. They are, therefore, permitted to depart in peace before applying the blockade. "The period," says Mr. Hall (Int. Law [4th Ed. 1895] 733), "which is allowed for the exit of ships is usually fixed at fifteen days, and during this time vessels may issue freely in ballast or with a cargo bona fide bought and shipped before the commencement of the blockade. This time was given in 1848 and 1864 by Denmark; by England and France during the Crimean war; by the United States during the Civil War, and by France in the war of 1870." By proclamation of April 22, 1898, the late President McKinley generously doubled this period. 10 Richardson's Messages and Papers of the Presidents, 1789-1897, 202.

<sup>23</sup> The statement of facts and part of the opinion are omitted.

<sup>24</sup> 1 Commentaries, 151.

<sup>25</sup> The *Olinde Rodrigues*, 174 U. S. 510, 19 Sup. Ct. 351, 43 L. Ed. 1065 (1899), lays down what may be considered the Anglo-American practice. The decision in this case is thus summarized in the headnote:

"A blockade to be binding must be known to exist. There is no rule of law determining that the presence of a particular force is necessary in order to render a blockade effective, but on the contrary, the test is whether it is practically effective, and that is a mixed question, more of fact than of law.

"While it is not practicable to define what degree of danger shall constitute a test of the efficiency of a blockade, it is enough if the danger is real and apparent.

"An effective blockade is one which makes it dangerous for vessels to attempt to enter the blockaded port; and the question of effectiveness is not



SECTION 4.—CONTRABAND<sup>26</sup>

## JURGAN v. LOGAN.

(Court of Sessions of Scotland, 1667. 1 Stair, 477.)

Captain Logan a Privateer having taken Hans Jurgan Citizen of Lubeck obtained his Ship and Goods, adjudged Prize by the Admiral, upon this ground that he had carried in Prohibit, or Counterband Goods to the Danes, being then the Kings Enemies, viz. Hemp and Victual, and that he was taken in the return of that Voyage, which was instructed by the Oaths of the said Hans and Sailers.

Hans raises a Reduction of the Admirals Decreet on these reasons: First, That the Victual was no Counterband Goods, but such Goods as the King allowed his own Subjects to Export out of England, and

controlled by the number of the blockading forces, but one modern cruiser is enough as matter of law, if it is sufficient in fact for the purpose, and renders it dangerous for other craft to enter the port.

"The blockade in this case was practically effective, and, until it should be raised by an actual driving away by the enemy, it was not open to a neutral trader to ask whether, as against a possible superiority of the enemy's fleet, it was or was not effective in a military sense."

<sup>26</sup> "There has been a recent tendency to extend widely the list of articles to be treated as contraband; and it is probable that, if the belligerents themselves are to determine at the beginning of a war what shall be contraband, this tendency will continue until the list of contraband is made to include a large proportion of all the articles which are the subject of commerce, upon the ground that they will be useful to the enemy. When this result is reached, especially if the doctrine of continuous voyages is applied at the same time, the doctrine that free ships make free goods and the doctrine that blockades in order to be binding must be effective, as well as any rule giving immunity to the property of belligerents at sea, will be deprived of a large part of their effect, and we shall find ourselves going backward instead of forward in the effort to prevent every war from becoming universally disastrous. The exception of contraband of war in the Declaration of Paris will be so expanded as to very largely destroy the effect of the declaration. On the other hand, resistance to this tendency toward the expansion of the list of contraband ought not to be left to the neutrals affected by it at the very moment when war exists, because that is the process by which neutrals become themselves involved in war. You should do all in your power to bring about an agreement upon what is to constitute contraband; and it is very desirable that the list should be limited as narrowly as possible." Elihu Root, Secretary of State, to the American Delegates to the Hague Conference of 1907. *Foreign Relations of the United States*, 1907, pt. 2, p. 1138.

"The distinction—more specious than real—between absolute and conditional contraband practically disappeared in the Great War by the adoption of the practice of considering goods of conditional contraband either to be subject to State control in the enemy country, or else bound for a port of naval or military equipment or a base of supply, all enemy ports being of this character." C. J. Colombos, "Cargoes in the Prize Courts of Great Britain, France, Italy and Germany," *The Journal of Comparative Legislation and International Law*, 3d series, vol. III, part IV, p. 286 (October, 1921).

declared that there should be no question thereupon, nor upon any Goods, not enumerat in an Act of Council, produced, all which are bellicus Instruments and Furniture, and hath nothing of Victual; and albeit Hemp be Prohibit by that Act, and commonly counted Counterband Goods; yet the quantity Deponed was only sixteen Stones, which is an unconsiderable quantity, and necessar for Calfing the Ship and Sowing the Sails, 2ly, The Pursuer produced the Duke of York his Pass, Warranting this Ship to come from Bergen, and therefore she could not have been taken in her return by any Privateer. 3ly, Whatever might have been alleadged, if the ship had been taken, having un-free Goods in her, there is neither Law nor Custom to sease upon the Ship in her return, when these goods are not in her, for the Ship might have been sold to another, then he that did the wrong; and it cannot appear whether the return was made out of the price of the former Fraught, and though it were, it might be of a hundreth times more value. And albeit such seasures in return were allowable, yet they could only be sustained when it is evident, at the time of the Seasure at Sea, that the Counterband Goods had been in the Ship that Voyage, either by Bills of Loading, Charter parties, or other Writs taken in the Ship, or by the Oaths, or Acknowledgements of the Company, otherwise upon that pretence Freedom of Commerce would be altogether stopped, seing every Ship might be brought in, that they may be tryed by the Admiral, whether or. not, they had in Counterband Goods that Voyage. 4ly, These Strangers could not be in culpa before the Indiction of the War could come to their Ears, but the Indiction of War, was by the Kings manifesto of the Date the ninteen of September, 1666. and this Ship Loosed from Lubeck the 24. of September, within five days after, and so could not possibly know the Indiction, and they Trading, bona fide, as they were formerly accustomed, cannot be seased as injuring the King, in assisting his Enemies, and they did, nor could not know they were such. It was answered for the Defender, that he had walked exactly according to his Commission, bearing expressly all kind of Grain to be Counterband Goods, and being impowered to sease upon any Ship in return, that had carried in Counterband Goods, and that it was in the Kings power leges imponere bello, and that Victual is Counterband Goods it is evident, not only because it is the first necessary in War, especially for Victualling of Ships, Norway being a barren Countrey that hath little Grain of its own, and produced a Treaty betwixt the King, and the Crown of Sweden, wherein the Swede hath a liberty to carry Counterband Goods; bearing expressly in the Latin Annona, in the Dutch Proviant, which shows, what Goods are accounted Counterband Goods, not only by the King, but other Nations. and for this Seasure in the return, it is not only warranted by the Commission, but upon evident Reason, because the Kings Allies have free Trade, both with Him, and his Enemies, so that they partake not with his Enemies

against Him, by furnishing them Instruments, or Furniture of War; and any privat Party transgressing the same, might, de rigore juris, be seased upon as an Enemie. and it is favour and benignity, that the seasure is allowed only in that very Voyage, in which the wrong is done. As to the Duke of Yorks Passe, Scotland being a free Kingdom, and the Duke not Admiral of Scotland, his Passe, or passing from any Delinquents, can only be Operative in England; and that which is produced is only an Extract out of the Admiralty Court, bearing that such a Ship was Cognosced to be a Lubeck Ship, and so that she might freely passe, which cannot import the Dukes knowledge, much lesse his passing frae her carrying of Counterband Goods, as to the pretence of Trading, bona fide, and the ignorance of the War, no respect ought to be had to the alleadgeance, because the War was begun, and flagrant long before the Lousing of the Ship, and there is no necessity of Manifesto's to indict War, but Acts of Hostility and publick fame of a War, are sufficient to hinder Allies of either Parties, or Neuters to assist against their friends: and here its offered to be proven, that six Moneths before this Ship Loused, many Commissions were granted against the Danes, Prizes taken, and the Kings Subjects taken by the Danes, and declared Pryze at Bergen, upon the account of the War, which must be presumed to be known by the Pursuer: and the City of Lubeck being a Hanse Town of Trade, which keeps Intercourse with London, and other Towns of Trade: and as to the Act of Council, permitting the Kings subjects to Trade, even in Corn with his Enemies, it is a special Indulgence in Favours of England only, and could not be effectual as to Scotland, and much lesse to Strangers.

The Pursuer answered, that there Was nothing alleadged to show by Law or custom, that Victual is Counterband Goods, unlesse it were carried in to an Enemy for Relieving a Besieged place, but not when it is but in common Commerce, and if the Lubeckers be hindered to Trade in Corn, or the like, being the only Growth of their Country, their Trade is altogether marred, contrary to the Kings Interest and Intention, who has written to the Emperour most favorably in behalf of the Hanse Towns, for the freedom of their Trade, and acknowledges them his good Allies, and not meerly Neuters, which Letter is produced, neither is the palpable inconveniencè answered, if Privateers may bring in all the Ships, whether they carried Counterband Goods in that Voyage, though they find none in them, neither is there anything alleadged sufficient to instruct, that the Pursuers knew, or were obliged to know of the War betwixt the King and Denmark, before they Loused from Lubeck for any Acts of Hostility, before the solemn Indiction produced, were such Deeds as the Pursuers were not obliged to notice, for the taking and declaring of Prizes doth not include Enimity or War, but may be for reparation of privat injuries without intention to make an open War, although a Pryze of the King of

Britains Subjects had been declared at Buirran, it does not infer, that Lubeck being a free State, at so far distance, behoved to know the same; much lesse, that thereby there was a War betwixt the King and Denmark.

The Lords having considered the whole Debate, were of different opinions, whether the Victual could be called Counterband Goods simply, or only when imported for relieving of Sieges, or for the like War-like use, and whether Ships could be seised in their return, not having actually Counterband Goods in, but especially whether they could be seised without evidence at the time of the seisure at Sea, that in that Voyage they had in Counterband Goods, but they did only Determine the first Reason, and found it relevant, to infer that the Lubeckers was in bona fide to continue the Commerce, having Loused within so few days of the Kings Manifesto; and that no other Act of Hostility before, were to be presumed to have come to the knowledge of Lubeck, or that thereby they were obliged to know, that there was an actual War, unless these Strangers' knowledge were instructed by their own Oaths, or that it was the common Fame notour at Lubeck before they Loused, that there was War betwixt the King and Denmark, and the Defenders offering to prove the same.

The Lords granted Commission to the Kings Resident at Hamburg to receive Witnesses above exception, and in the mean time, ordains the Strangers Ship and Goods to be inventared, and Estimate, and delivered again to the Strangers. Upon Caution to make the same or price forthcoming, in case the Defender prov'd, and prevail'd, and with the burden of the Strangers damage and expences, if they betook themselves to this manner of Probation, and not to the Oaths of the Strangers who were present, reserving to the Lords the remanent Points to be Decided, if the Strangers knowledge of the War were known.

In this Processe the Lords found also that competent, and emitted before the Admiral, could not operat against thir Strangers, qui utuntur communi jure gentium.

#### THE HAABET.<sup>27</sup>

(High Court of Admiralty, 1800. 2 O. Rob. 174.)

Sir W. Scott.<sup>28</sup> This is a question on a report of the registrar and merchants respecting an allowance of insurance on a cargo of corn, seized and brought into this country. The cargo was decreed to be restored, and the registrar and merchants were directed to make a report on the value due to the claimant; such reports are in their nature partly legal and partly mercantile. It is a report proceeding

<sup>27</sup> Affirmed on appeal August 10, 1803.

<sup>28</sup> The statement of facts and part of the opinion are omitted.

from persons qualified, in both these respects, to form a sound judgment on the subject before them; one of them being, from his connection with courts of justice, supposed capable of forming his own opinion, and of assisting his associates on all questions of law, in the first instance subject to the inspection and correction of the court, whilst the other part of this domestic forum, as I may call it, consists of persons acquainted with trade, and exercising their judgment on matters relative to commerce. It is from the report of a commission so constituted, that the question is now brought before the court on a subject partly legal and partly mercantile. \* \* \*

The question is, Whether there is any reasonable ground for me to pronounce that the registrar and merchants have disallowed a just demand, in disallowing a charge of insurance which had not been made. It has been argued that this charge ought to have been allowed, because it is usually so allowed in the dealings of merchants with each other. I am not clear that this is a necessary consequence, for it is surely no certain rule that in all cases where a cargo is taken *jure belli* but for the mere purpose of preëmption, that it is to receive a price calculated exactly in the same manner, and amounting precisely to the same value, as it would have done, if it had arrived at its port of destination in the ordinary course of trade.

The right of taking possession of cargoes of this description, "commeatus," or provisions, going to the enemy's ports, is no peculiar claim of this country; it belongs generally to belligerent nations. The ancient practice of Europe, or at least of several maritime states of Europe, was to confiscate them entirely; a century has not elapsed since this claim has been asserted by some of them. A more mitigated practice has prevailed in later times, of holding such cargoes subject only to a right of preëmption, that is, to a right of purchase upon a reasonable compensation, to the individual whose property is thus diverted. I have never understood that, on the side of the belligerent, this claim goes beyond the case of cargoes avowedly bound to the enemy's ports, or suspected, on just grounds, to have a concealed destination of that kind; or that, on the side of the neutral, the same exact compensation is to be expected which he might have demanded from the enemy in his own port. The enemy may be distressed by famine, and may be driven, by his necessities, to pay a famine price for the commodity if it gets there; it does not follow that acting upon my rights of war in intercepting such supplies, I am under the obligation of paying that price of distress. It is a mitigated exercise of war on which my purchase is made, and no rule has established, that such a purchase shall be regulated exactly upon the same terms of profit which would have followed the adventure, if no such exercise of war had intervened; it is a reasonable indemnification and a fair profit on the commodity that is due, reference being had to the original price actually paid by the exporter, and the expenses which he has incurred. As to what is to

be deemed a reasonable indemnification and profit, I hope and trust that this country will never be found backward in giving a liberal interpretation to these terms. But certainly the capturing nation does not always take these cargoes on the same terms on which an enemy would be content to purchase them; much less are cases of this kind to be considered as cases of costs and damages, in which all loss of possible profit is to be laid upon unjust captors, for these are not unjust captures, but authorized exercises of the rights of war.

Two or three considerations have been urged, which may, with all propriety, be dismissed. One is, that it was understood between the King's government and the parties, that this charge should be allowed. Certainly if it were made out by any credible proof, that the faith of government had been in the slightest manner pledged to such an understanding, there is no principle which this court would hold more sacred, than that the faith of government should be held inviolate in transactions of this kind; but no sort of proof is offered of this, and the fact has in no way come to my knowledge. It is said, likewise, that in the cases of this kind which occurred last war, and which were then settled by the navy board, the charge of insurance was allowed, but the policy of insurance was never called for. How this practice came to prevail there, whether under a notion that the insurances had been really made whenever they were charged, whether under any order of government, or how otherwise, I am not informed. The persons who had to settle those accounts were not mercantile men, and might be led by the charge to suppose that it had actually been incurred. Under whatever circumstances such a practice grew up, if it did obtain, it is no binding rule upon the registrar and merchants here. It might be simple mistake, and at best, it is no deciding authority.

I have already said that the expected payment at the port of delivery, is not the necessary measure of compensation at the port of the belligerent. It is not so with reference to any constituent of price. With respect to insurance considered as such, it would be peculiarly improper. It is reasonably to be charged at the port of delivery, although it has never been paid, because the merchant has stood his own risk, and has purchased the insurance at the expense of his own danger. But is that the case where the voyage has been interrupted almost in its commencement, where the cargo has been carried into a neighboring port? In the present case, the voyage was from Altona to Cadiz, from the north to the south of Europe, and the cargo is seized upon its entrance into the British Channel very soon after quitting its port. Most of the cargoes taken have a similar destination, and are taken under similar circumstances. What pretence is there to say that all risks of the voyage have been incurred? The utmost that could be claimed is an insurance *pro rata itineris peracti*, amounting to a very small proportion of the whole, hardly deserving a particular consideration. As to what is said, that in the case of capture of ships, you allow the full

freight of the whole voyage; that allowance is made on another account; you take the ship in that case on account, not of itself, but of its cargo. You interrupt its occupation which was legal and innocent, and it is therefore not unjust to allow it the benefit of its original contract, which you alone have prevented from being carried into execution. Very different is the consideration of risk respecting a cargo which has never been incurred, and of a payment which is due only on the event of that risk having been actually incurred, no contract subsisting, and the cargo being, in its own nature, liable to this species of interception.

Upon the whole, I see no sufficient reason to pronounce that the registrar and merchants have adopted a wrong measure of value in disallowing the charge of insurance. They have allowed what, upon their own experience, they pronounce to be a reasonable indemnification and profit, and I do not understand that the sufficiency of this indemnification and profit is impeached, on any other ground, than that an insurance would have been added in the ordinary course of a mercantile account, if the cargo had reached its intended destination. Being of opinion that the ordinary terms of a mercantile account, to be settled on the completion of the voyage, do not furnish, (all circumstances being duly weighed,) the necessary or just measure of value to be applied in transactions of this kind, I do not find myself enabled to sustain the objection. If, as it has been repeatedly urged, an understanding to a different effect has subsisted between the king's government and the parties, there can be no doubt that on their resort to a superior tribunal, better acquainted with any communications that may have passed upon the subject, they will have the full benefit of any such engagement.

Report confirmed.<sup>29</sup>

<sup>29</sup> "In strictness," says Hall (Int. Law, 690, 691 [4th Ed., 1895]), "every article which is either necessarily contraband, or which has become so from the special circumstances of the war, is liable to confiscation; but it is usual for those nations who vary their list of contraband to subject the latter class to pre-emption only, which by the English practice means purchase of the merchandise at its mercantile value, together with a reasonable profit usually calculated at ten per cent on the amount. This mitigation of extreme belligerent privilege is also introduced in the case of products native to the exporting country, even when they are affected by an inseparable taint of contraband."

**In re Arbitration Between OSAKA SHOSEN KAISHA and  
Owners of Steamship PROMETHEUS.**

(Supreme Court of Hongkong, 1906. 2 Hongkong Law Reports, 207.)

**THE CHIEF JUSTICE.** This is a special case stated for the opinion of this court by the arbitrator acting under a submission to arbitration contained in a certain charter party made at Hongkong on the 10th of February, 1904, between Messrs. Sander, Wieler & Co., "agents for the steamship Prometheus, under Norwegian colours," on the one part, and "the Osaka Shosen Kaisha, Osaka, by their Hongkong Office, Charterers" on the other part, by which that ship was chartered to the Osaka Shosen Kaisha for six months subject to, inter alia, a special stipulation that she was not to carry any contraband of war. \* \* \*

The charter party was signed at Hongkong on the 10th of February, 1904, subsequent to the outbreak of hostilities between Russia and Japan. The fact that Russia and Japan were at war was unknown to the parties at the time they signed the charter party, but the charter party was made in anticipation of war, and the fact that war had broken out became known to the parties immediately after the charter party had been signed. The owners of the Prometheus are Norwegians, subjects of a power neutral in the war between Russia and Japan. The charterers, the Osaka Shosen Kaisha, a Japanese steamship company, are subjects of Japan, one of the belligerent powers. The Osaka Shosen Kaisha is a well-known company engaged prior to the outbreak of war in running a regular line of steamers carrying cargo and passengers from Japan to Formosa and back, calling at Japanese inter-ports each way, and carrying ordinarily and regularly as part of such cargo sugar, rice, and foodstuffs generally. The fact was known to Messrs. Sander, Wieler & Co. at the time of the negotiations for the charter of the Prometheus, and the Prometheus was chartered for the express purpose of being employed in that line, so running between Japan and Formosa, to replace certain steamers regularly theretofore so employed which had been taken up by the Japanese Government. \* \* \* On the 19th of March the master of the Prometheus received at Kobe a telegram from his owners directing him to "decline rice and provisions between Japanese ports" and further directing him to "try cancel" the charter party. The direction to decline to load rice and provisions was communicated by the master to the Osaka Shosen Kaisha. A correspondence ensued between the charterers, and the master, in which the charterers denied and the master asserted that rice, sugar and provisions generally were contraband of war, ending by the master declining to load "rice, sugar and provisions" for carriage between Japanese ports unless an increased amount was paid for the hire of the ship, alleging as the ground for this refusal that pro-

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visions were contraband of war, which, by an express term of the charter party, was not to be loaded on his ship. \* \* \*

In consequence of the refusal of the master to load this cargo the whole purpose of the charter party was frustrated. The intended voyage for which the Prometheus was loading at the time was on the regular line between Kobe and Formosa, and the ports to which it was proposed to send the Prometheus were not ports of military or naval equipment, but ordinary commercial ports. \* \* \* Of the remaining clauses of the charter party the 37th only seems to bear upon the matters in dispute between the charterers and the owners of the Prometheus.

That clause is as follows: "In case of war steamer not to be directed to any blockaded port nor to carry any contraband of war." In the "London Gazette" of the 1st March, 1904, a notification from his Majesty's Secretary of State for Foreign Affairs, dated 29th February, 1904, appeared, the material portion of which is as follows: "His Majesty's Secretary of State for Foreign Affairs has received the following telegram from his Majesty's Ambassador at St. Petersburg—"Regulation affecting neutrals to be applied by Russia during war with Japan, published to-day. Declared Contraband of War." Here follows a detailed statement of specific articles, which are to be considered unconditional contraband of war, and the declaration concludes as follows: "Generally all objects intended for war by sea or land including rice, provisions," etc. \* \* \*

It is on the above briefly summarized facts that the arbitrator has addressed to me his questions, three in number, as follows: Firstly, whether under the terms of Russia's declaration the cargo intended for shipment, from Yokohama and Kobe to Kagoshima, Okinawa, Anping and Takao by the Prometheus was contraband? If so, whether Russia's declaration in this respect is binding upon neutrals, or whether it is ultra vires. \* \* \*

Now, bearing that rule in mind I proceed to determine what is the primary sense of the expression "contraband of war," and to enquire whether there is anything in the charter party to warrant me in setting aside the primary meaning of that expression, and in attaching a peculiar meaning thereto. \* \* \* The expression "contraband of war," as used in the agreement between the Osaka Shosen Kaisha and the owners of the Prometheus, must, therefore, be given the primary sense attached thereto at the time of the signing of the charter party, and not any other and particular meaning which it might suit either party in the light of subsequent events to attach thereto; for I cannot see anything in the document itself which would justify me in depriving that expression of its primary meaning. The expression contraband of war only appears once in the charter party, and its meaning is in no way affected by anything in the context. What then is the meaning of expression "contraband of war" in its primary sense? Mr.

Wharton, in his "Law Lexicon" defines contraband of war as meaning in its primary sense that which according to international law cannot be supplied to a hostile belligerent except at the risk of seizure and condemnation by the aggrieved belligerent. That seems to me a sound definition if you understand the word "risk" to mean that risk which is contemplated and recognized by the law of nations. Broadly stated then "contraband of war" is that which is so considered by the law of nations. The question which naturally follows is, "What do you mean by the law of nations?" I answer that the law of nations is that system of rules respecting belligerent and neutral rights established by consent among the civilised and commercial nations of the world, partly written and partly arising out of custom and rendered stable by judicial decisions from time to time.

In my opinion, the expression contraband of war has a well-known and accepted meaning among the civilised commercial powers of the world. If that were not so we should not, as we do, find that expression used without definition in solemn treaties between the powers. The expression "contraband of war" is used without any definition of its meaning in the Treaty of Paris of the 16th April, 1856. The inference from that fact is, to my mind, irresistible that there was no definition needed, because the expression had the same definite meaning in the minds of all the plenipotentiaries of the Powers parties to that treaty.

The Treaty of Paris, to which Russia is a party, and to which she still adheres, commences with the following preamble: "Considering that maritime law in time of war has long been the subject of deplorable disputes; that uncertainty of the law and of the duties in such a matter gives rise to difference of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts; that it is consequently advantageous to establish a uniform doctrine on so important a point; that the plenipotentiaries assembled in congress at Paris cannot better respond to the intention by which their Governments are animated than by seeking to introduce into international relations fixed principles in this respect." Then immediately follows this declaration:

"The above-mentioned plenipotentiaries being duly authorised resolved to concert among themselves as to the means of attaining this object; and having come to an agreement have adopted the following solemn declaration:

"(1) Privateering is, and remains abolished.

"(2) The neutral flag covers enemy's goods, with the exception of contraband of war.

"(3) Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.

"(4) Blockades in order to be binding, must be effective, that is to say maintained by a force sufficient really to prevent access to the coast of the enemy."

I draw special attention to the fact that the expression "contraband of war" is twice used in this declaration without being in any way defined. This declaration was designed to give effect to the opinion of the plenipotentiaries expressed in the preamble, viz. that it was to the advantage of the civilized world to establish a uniform doctrine on the subject of maritime law in time of war; and with that object in view to introduce certain "fixed principles." At the same sitting of the plenipotentiaries the following resolution was adopted (Protocol No. 24):

"On the proposition of Count Walewski, and recognizing that it is for the general interest to maintain the indivisibility of the four principles mentioned in the declaration signed this day, the plenipotentiaries agree that the powers which shall have signed it, or which shall have acceded to it, cannot hereafter enter into any arrangement in regard to the application of the right of neutrals in time of war which does not at the same time rest on the four principles which are the object of the said declaration."

It will be observed that by this protocol the plenipotentiaries of Russia bind that power not thereafter to adopt any attitude towards neutrals in time of war which does not rest upon the four principles enunciated in the declaration. This protocol has an important bearing upon the contention at the bar that Russia as an independent sovereign state possesses, as a concomitant to the right to make war, the right to declare what shall or shall not be considered contraband of war.

I dwell here upon the fact that the expression "contraband of war" occurs twice in the declaration in the Treaty of Paris; that the expressions "privateering" and "blockade" occur each once; and that there is in that declaration no definition of the meaning of any of those expressions. Why was there this omission to define these expressions? Was it not because they each had in the minds of the plenipotentiaries of the powers a recognized meaning at the time when the treaty was signed? and because the expression "contraband of war" no more needed definition than the expressions "blockade" or "privateering" did? What then was the meaning which it must fairly be assumed the plenipotentiaries attached to the expression "contraband of war" as used by them in the Treaty of Paris? It seems to me that the plenipotentiaries had in their minds the meaning which at that time attached to the expression "contraband of war" resulting from the decisions of the courts of law of the nations of Europe and America; principally indeed the decisions in the English courts on cases arising during the Napoleonic War. What then is the result of those decisions? What meaning has been thereby attached to the expression "contraband of war"? The result has been to attach to that expression the following twofold meaning: (1) Absolute contraband of war—which includes everything useful for war only; (2) that which is conditional contraband of war—which includes all things which though useful

for both peace and war become contraband if destined for the purposes of war—excluding from the meaning of contraband of war such things as are useful for the purposes of peace only. “Provisions,” consequently, come within the definition of conditional contraband only, if and when destined for the enemy’s forces; otherwise they are excluded from the definition.

That is, in my opinion, the true meaning to be attached to the expression “contraband of war,” and that is the sense which, in my opinion, that expression bears on a true construction of the declaration of the plenipotentiaries who signed the Treaty of Paris of 1856. That is, in my opinion, the sense in which the parties to the charter of the ship *Prometheus* must be taken to have understood the expression “contraband of war” when they agreed by clause 37, that the ship *Prometheus* was not to “carry any contraband of war.” To construe that expression as meaning whatever might at any time, that is to say from time to time, be declared by Russia to be contraband, as the learned counsel for the owner contended I should, would be to import into the contract between the parties an element of uncertainty where none need exist. The contract was made in Hongkong, and therefore in the absence of evidence to the contrary which I could act upon the parties must be taken to have used the expression “contraband of war” in the sense in which it is understood in British courts of law, which is its sense in international law. It cannot be successfully contended that provisions would be regarded by British courts of law as unconditional contraband of war, or that there is any likelihood that they will ever take that view. Had this court been asked at any time between the signing of the charter party on the 10th February 1904 and the issuing of the Russian declaration to construe the meaning of the words contraband of war it cannot be doubted that it would have excluded provisions from the category of unconditional contraband.

It is contended, however, that the court ought to place a different meaning on that expression, after, and in view of, the terms of the Russian declaration, inasmuch as Russia being a sovereign independent power has a prerogative right to declare whatever she pleases to be contraband of war in any war in which she may be engaged, and that the effect of the Russian declaration having been to make provisions unconditionally contraband the master of the ship *Prometheus* was excused from loading them on his ship. In this contention I am unable to concur. In the view which I take of the effect of the declaration under the Treaty of Paris of 1856, and of the undertaking by the several powers signatory thereto, given in the protocol No. 24, not to depart from the principles enunciated in the declaration, I think that Russia was not at liberty to declare provisions unconditional contraband of war; and that her declaration in that respect could not affect the contract between the parties to this charter party, even supposing it could be held that contraband of war means, as used in the charter party,

whatever Russia may consider as such: for Russia having been a party to the solemn declaration of "fixed principles" under the Treaty of Paris was not at liberty to disregard those principles and was therefore bound to recognize, and act upon, the generally accepted rule of international law that provisions are not unconditional contraband. In this view I am supported by the decision in the case of *Pollard v. Bell*, 8 T. R. 434, where it was laid down that it is not competent to one nation to add to the law of nations by its own arbitrary ordinances without the concurrence of other nations. \* \* \*

In *Pollard v. Bell*, 8 T. R. 434, decided in 1800, a French Prize Court, France then being at war with Great Britain, and Denmark being neutral, condemned a Danish ship on the ground that she was at the time of capture carrying a Scotchman as supercargo in violation of an ordinance by which it was declared that all ships should be confiscated "wherever there shall be found on board a supercargo, merchant, commissary, or chief officer being an enemy." In dealing with the ground assigned by the French court condemning the ship Chief Justice Lord Kenyon said: "This is one of the numberless questions that have arisen in consequence of the extraordinary sentences of condemnation passed by the courts of admiralty in France during this war \* \* \* to a question asked in the course of the argument, what are the rules on which the courts of admiralty profess to proceed, I answer, the law of nations, and such treaties as particular states have agreed shall be engrafted on that law. It was said by the defendant's counsel that an ordinance has the same force as a treaty, but without stopping to enlarge on the difference between them it is sufficient to say that the one is a contract made by the contracting parties and that the other is an ex parte ordinance made by one nation only, to which no other state is a party; and I concur with Lord Mansfield in opinion that it is not competent to one nation to add to the law of nations by its own arbitrary ordinances without the concurrence of other nations." \* \* \*

Applying the principle of that case to the present case, I say that the Russian declaration including provisions among the list of articles absolutely contraband and as departing from the recognised custom of nations had no binding effect upon other nations, and consequently could not excuse the nonperformance of the contract under the charter party between the *Osaka Shosen Kaisha* and the owners of the steamship *Prometheus*. It was contended on behalf of the owners of the *Prometheus* that the term "law" as applied to this recognised system of principles and rules known as international law is an inexact expression, that there is, in other words, no such thing as international law; that there can be no such law binding upon all nations inasmuch as there is no sanction for such law, that is to say that there is no means by which obedience to such law can be imposed upon any given nation

refusing obedience thereto. I do not concur in that contention. In my opinion a law may be established and become international, that is to say binding upon all nations, by the agreement of such nations to be bound thereby, although it may be impossible to enforce obedience thereto by any given nation party to the agreement. The resistance of a nation to a law to which it has agreed does not derogate from the authority of the law because that resistance cannot, perhaps, be overcome. Such resistance merely makes the resisting nation a breaker of the law to which it has given its adherence, but it leaves the law, to the establishment of which the resisting nation was a party, still subsisting. Could it be successfully contended that because any given person or body of persons possessed for the time being power to resist an established municipal law such law had no existence? The answer to such a contention would be that the law still existed, though it might not for the time being be possible to enforce obedience to it. My answer to the first question put to me by the arbitrator must therefore, for the reasons I have given, be (1) that the cargo intended to be loaded by the charterers on the steamship *Prometheus* was not contraband of war within the meaning of the charter party; (2) that the Russian declaration constituting provisions unconditional contraband was not binding upon neutrals who were no party thereto, and consequently has no bearing upon the construction of the charter party between the *Osaka Shosen Kaisha* and the owners of the ship *Prometheus*. \* \* \*

The special case will now be remitted to the arbitrator, who will guide himself in making his award by the answers which I have given to the questions put by him to me.

### THE HAKAN.

(Privy Council, 1917. L. R. [1918] App. Cas. 148.)

The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON.<sup>20</sup> The Swedish steamship *Hakan*, the subject of this appeal, was captured at sea by H. M. S. *Nonsuch* on April 4, 1916, having sailed the same day from Haugesund in Norway on a voyage to Lübeck in Germany with a cargo of salted herrings. Foodstuffs had as early as August 4, 1914, been declared to be conditional contraband. The writ in the present proceedings claimed condemnation of both ship and cargo, the former on the ground that it was carrying contraband goods and the latter on the ground that it consisted of contraband goods.

It should be observed that the cargo, being on a neutral ship, was,

<sup>20</sup> The statement of facts and parts of the opinion are omitted.

even if it belonged to enemies, exempt from capture unless it consisted of contraband goods. See the Declaration of Paris.

The cargo owners did not appear or make any claim in the action, although, according to the usual practice of the Prize Court, even enemies may appear and be heard in defence of their rights under an international agreement. The question whether the goods were contraband was, however, fully argued by counsel for the owners of the ship, a Swedish firm carrying on business at Gothenburg. The President condemned the cargo as contraband. He also condemned the ship for carrying contraband. The owners of the ship have now appealed to his Majesty in Council. Under these circumstances the first question to be decided is whether the cargo was rightly condemned as contraband, for if it was not there could be no case against the ship.

In their Lordships' opinion, goods which are conditional contraband can be properly condemned whenever the court is of opinion, under all the circumstances brought to its knowledge, that they were probably intended to be applied for warlike purposes: *The Jonge Margaretha*, 1 C. Rob. 189. The fact alone that the goods in question are on the way to an enemy base of naval or military equipment or supply would justify an inference as to their probable application for warlike purposes. But the character of the place of destination is not the only circumstance from which this inference can be drawn. All the known facts have to be taken into account. The fact that the goods are consigned to the enemy government, and not to a private individual, would be material. The same would be the case if, though the goods are consigned to a private individual, such individual is in substance or in fact the agent or representative of the enemy Government.

In the present case Lübeck, the port of destination of the goods, is undoubtedly a port used largely for the importation into Germany of goods from Norway and Sweden; but it does not appear whether it is used exclusively or at all as a base of naval or military equipment. On the other hand, it is quite certain that the persons to whom the goods were consigned at Lübeck were bound forthwith to hand them over to the Central Purchasing Company, of Berlin, a company appointed by the German government to act under the direction of the Imperial Chancellor for purposes connected with the control of the food supplies rendered necessary by the war. The proper inference seems to be that the goods in question are in effect goods requisitioned by the government for the purposes of the war. It may be quite true that their ultimate application, had they escaped capture, would have been to feed civilians, and not the naval or military forces of Germany; but the general scarcity of food in Germany had made the victualling of the civil population a war problem. Even if the military or naval forces of Germany are never supplied with salted herrings, their rations of bread or meat may well be increased by reason of the possibility of

supplying salted herrings to the civil population. Under these circumstances, the inference is almost irresistible that the goods were intended to be applied for warlike purposes, and, this being so, their Lordships are of opinion that the goods were rightly condemned.

The second question their Lordships have to determine relates to the condemnation of the ship for carrying the goods in question. \* \* \*

It seems quite clear that at one time in our history the mere fact that a neutral ship was carrying contraband was considered to justify its condemnation, but this rule was subsequently modified. Lord Stowell deals with the matter in *The Neutralitet* (1801) 3 C. Rob. 295. "The modern rule of the law of nations is, certainly," he says, "that the ship shall not be subject to condemnation for carrying contraband articles. The ancient practice was otherwise; and it cannot be denied that it was perfectly defensible on every principle of justice. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent. The policy of modern times has, however, introduced a relaxation on this point; and the general rule now is, that the vessel does not become confiscable for that act. But this rule is liable to exceptions:—where a ship belongs to the owner of the cargo, or where the ship is going on such service, under a false destination or false papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient one."

It is to be observed that Lord Stowell does not say that the particular cases he refers to are the only exceptions to the modern rule. On the contrary, his actual decision in *The Neutralitet*, 3 C. Rob. 295, creates a third exception. It should be observed, too, that in a later part of his judgment he states the reason for the modification of the ancient rule to be the supposition that noxious or doubtful articles might be carried without the personal knowledge of the owner of the ship. He held in the case before him that this ground for the modification of the rule entirely failed, so that the ancient rule applied. The reasoning is sound. For if the ancient rule was modified because of the possible want of knowledge on the part of the shipowner, it is perfectly logical to treat actual knowledge on the part of the shipowner as a good ground for excepting any particular case from the modern rule. Knowledge will also explain the two main exceptions to which Lord Stowell refers. If the shipowner also owns the contraband cargo, he must have this knowledge; and if he sails under a false destination or with false papers, it is quite legitimate to infer this knowledge from his conduct. In his earlier decision in *The Ringende Jacob* (1798) 1 C. Rob. 89, Lord Stowell had stated the modern rule to be that the carrying of contraband is attended only with loss of freight and expenses, except where the ship belongs to the owner of the contraband



cargo or where the simple misconduct of carrying a contraband cargo has been connected with other malignant and aggravating circumstances. If by malignant and aggravating circumstances Lord Stowell meant only circumstances from which knowledge of the character of the cargo might be properly inferred, the rule thus stated does not differ from that laid down in the subsequent case of *The Neutralitet*, 3 C. Rob. 295. But the words used have by some writers been taken as indicating that, in Lord Stowell's opinion, besides knowledge of the character of the cargo, there must be on the part of the shipowner some intention or conduct to which the epithets "malignant or aggravating" can be applied in a real as opposed to a rhetorical sense. Any such hypothesis seems, however, to vitiate the reasoning of Lord Stowell in *The Neutralitet*, 3 C. Rob. 295. Sailing under a false destination or false papers may possibly be called malignant or aggravating. There is not only the knowledge of guilt, but an attempt to evade its consequences. But in the case of the shipowner who also owns the contraband on board his ship it is difficult to see where the malignancy or aggravation lies, if it be not in the knowledge of the character of the goods on board. If it be malignant or aggravating on the part of the owner of the goods to consign them to the enemy, it must be equally malignant and aggravating on the part of the shipowner knowingly to aid in the transaction.

Nevertheless, it was this construction of Lord Stowell's words in *The Ringende Jacob*, 1 C. Rob. 89, rather than the reasoning on which his decision in *The Neutralitet*, 3 C. Rob. 295, case was based that was adopted by the Supreme Court of the United States in the case of *The Bermuda* (1865) 3 Wall. 514, 555, 18 L. Ed. 200. In that case Chase, C. J., in delivering the opinion of the Court, says as to the relaxation of the ancient rule: "It is founded on the presumption that the contraband shipment was made without the consent of the owner given in fraud of belligerent rights, or, at least, without intent on his part to take hostile part against the country of the captors; and it must be recognized and enforced in all cases where that presumption is not repelled by proof. The rule, however, requires good faith on the part of the neutral, and does not protect the ship where good faith is wanting. \* \* \* Mere consent to transportation of contraband will not always or usually be taken to be a violation of good faith. There must be circumstances of aggravation. The nature of the contraband articles and their importance to the belligerent, and the general features of the transaction, must be taken into consideration in determining whether the neutral owner intended or did not intend, by consenting to the transportation, to mix in the war."

Passing from the English and American decisions to the views which were at the commencement of the present hostilities entertained by the prize courts or jurists of other nations, we find what at first

sight appears to be considerable divergence of opinion. If, however, the true principle be that knowledge of the character of the cargo is a sufficient ground for depriving a shipowner of the benefit of the modern rule, this divergence is more apparent than real. It reduces itself to a difference of opinion as to the circumstances under which the knowledge may be inferred, and if it be remembered that knowledge on the part of the shipowner of the character of the cargo must be largely a matter of inference from a great variety of circumstances, such difference of opinion is readily intelligible. \* \* \*

Their Lordships consider that in this state of the authorities they ought to hold that knowledge of the character of the goods on the part of the owner of the ship is sufficient to justify the condemnation of the ship—at any rate, where the goods in question constitute a substantial part of the whole cargo.

In the light of what has been said as to the rule of international law their Lordships will now proceed to consider the special facts of this case. The owners of the ship are a Swedish firm carrying on business at Gothenburg. On January 8, 1916, they chartered the ship to a German firm of fish dealers for a period of six weeks from the time when the vessel was placed at charterers' disposal, with power for the charterers to prolong this period up to May 16, 1916. The voyages undertaken by the charterers were to be from Scandinavian to German Baltic ports. It must have been quite evident to the owners that the ship would be used for the importation of fish into Germany. They must also have known that foodstuffs were conditional contraband. It is almost inconceivable that they did not also know of the food difficulties in Germany and of the manner in which the German government had in effect requisitioned salted herrings to meet the exigencies of the war. They had an opportunity in the court below of establishing their want of knowledge if it existed, but they did not attempt to do so. The inference that they did in fact know that the vessel would be used for the purpose for which it was used is irresistible. If knowledge of the character of the goods be the true criterion as to confiscability, the vessel was rightly condemned.

Even on the hypothesis that something beyond mere knowledge of the character of the cargo is required, something which may be called "malignant or aggravating" within the principles of *The Ringende Jacob*, 1 C. Rob. 89, or *The Bermuda*, 3 Wall. 514, 18 L. Ed. 200, decisions, that something clearly exists in the present case. A shipowner who lets his ship on time charter to an enemy dealer in conditional contraband for the purposes of his trade at a time when the conditional contraband is vitally necessary to and has been requisitioned by the enemy government for the purpose of the war is, in their Lordships opinion, deliberately "taking hostile part against the country of the captors" and "mixing in the war" within the meaning of those ex-

pressions as used by Chase, C. J., in *The Bermuda*, 3 Wall. 514, 18 L. Ed. 200.

In their Lordships' opinion, the appeal fails and should be dismissed with costs.<sup>21</sup>

### THE COMMERCE.

(Supreme Court of the United States, 1816. 1 Wheat. 382, 4 L. Ed. 116.)

Appeal from the Circuit Court for the District of Massachusetts. This was the case of a Swedish vessel captured on the 16th of April, 1814, by the private armed schooner *Lawrence*, on a voyage from Limerick, in Ireland, to Bilboa, in Spain. The cargo consisted of barley and oats, the property of British subjects, the exportation of which is generally prohibited by the British government; and, as well by the official papers of the custom-house, as by the private letters of the shippers, it appeared to have been shipped under the special permission of the government, for the sole use of his Britannic Majesty's forces then in Spain. Bonds were accordingly given for the fulfilment of this object. At the hearing in the District Court of Maine, the cargo was condemned as enemy's property, and the vessel restored, with an allowance, among other things, of the freight for the voyage, according to the stipulation of the charter party. The captors appealed from so much of the sentence as decreed freight to the neutral ship; and, upon the appeal to the circuit court of Massachusetts, the decree, as to freight, was reversed, and from this last sentence an appeal was prosecuted to this court. \* \* \*

<sup>21</sup> In *The Zamora* No. 2, L. R. [1921] 1 App. Cas. 801, 804, 805 (1921), Lord Sumner, speaking for the Privy Council, said:

"It is clearly settled that a shipowner who carries an entire cargo of contraband knowingly forfeits his ship in prize. What constitutes knowledge and what suffices as evidence of it may be matters of difficulty. During part of the eighteenth century the rigorous doctrine still prevailed that any carriage of contraband involved as a penalty the confiscation of the carrying ship. By the end of that time, Sir William Scott records, in the *Ringende Jacob*, 1 C. Rob. 89 (1798), and in *The Neutralitet*, 3 C. Rob. 295 (1801), that the practice of the great powers had greatly relaxed that rule: \* \* \* Lord Parker of Waddington, in pronouncing their Lordships' judgment on appeal in *The Hakan*, A. C. 148, 155 (1918), pointed out that the common element, which unites the varying practices of different nations, is knowledge on the carriers' part of the character of the cargo carried, and that a presumption of knowledge, sometimes rebuttable and sometimes not, is the feature which makes relevant the proportion of the contraband cargo to the whole. Some countries attach to certain proportions a presumption of knowledge in all cases, irrespective of the extent to which the mind of the particular carrier or shipowner may consciously have been privy to the carriage of contraband. The English prize courts, at any rate, have long held that if a shipowner knowingly carries a cargo which is, in whole or in large part, contraband, he is liable to forfeit his ship. It accordingly becomes necessary to examine the facts of this case somewhat at length, for if they warrant the inference that the shipowners knew that they were carrying contraband, the decree of condemnation should be affirmed without further inquiry."

STORY, J., delivered the opinion of the court.<sup>32</sup>

The single point now in controversy in this cause is, whether the ship is entitled to the freight for the voyage. The general rule that the neutral carrier of enemy's property is entitled to his freight, is now too firmly established to admit of discussion. But to this rule there are many exceptions. If the neutral be guilty of fraudulent or unneutral conduct, or has interposed himself to assist the enemy in carrying on the war, he is justly deemed to have forfeited his title to freight. Hence, the carrying of contraband goods to the enemy; the engaging in the coasting or colonial trade of the enemy; the spoliation of papers, and the fraudulent suppression of enemy interests, have been held to affect the neutral with the forfeiture of freight, and in cases of a more flagrant character, such as carrying despatches or hostile military passengers, an engagement in the transport service of the enemy, and a breach of blockade, the penalty of confiscation of the vessel has also been inflicted.<sup>33</sup> By the modern law of nations, provisions are not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination.<sup>34</sup> If destined for the ordinary use of life in the enemy's country they are not, in general, contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband.<sup>35</sup> Another exception from being treated as contraband is, where the provisions are the growth of the neutral exporting country. But if they be the growth of the enemy's country, and more especially if the property of his subjects, and destined for enemy's use, there does not seem any good reason for the exemption; for, as Sir William Scott has observed, in such case the party has not only gone out of his way for the supply of the enemy, but he has assisted him by taking off his surplus commodities.<sup>36</sup>

But it is argued that the doctrine of contraband cannot apply to the present case, because the destination was to a neutral country; and it is certainly true that goods destined for the use of a neutral country can never be deemed contraband, whatever may be their character, or however well adapted to warlike purposes. But if such goods are destined for the direct and avowed use of the enemy's army or navy,

<sup>32</sup> Part of the opinion of Story, J., and the dissenting opinions of Marshall, C. J., and Livingston and Johnson, JJ., are omitted.

<sup>33</sup> *Bynk. Quaest. J. Pub. c. 14*; *The Sarah Christina*, 1 C. Rob. 237 (1799); *The Haase*, Id. 286 (1799); *The Emanuel*, Id. 296 (1799); *The Immanuel*, 2 C. Rob. 186 (1799); *The Atlas*, 3 C. Rob. 299 (1801); *The Rising Sun*, 2 C. Rob. 104 (1799); *The Madonna Del Burso*, 4 C. Rob. 169 (1802); *The Neutralitet*, 3 C. Rob. 295 (1801); *The Weelvaart Van Pillaw*, 2 C. Rob. 128 (1799); *The Friendship*, 6 C. Rob. 420 (1807).

<sup>34</sup> *The Jonge Margaretha*, 1 C. Rob. 189 (1799).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

we should be glad to see an authority which countenances this exemption from forfeiture, even though the property of a neutral. Suppose, in time of war, a British fleet were lying in a neutral port, would it be lawful for a neutral to carry provisions or munitions of war thither, avowedly for the exclusive supply of such fleet? Would it not be a direct interposition in the war, and an essential aid to the enemy in his hostile preparations? In such a case the goods, even if belonging to a neutral, would have had the taint of contraband in its most offensive character, on account of their destination; and the mere interposition of a neutral port would not protect them from forfeiture. Strictly speaking, however, this is not a question of contraband; for that can arise only when the property belongs to a neutral, and here the property belonged to an enemy, and, therefore, was liable, at all events, to condemnation. \* \* \*

On the whole, the court are of opinion that the voyage, in which this vessel was engaged, was illicit, and inconsistent with the duties of neutrality, and that it is a very lenient administration of justice to confine the penalty to a mere denial of freight.<sup>87</sup>

#### CARRINGTON et al. v. MERCHANTS' INS. CO.

(Supreme Court of the United States, 1834. 8 Pet. 495, 8 L. Ed. 1021.)

Mr. Justice STORY delivered the opinion of the court.<sup>88</sup> \* \* \*

This cause comes before the court upon a certificate of a division of opinion of the judges of the Circuit Court for the district of Massachusetts. Upon the trial of the cause upon the evidence, the parties propounded certain questions, upon which the Circuit Court (with the assent of the parties), certified a division of opinion, for the purpose of obtaining the final decision of this court in regard to them.

The first is, whether a seizure and detention, to come within the

<sup>87</sup> In the *Prins der Nederlanden*, L. R. [1921] 1 App. Cas. 754, 760 (1921), Lord Sumner, speaking for the Privy Council, said:

"The term 'penalty,' however, though often mentioned (e. g. in *The Commercen*, 1 Wheaton, 382, 394 (1816), is not in this connection really one, which implies that the carriage of contraband is attended with the usual incidents of the commission of an offence. Neutrals who carry contraband do not break the law of nations; they run a risk for adequate gain and, if they are caught, they take the consequences. If they know what they are doing, those consequences may be very serious; if they do not, they may get off merely with some inconvenience or delay. This must suffice them. Having done their best to aid one belligerent by carrying contraband for him, they cannot ask that the other shall pay the penalty for his own success in defeating the attempt by rewarding the neutral carrier as if his venture had succeeded. That would be to encourage the carrying of contraband, whereas it is a thing to be deterred. Nor should ignorance of what he is doing be a safeguard to the carrier. If he is to be deterred, it must be made worth his while to know, in order that he may prefer to abstain."

<sup>88</sup> The statement of facts and that part of the opinion dealing with "the fourth and fifth questions" are omitted.

exception of the policy relating to contraband and illicit trade, must be for a legal and justifiable cause. The question here propounded is not whether there must be a legal or justifiable cause for condemnation; but simply, whether there must not be such cause for the seizure and detention. And we are of opinion that the question ought to be answered in the affirmative. \* \* \*

The second question is, whether, assuming the other facts to be as stated and alleged above, and taking the authority of the seizing vessel to be such as the plaintiffs allege (that is to say, of an armed vessel fitted out and commissioned at Callao by Rodil), there was a legal and justifiable cause for the seizure of the General Carrington and her cargo. The third is precisely the same in terms, except taking the authority of the armed vessel to be such as the defendants allege (that is to say, to be an armed vessel sailing under the royal Spanish flag, and acting by the royal authority of Spain).

Both these questions present the same general point, whether there was, under the circumstances of the case, a legal and justifiable cause for the seizure and detention of the ship and her cargo. The facts material to be taken into consideration in ascertaining this point are, that the ship, when seized, had not landed all her outward cargo, but was still in the progress of the outward voyage originally designated by the owners; that she sailed on that voyage from Providence with contraband articles on board, belonging, with the other parts of the cargo, to the owners of the ship, with a false destination and false papers, which yet accompanied the vessel; that the contraband articles had been landed before the policy, which is a policy on time, designating no particular voyage, had attached; that the underwriters, though taking no risks within the exception, were not ignorant of the nature and objects of the voyage; and that the alleged cause of the seizure and detention was the trade in articles contraband of war by the landing of the powder and muskets already mentioned.

If by the principles of the law of nations there existed under these circumstances a right to seize and detain the ship and her remaining cargo, and to subject them to adjudication for a supposed forfeiture, notwithstanding the prior deposit of the contraband goods; then the question must be answered in the affirmative, that there was a legal and justifiable cause.

According to the modern law of nations, for there has been some relaxation in practice of the strictness of the ancient rules, the carriage of contraband goods to the enemy subjects them, if captured, in delicto, to the penalty of confiscation; but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty. The penalty is applied to the latter only when there has been some actual co-operation on their part in a meditated fraud upon the belligerents, by covering up the voyage under false papers and with a false destination. This is the

general doctrine when the capture is made in transitu, while the contraband goods are yet on board. But when the contraband goods have been deposited at the port of destination, and the subsequent voyage has thus been disconnected with the noxious articles, it has not been usual to apply the penalty to the ship or cargo upon the return voyage, although the latter may be the proceeds of the contraband. And the same rule would seem by analogy to apply to cases where the contraband articles have been deposited at an intermediate port on the outward voyage, and before it had terminated; although there is not any authority directly in point.

But in the highest prize courts of England, while the distinction between the outward and homeward voyage is admitted to govern, yet it is established that it exists only in favor of neutrals who conduct themselves with fairness and good faith in the arrangements of the voyage. If, with a view to practice a fraud upon the belligerent, and to escape from his acknowledged right of capture and detention, the voyage is disguised, and the vessel sails under false papers, and with a false destination, the mere deposit of the contraband in the course of the voyage is not allowed to purge away the guilt of the fraudulent conduct of the neutral. In the case of *The Franklin*, in 1801, 3 Rob. 217, Lord Stowell said, "I have deliberated upon this case and desire it to be considered as the settled rule of law received by this court, that the carriage of contraband with a false destination will make a condemnation of the ship, as well as the cargo." Shortly afterwards, in the case of *The Neutralitet*, 1801, 3 Rob. 295, he added, "The modern rule of the law of nations is, certainly, that the ship shall not be subject to condemnation for carrying contraband goods. The ancient practice was otherwise; and it cannot be denied that it was perfectly justifiable in principle. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in affecting that illegal purpose cannot be innocent. The policy of modern times has, however, introduced a relaxation on this point; and the general rule now is, that the vessel does not become confiscated for that act. But this rule is liable to exceptions. Where a ship belongs to the owner of the cargo, or where the ship is going on such service under a false destination or false papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient rule." The cases in which this language was used were cases of capture upon the outward voyage. See also *The Edward*, 4 Rob. 68.

The same doctrine was afterwards held by the same learned judge to apply to cases where the vessel had sailed with false papers, and a false destination upon the outward voyage, and was captured on the return voyage. See *The Nancy*, 3 Rob. 122; *The Christianberg*, 6 Rob. 376. And finally in the cases of *The Rosalie* and *The Elizabeth*,

in 1802, 4 Rob., note to table of cases, the Lords of Appeal in prize cases held that the carriage of contraband outward with false papers will affect the return cargo with condemnation. These cases are not reported at large. But in the case of *The Baltic*, 1 Acton, 25, and that of *The Margaret*, 1 Acton, 333, the Lords of Appeal deliberately reaffirmed the same doctrine. In the latter case Sir William Grant, in pronouncing the judgment of the court said, "The principle upon which this and other prize courts have generally proceeded to adjudication in cases of this nature (that is, where there are false papers), appears simply to be this: that if a vessel carried contraband on the outward voyage she is liable to condemnation on the homeward voyage. It is by no means necessary that the cargo should have been purchased by the proceeds of this contraband. Hence we must pronounce against this appeal; the sentence (of condemnation) of the court below being perfectly valid and consistent with the acknowledged principles of general law."

We cannot but consider these decisions as very high evidence of the law of nations, as actually administered; and in their actual application to the circumstances of the present case, they are not, in our judgment, controlled by an opposing authority. Upon principle, too, we think, that there is great soundness in the doctrine, as a reasonable interpretation of the law of nations. The belligerent has a right to require a frank and bona fide conduct on the part of neutrals in the course of their commerce in times of war; and if the latter will make use of fraud, and false papers, to elude the just rights of the belligerents, and to cloak their own illegal purposes, there is no injustice in applying to them the penalty of confiscation. The taint of the fraud travels with the party and his offending instrument during the whole course of the voyage, and until the enterprise has, in the understanding of the party himself, completely terminated. There are many analogous cases in the prize law where fraud is followed by similar penalties. Thus, if a neutral will cover up enemy's property under false papers, which also cover his own property, prize courts will not disentangle the one from the other, but condemn the whole as good prize. That doctrine was solemnly affirmed in this court in the case of *The St. Nicholas*, 1 Wheat. 417, 4 L. Ed. 125.

Upon the whole, our opinion is, that the general question involved in the second and third questions, whether there was a legal and justifiable cause of capture under the circumstances of the present case, ought to be answered in the affirmative. The question as to the authority of the cruiser to seize, so far as it depends upon her commission, can only be answered in a general way. If she had a commission under the royal authority of Spain, she was beyond question entitled to make the seizure. If Rodil had due authority to grant the commission the same result would arise. If he had no such authority,



then she must be treated as a non-commissioned cruiser, entitled to seize for the benefit of the crown; whose acts, if adopted and acknowledged by the crown or its competent authorities, become equally binding. Nothing is better settled both in England and America than the doctrine that a non-commissioned cruiser may seize for the benefit of the government; and if his acts are adopted by the government, the property, when condemned, becomes a droit of the government. The *Amiable Isabella*, 6 Wheat. 1, 5 L. Ed. 191; *The Dos Hermanos*, 10 Wheat. 306, 6 L. Ed. 328; *The Melomane*, 5 Rob. 41; *The Elsebe*, 5 Rob. 174; *The Maria Françoise*, 6 Rob. 282. \* \* \*

The sixth and last question is whether, supposing the ship to have traded in articles contraband of war in the ports of Chili, and to have been seized afterwards in a port of Peru, then under the royal authority, before she had discharged her outward cargo for and on account of such contraband trade, the underwriters be not discharged, whether the subsequent proceedings for her adjudication were regular or irregular. This question is understood to raise the point whether, if the seizure and detention be bona fide for and on account of illicit or contraband trade, a sentence of condemnation or acquittal, or other regular proceedings to adjudication, are necessary to discharge the underwriters. We are of opinion that they are not. If the seizure or detention be lawfully made for or on account of illicit or contraband trade, all charges, damages, and losses consequent thereon, are within the scope of the exception. They are properly attributable to such seizure and detention as the primary cause, and relate back thereto. If the underwriters be discharged from the primary hostile act, they are discharged from the consequences of it. The whole reasoning in *Church v. Hubbard*, 2 Cranch, 187, 2 L. Ed. 249, presupposes that if the underwriters be exempted from the risk of a justifiable seizure for illicit trade, they are not accountable for losses consequent thereon, whether arising from a sentence of condemnation or otherwise.<sup>89</sup> \* \* \*

<sup>89</sup> This consequence does not attach unless false papers have been used. "The doctrine of these cases is not approved of by Wheaton or by foreign jurists; and, while undoubtedly severe, it does not appear to be a necessary deduction from the general principles governing the forfeiture of contraband cargoes." Hall, *Int. Law*, p. 696 (4th Ed., 1895). But see 1 Duer, *Marine Ins.*, 627, note c (1845).

The enemy property is often fraudulently blended in the same claim with neutral property. In such a case, the neutral property is liable to the fate of the guilty, as was held in *The St. Nicholas*, 1 Wheat. 417, 4 L. Ed. 125 (1816). In like manner, guilty and innocent goods may belong to one and the same party. In such a case, the innocent goods are infected by the guilty to such a degree that they share its fate.

For the nature and origin of the doctrine of infection, see, *The Kronprinsessan Margareta, The Parana, and Other Ships*, L. R. [1921] 1 App. Cas. 486, 491, 494, 496, 497, in which Lord Sumner, speaking for the Privy Council, said:

"These appeals are brought to test the validity of the doctrine of 'infection' and its applicability to the conditions and forms of overseas commerce at the present time, and their Lordships think it right to deal with them accordingly,

## THE PETERHOFF.

(Supreme Court of the United States, 1866. 5 Wall. 28, 18 L. Ed. 584)

Mr. Chief Justice CHASE.<sup>40</sup> \* \* \* The classification of goods as contraband or not contraband has much perplexed text-writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes.

Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.

A considerable portion of the cargo of the Peterhoff was of the third class, and need not be further referred to. A large portion, perhaps, was of the second class, but is not proved, as we think, to have

although, as will appear, they, or at any rate some of them, might have been disposed of on narrower grounds. \* \* \*

"For about one hundred and fifty years at least the law of prize has contained two settled rules, one which refuses to recognize transfers of the ownership of movables afloat from an enemy transferor to a neutral transferee, when unaccompanied by actual delivery of the goods; and the other, which condemns as if contraband any goods which, though not condemnable in themselves, belong or are deemed to belong when captured to the same owner as other cargo in the same vessel, which cargo itself is liable to condemnation as contraband. \* \* \*

"Their Lordships are fully aware that some continental jurists have criticized the rule of infection adversely, and that continental Prize Courts have not always accepted it, though it has long been adopted in the United States and more recently in Japan. They are, however, bound by the decisions of their predecessors, which, consistent as they are, it is too late to overrule and impracticable to distinguish. They would observe that, valuable as the opinions of learned and distinguished writers must always be, as aids to a full and exact comprehension of a systematic law of nations, Prize Courts must always attach chief importance to the current of decisions, and the more the field is covered by decided cases the less becomes the authority of commentators and jurists. \* \* \*

"When once it is found that, at the time of the seizure, the same person was owner of goods on board and embarked in the same transaction or transit, of which the ulterior destination involved their condemnation, and of goods bound for a neutral port without any ulterior destination, neither the captor nor the court is called on to investigate his mercantile operations as to these other parcels—an inquiry complex and remote, in which the claimant has all the information, and the captor all the disadvantage—but these goods also are involved in the condemnation."

<sup>40</sup> The statement of facts is omitted and only that part of the opinion is given relating to contraband and its classification.

been actually destined to belligerent use, and cannot therefore be treated as contraband. Another portion was, in our judgment, of the first class, or, if of the second, destined directly to the rebel military service. This portion of the cargo consisted of the cases of artillery harness, and of articles described in the invoices as "men's army bluchers," "artillery boots," and "government regulation gray blankets." These goods come fairly under the description of goods primarily and ordinarily used for military purposes in time of war. They make part of the necessary equipment of an army.

It is true that even these goods, if really intended for sale in the market of Matamoras, would be free of liability; for contraband may be transported by neutrals to a neutral port, if intended to make part of its general stock in trade. But there is nothing in the case which tends to convince us that such was their real destination, while all the circumstances indicate that these articles, at least, were destined for the use of the rebel forces then occupying Brownsville, and other places in the vicinity.

And contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not.

The trade of neutrals with belligerents in articles not contraband is absolutely free, unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea. Hence, while articles, not contraband, might be sent to Matamoras and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character, destined in fact to a state in rebellion, or for the use of the rebel military forces, were liable to capture, though primarily destined to Matamoras.

We are obliged to conclude that the portion of the cargo which we have characterized as contraband must be condemned. And it is an established rule that the part of the cargo belonging to the same owner as the contraband portion must share its fate. This rule is well stated by Chancellor Kent, thus: "Contraband articles are infectious, as it is called, and contaminate the whole cargo belonging to the same owners, and the invoice of any particular article is not usually admitted, to exempt it from general confiscation."

So much of the cargo of the *Peterhoff*, therefore, as actually belonged to the owner of the artillery harness, and the other contraband goods, must be also condemned. \* \* \*

## SECTION 5.—DESTINATION

I. CONTINUOUS VOYAGE <sup>41</sup>

## THE WILLIAM.

(Lords on Appeal in Prize Cases, 1806. 5 C. Rob. 385.)

This was a question on the continuity of a voyage in the colonial trade of the enemy, brought by appeal from the Vice Admiralty Court at Halifax, where the ship and cargo, taken on a destination to Bilboa in Spain, and claimed on behalf of Messrs. W. & N. Hooper of Marblehead in the state of Massachusetts, had been condemned 17th July, 1800.

It appeared in evidence that the ship had gone to Martinique, where the outward cargo was disposed of; that she then proceeded to Laguirra, and took on board a cargo of cocoa, the property of the owners, which was brought to Marblehead on the 29th May, and unladen; that the ship was then cleaned and slightly repaired, and again took on board the chief part of the former cargo, with some sugars brought from the Havana in other ships, and purchased by the owners, and sailed, on or before the 7th June, upon a destination to Bilboa. Among the papers was a certificate from the collector of the customs, "that this vessel had entered and landed a cargo of cocoa, belonging to Messrs. W. & N. Hooper, and that the duties had been secured agreeable to law, and that the said cargo had been reshipped on board this vessel, bound for Bilboa; and that her cargo, consisting of cocoa, sugar, and fish, was the property of the said W. & N. Hooper."

On the 7th May, 1804, the cause came on to be heard before the Lords of Appeal, upon the original evidence, when the case was argued on the principle of continuity, and the application of that principle to the circumstances of the present case, by the King's Advocate and the Attorney General, on the part of the captor, and by Mr. Dallas and Dr. Arnold, on the part of the appellant. The Lords "pronounced for the appeal, reversed the sentence appealed from, and retained the principal cause, therein admitted the claim for the ship and cargo, pronounced the said cargo, except seventy hogsheads of cocoa and five bags of cocoa, to have belonged as claimed, and dismissed the bail given in the court below to answer the appeal in respect thereto; but directed farther proof to be made of the importation of the said cocoa into, and exportation from, the port of Marblehead, in America, and the payment of duties thereon, within nine months."

<sup>41</sup> See Charles B. Elliott's *Doctrine of Continuous Voyages*, 1 *American Journal of International Law* (1907) 61; Lester H. Woolsey's *Early Cases on the Doctrine of Continuous Voyages*, *Id.* IV 823 (1910).

In obedience to that decree farther proof was exhibited, consisting of sundry documents.

On this proof the cause was farther argued; and, on the 11th March, 1806, the judgment of the Court of Appeal was delivered by the Right Honorable Sir William Grant, Master of the Rolls, in the following terms:

Sir WILLIAM GRANT.<sup>42</sup> The question in this case is, whether that part of the cargo which has been the subject of further proof, and which, it is admitted, was, at the time of the capture, going to Spain, is to be considered as coming directly from Lagaira, within the meaning of his Majesty's instructions. According to our understanding of the law, it is only from those instructions that neutrals derive any right of carrying on with the colonies of our enemies, in time of war, a trade from which they were excluded in time of peace. The instructions had not permitted the direct trade between the hostile colony and its mother country, but had, on the contrary, ordered all vessels engaged in it to be brought in for lawful adjudication; and what the present claimants accordingly maintain, is not that they could carry the produce of Lagaira directly to Spain; but that they were not so carrying the cargo in question, inasmuch as the voyage in which it was taken was a voyage from North America, and not directly from a colony of Spain.

What then, with reference to this subject, is to be considered as a direct voyage from one place to another? Nobody has ever supposed that a mere deviation from the straightest and shortest course, in which the voyage could be performed, would change its denomination, and make it cease to be a direct one within the intendment of the instructions. Nothing can depend on the degree or the direction of the deviation, whether it be of more or fewer leagues, whether towards the coast of Africa, or towards that of America. Neither will it be contended that the point from which the commencement of a voyage is to be reckoned changes as often as the ship stops in the course of it; nor will it the more change, because a party may choose arbitrarily by the ship's papers, or otherwise, to give the name of a distinct voyage to each stage of a ship's progress. The act of shifting the cargo from the ship to the shore, and from the shore back again into the ship, does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done. Supposing the landing to be merely for the purpose of airing or drying the goods, or of repairing the ship, would any man think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process? Again, let it be supposed that the party has a motive for desiring to make the voyage appear to

<sup>42</sup> Part of the opinion is omitted.

begin at some other place than that of the original lading, and that he, therefore, lands the cargo purely and solely for the purpose of enabling himself to affirm, that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give it the appearance of having begun from a different place?

The truth may not always be discernible, but when it is discovered, it is according to the truth and not according to the fiction, that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have been ended. That those acts have been attended with trouble and expense cannot alter their quality or their effect. The trouble and expense may weigh as circumstances of evidence, to show the purpose for which the acts were done; but if the evasive purpose be admitted or proved, we can never be bound to accept as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it. Between the actual importation by which a voyage is really ended, and the colourable importation which is to give it the appearance of being ended, there must necessarily be a great resemblance. The acts to be done must be almost entirely the same; but there is this difference between them. The landing of the cargo, the entry at the custom-house, and the payment of such duties as the law of the place requires, are necessary ingredients in a genuine importation; the true purpose of the owner cannot be effected without them. But in a fictitious importation they are mere voluntary ceremonies, which have no natural connection whatever with the purpose of sending on the cargo to another market, and which, therefore, would never be resorted to by a person entertaining that purpose, except with a view of giving to the voyage which he has resolved to continue, the appearance of being broken by an importation, which he has resolved not really to make.

Now, what is the case immediately before us? The cargo in question was taken on board at Lagaira. It was at the time of the capture proceeding to Spain; but the ship had touched at an American port. The cargo was landed and entered at the custom-house, and a bond was given for duties to the amount of 1,239 dollars. The cargo was re-shipped, and a debenture for 1,211 dollars by way of drawback was obtained. All this passed in the course of a few days. The vessel arrived at Marblehead on the 29th of May; on that day the bond for securing the duties was given. On the 30th and 31st the goods were landed, weighed, and packed. The permit to ship them is dated the 1st of June, and on the 3d of June the vessel is cleared out as laden, and ready to proceed to sea. We are frequently obliged to collect the purpose from the circumstances of the transaction.

The landing thus almost instantaneously followed by the re-shipment, has little appearance of having been made with a view to actual importation; but it is not upon inference that the conclusion in this case is left to rest. The claimants, instead of showing that they really did import this cargo, have, in their attestation, stated the reasons which determined them not to import it. They say, indeed, that when they ordered it to be purchased, "it was with the single view of bringing it to the United States, and that they then had no intention or expectation of exporting it in the said schooner to Spain." Supposing that from this somewhat ambiguous statement we are to collect that their original intention was to have imported this cargo into America, with a view only to the American market, yet their intention had been changed before the arrival of the vessel. For they state that in the beginning of May they had received accounts of the prices of cocoa in Spain, which satisfied them that it would sell much better there than in America, and that they had, therefore, determined to send it to the Spanish market.

Nothing is alleged to have happened between the landing of the cargo and its re-shipment, that could have the least influence on their determination. It was not in that short interval that American prices fell, or that information of the higher prices in Spain had been received. Knowing beforehand the comparative state of the two markets, they neither tried nor meant to try that of America, but proceeded with all possible expedition to go through the forms which have been before enumerated. If the continuity of the voyage remains unbroken, it is immaterial whether it be by the prosecution of an original purpose to continue it, as in the case of the *Essex*, or, as in this case, by the relinquishment of an original purpose to have brought it to a termination in America. It can never be contended, that an intention to import, once entertained, is equivalent to importation. And it would be a contradiction in terms to say that by acts done after the original intention has been abandoned, such original intention has been carried into execution. Why should a cargo, which there was to be no attempt to sell in America, have been entered at an American custom-house, and voluntarily subjected to the payment of any, even the most trifling duty? Not because importation was, or in such a case could be intended, but because it was thought expedient that something should be done, which in a British Prize Court might pass for importation. Indeed, the claimants seem to have conceived that the inquiry to be made here was, not whether the importation was real or pretended, but whether the pretence had assumed a particular form, and was accompanied with certain circumstances which by positive rule were, in all cases, to stand for importation, or to be conclusive evidence of it. And it has, I understand, been said that our departure from that supposed rule in the case of *The Essex*, Orne, was a surprise upon the merchants of America, who had by our former decisions

been led to believe, that proof of landing and payment of duties in America would, in every case, be held absolutely decisive of the legality of the voyage.

How far even that rule would have been departed from by the decision in the case of *The Essex*, will hereafter be considered. But after having looked very attentively into all the cases in which, as far as I am aware, this sort of question has occurred, I conceive, not only that it will be impossible to point out a judgment, in which any such unqualified doctrine has been laid down, but that the judgments antecedent to that in *The Essex* had clearly and unequivocally negatived the existence of the alleged rule of decision. \* \* \*

As it is not the object of this review of the cases to discuss the merits of the particular judgments, but only to examine whether there be any inconsistency in their principles, it is unnecessary to advert to any other point in the last-mentioned decision, than its alleged novelty, in departing from the supposed principle of holding that landing and payment of duties in America did, absolutely, and under all circumstances, legalize the subsequent voyage. I have shown that there was not one decision in which any such principle had been asserted or implied, and that there were at least two decisions which stood in direct contradiction to it—that in *The Freeport*, in 1803, and that in *The William*, in 1804.

But supposing that we had uniformly held that payment of the import duties furnished conclusive evidence of importation, would there have been any inconsistency or contradiction in holding that the mere act of giving a bond for an amount of duties, of which only a very insignificant part was ever to be paid, could not have the same effect as the actual payment of such amount? The further proof in the *Essex* first brought distinctly before us the real state of the fact in this particular. It has been already mentioned that we had called for an account of the drawbacks, if any, that had been received. This produced the information that although the duties secured amounted to 5,278 dollars, yet a debenture was immediately afterwards given for no less than 5,080 dollars; so that on that valuable cargo no more than \$198 would be ultimately payable, which sum is said to be more than compensated by the advantage arising from the negotiability of the debenture. In the case of *The Eagle*, immediately preceding, it had been sworn by the owner and certified by the custom-house, that the duties, amounting to \$1,333, not an unsubstantial sum on the not very valuable cargo of a small vessel of one hundred and ten tons, had been actually paid. In *The Polly*, *Lasky*, it was sworn generally that the duties were paid; in *The Mercury*, that they were paid or secured; in *The William*, that they were secured. Not a word was said about drawbacks. It was therefore natural for us to understand American claimants, as they certainly wished we should understand them, to be speaking of the payment of such duties as



were chargeable on importation into America, and of a security that would make the whole amount secured become payable at some future day. If we had ascribed to the fact, as we believed it to exist, ever so decisive an effect, I again ask, where would be the inconsistency in denying the same effect to a fact of a totally different nature? It must not be supposed that we pretend to judge what duties it may be proper for the American government to exact or to remit, neither do we contend that an importation cannot be genuine because a high duty has not been paid. All we say is, that, in the nature of the thing, the payment of a slight duty does not tend, in the same degree, to establish the bona fides of an importation, as the payment of a heavy duty would have done. We never held that either would necessarily outweigh all the evidence which could possibly be put into the opposite scale; but that the one has less weight than the other is obvious to every man's apprehension.

On the whole, I trust, I have demonstrated that we did not, in the case of *The Essex*, and that we do not, in the case now before us, depart from any principle which we have ever adopted. The application to this case of the principles on which we really have proceeded has been already shown. The consequence is, that the voyage was illegal, and that the sentence of condemnation must be affirmed.<sup>43</sup>

<sup>43</sup> In *The Louisiana and Other Ships*, L. R. [1918] A. C. 461, 468, 469 (1918), Lord Parker of Waddington, speaking for the Privy Council, said:

"Under the circumstances above mentioned, the only possible conclusion is that the shipments per *Louisiana* and *Tomsk* were made by or on behalf of the German government through its agents in America, and that the details of the transactions were so arranged as to conceal the fact.

"In considering, on the principle of continuous voyage, what is the ultimate destination of goods which are in their nature conditional contraband, it is the intention of the person who is in a position to control the destination which is really material. \* \* \* Had the appellants been dealing with their own goods on their own behalf, their intention might have been the determining factor. But if, as their Lordships find, the appellants were acting by the direction of an agent of the German government, it is the intention of the German government which must be looked for. It would be ridiculous to suppose that the German government were speculating in fodder stuffs for the Scandinavian markets. These stuffs were urgently needed in Germany for the purposes of the war, and the only possible inference is that the goods in question were intended to reach Germany and be utilized for war purposes."

In *The Bonna*, 3 British and Colonial Prize Cas. 163, 168, 169 (1918), a neutral vessel was seized as prize on the ground that it was carrying coconut oil (conditional contraband), and condemnation was claimed by the crown on the ground that although destined to Sweden it would there be made into a substitute for butter, and the butter thus released, exported to Germany. Sir Samuel Evans disallowed the claim for the following reasons:

"Before pronouncing the decision of the court, I think it right to say that, if it were established that raw materials were imported by a neutral for the manufacture of margarine with an intention to supply the enemy with the manufactured article, I should be prepared to hold that the doctrine of continuous voyage applied so as to make such raw materials subject to condemnation as conditional contraband with an enemy destination. I should go even further, and hold that if it were shown that in a neutral country particular manufacturers of margarine were acting in combination with particular producers or vendors of butter, and that the intention and object of their combination

### THE STEPHEN HART.

(District Court of the United States, S. D. New York, 1863. Blatchford's Pr. Cas., 387, Fed. Cas. No. 13,364.)

BETTS, District Judge.<sup>44</sup> The schooner *Stephen Hart* was captured as lawful prize of war, by the United States vessel-of-war *Supply*, on the 29th of January, 1862, in latitude 24° 12' north, and longitude 82° 14' west, off the southern coast of Florida, about 25 miles from Key West, and about 82 miles from Point de Yeacos, in Cuba, and was sent to the port of New York for adjudication, under convoy of her captor. A libel was filed against her in this court on the 18th of February, 1862. On the 1st of May, 1862, a claim to the vessel was interposed by John Myer Harris, of Liverpool, England, as her sole owner. The test oath to that claim was made by Charles N. Dyett, the master of the schooner. On the same day, a claim was put in to the whole of the cargo of the schooner, by Samuel Isaac, on behalf of himself and Saul Isaac, as copartners and subjects of Great Britain, doing business in England under the firm name of S. Isaac, Campbell & Co., and claiming to be the sole owners of the cargo. The test oath to that claim was made by Samuel Isaac. On the 25th of October, 1862, another claim to the schooner on behalf of Harris was interposed. In this second claim Harris is described as late of Liverpool, England, but now of Sherbro', on the western coast of Africa, at present residing in England, merchant. This second claim sets up that he is the sole owner of the schooner, and is a subject of the crown of Great Britain. \* \* \*

Many of the principal questions involved in the present case, and in the cases of *The Springbok* and *The Peterhoff*, are alike; and, as the conclusion at which the court has arrived in all of those cases is to condemn the vessels and their cargoes, I shall announce, in this case, the leading principles of public law which lead to a condemnation in all the cases.

was to produce the margarine in order to send the butter to the enemy, the same doctrine would be applicable with the same results.

"But there is a long space between those two supposed cases and the one now before the court; and this space in my view cannot be spanned by the application of the accepted principles of the law of nations. I do not consider that it would be in accordance with international law to hold that raw materials on their way to citizens of a neutral country to be converted into a manufactured article for consumption in that country were subject to condemnation on the ground that the consequence might, or even would necessarily, be that another article of a like kind and adapted for a like use would be exported by other citizens of the neutral country to the enemy."

In *The Balto*, L. R. [1917] Prob. Div. 79, 83 (1917), Sir Samuel Evans, condemning leather destined to Sweden on the ground that it there could and would be manufactured into boots, and the manufactured product conveyed to Germany, held that under such conditions the goods imported did not "become part of the common stock of the neutral country into which they were first brought."

<sup>44</sup> Parts of the opinion are omitted.

On behalf of the libelants, it is urged in this case, 1st. That the *Stephen Hart* and her cargo were enemy's property when the voyage in question was undertaken, and when the capture was made; 2d. That the schooner was laden with articles contraband of war, destined for the aid and use of the enemy, and on transportation by sea to the enemy's country at the time of capture; 3d. That, with a full knowledge, on the part of the owner of the vessel and of the owners of her cargo, that the ports of the enemy were under blockade, the vessel and her cargo were despatched from a neutral port with an intention, on the part of the owners of each, that, in violation of the blockade, both the vessel and her cargo should enter a port of the enemy.

On the part of the claimants, it is maintained, 1st. That the transportation of all articles, including arms and munitions of war, between neutral ports in a neutral vessel, is lawful in time of war; 2d. That if a neutral vessel, with a cargo belonging to neutrals, be in fact on a voyage from one neutral port to another, she cannot be seized and condemned as lawful prize, although she be laden with contraband of war, unless it be determined that she was actually destined to a port of the enemy upon the voyage on which she was seized, or unless she is taken in the act of violating a blockade.

It is insisted, on the part of the claimants, that the *Stephen Hart* was, at the time of her capture, a neutral vessel, carrying a neutral cargo from London to Cardenas—both of them being neutral ports—in the regular course of trade and commerce. On the other side it is contended that the cargo was composed exclusively of articles contraband of war, destined, when they left London, to be delivered to the enemy, either directly, by being carried into a port of the enemy in the *Stephen Hart* or by being transshipped at Cardenas to another vessel; that Cardenas was to be used merely as a port of call for the *Stephen Hart*, or as a port of transshipment for her cargo; that the vessel and her cargo are equally involved in the forbidden transaction; and that the papers of the vessel were simulated and fraudulent in respect to her destination and that of her cargo. A condemnation is not asked if the cargo was in fact neutral property, to be delivered at Cardenas for discharge and general consumption or sale there, but is only claimed if the cargo was really intended to be delivered to the enemy at some other place than Cardenas, after using that port as a port of call or of transshipment, so as to thus render the representations contained in the papers of the vessel false and fraudulent as to the real destination of the vessel and her cargo.

It would scarcely seem possible that there could be any serious debate as to the true principles of public law applicable to the solution of the questions thus presented; and, indeed, the law is so well settled as to make it only necessary to see whether the facts in this case bring the vessel and her cargo within the rules which have been laid down by the most eminent authorities in England and in this country.

The principles upon which the government of the United States, and the public vessels acting under its commission, have proceeded, during the present war, in arresting vessels and cargoes as lawful prize upon the high seas, are very succinctly embodied in the instructions issued by the Navy Department on the 18th of August, 1862, to the naval commanders of the United States, and which instructions are therein declared to be a recapitulation of those theretofore from time to time given. The substance of those instructions, so far as they are applicable to the present case, is, that a vessel is not to be seized "without a search carefully made, so far as to render it reasonable to believe that she is engaged in carrying contraband of war for or to the insurgents, and to their ports directly, or indirectly by transshipment, or otherwise violating the blockade."

The main feature of these instructions, so far as they bear upon the questions involved in this case, is but an application of the doctrine in regard to captures laid down by the government of the United States at a very early day. In an ordinance of the Congress of the Confederation, which went into effect on the 1st of February, 1782 (5 Wheaton, Appendix, p. 120), it was declared to be lawful to capture and to obtain condemnation of "all contraband goods, wares, and merchandises, to whatever nations belonging, although found in a neutral bottom, *if destined for the use of an enemy.*"

The soundness of these principles, and the fact that the law of nations, as applicable to cases of prize, has been observed and applied by the government of the United States and its courts during the present war, was fully recognized by Earl Russell, her Britannic Majesty's principal secretary of state for foreign affairs, in his remarks made in the House of Lords on the 18th of May last. Earl Russell there stated that the judgments of the United States prize courts, which had been reported to her Majesty's government during the present war, did not evince any disregard of the established principles of international law; that the law officers of the crown, after an attentive consideration of the decisions which had been laid before them, were of opinion that there was no rational ground of complaint as to the judgments of the American prize courts; and that the law of nations in regard to the search and seizure of neutral vessels had been fully and completely acknowledged by the government of the United States. On the same occasion Earl Russell remarked: "It has been a most profitable business to send swift vessels to break or run the blockade of the Southern ports, and carry their cargoes into those ports. There is no municipal law in this or any country to punish such an act as an offence. I understand that every cargo which runs the blockade and enters Charleston is worth a million of dollars, and that the profit on these transactions is immense. It is well known that the trade has attracted a great deal of attention in this country from those who have a keen eye to such gains, and that vessels have been sent to Nassau in

order to break the blockade at Charleston, Wilmington, and other places, and carry contraband of war into some of the ports of the Southern States." He added: "I certainly am not prepared to declare, nor is there any ground for declaring, that the courts of the United States do not faithfully administer the law; that they will not allow evidence making against the captors; or that they are likely to give decisions founded, not upon the law, but upon their own passions and national partialities." He also said, that in a case of simulated destination—that is, a vessel pretending that she is going to Nassau, when she is in reality bound to a port of the enemy—the right of seizure exists.

The then Solicitor General of England (Sir Roundell Palmer) stated, in the House of Commons, on the 29th of June last, referring to the cases of *The Dolphin* and *The Pearl*, decided by the District Court for the Southern district of Florida (those vessels having been captured while ostensibly on voyages from Liverpool to Nassau, and it having been held by the court that the intention of the owners of the vessels was that they should only touch at Nassau, and then go on and break the blockade at Charleston), that "if the owners imagined that the mere fact of the vessel touching at Nassau when on such an expedition exonerated her, they were very much mistaken"; that the principles of the judgment in the case of the *Dolphin* "were to be found in every volume of Lord Stowell's decisions"; that it was well known to everybody that there was a large contraband trade between England and America by way of Nassau; that it was absurd to pretend to shut their eyes to it; and that the trade with Nassau and Matamoras had become what it was in consequence of the war.

The Foreign Office of Great Britain, in a letter to the owner of the *Peterhoff*, on the 3d of April last, announced as its conclusion, after having communicated with the law officers of the crown, that the government of the United States has no right to seize a British vessel *bona fide* bound from a British port to another neutral port, unless such vessel attempts to touch at, or has an intermediate or contingent destination to, some blockaded port or place, or is a carrier of contraband of war destined for the enemy of the United States; that her Majesty's government, however, cannot, without violating the rules of international law, claim for British vessels navigating between Great Britain and such neutral ports any general exemption from the belligerent right of visitation by the cruisers of the United States, or proceed upon any general assumption that such vessels may not so act as to render their capture lawful and justifiable; that nothing is more common than for those who contemplate a breach of blockade or the carriage of contraband, to disguise their purpose by a simulated destination and by deceptive papers; and that it has already happened, in many cases, that British vessels have been seized while engaged in voyages apparently lawful, and have been afterwards proved in the prize courts to have

been really guilty of endeavoring to break the blockade, or of carrying contraband to the enemy of the United States.

The cases of *The Stephen Hart*, *The Springbok* [Fed. Cas. No. 13,264], *The Peterhoff* [Fed. Cas. No. 11,024], and *The Gertrude* [Fed. Cas. No. 5,369], illustrate a course of trade which has sprung up during the present war, and of which this court will take judicial cognizance, as it appears from its own records and those of other courts of the United States as well as from public reputation. Those neutral ports have suddenly been raised from ports of comparatively insignificant trade to marts of the first magnitude. Nassau and Cardenas are in the vicinity of the blockaded ports of the enemy, while Matamoras is in Mexico, upon the right bank of the Rio Grande, directly opposite the town of Brownsville, in Texas. The course of trade, in respect to Nassau and Cardenas, has been generally to clear neutral vessels, almost always under the British flag, from English ports for those places, and, using them merely as ports either of call or of transshipment, to either resume new voyages from them in the same vessels, or to transship their cargoes to fleet steamers, with which to run the blockade, the cargoes being composed, in almost all cases, more or less, of articles contraband of war. The character and course of this trade, and its sudden rise, are very properly commented upon in a despatch from the Secretary of State of the United States to Lord Lyons, of the 12th of May, 1863.

The broad issue upon the merits in this case is, whether the adventure of the *Stephen Hart* was the honest voyage of a neutral vessel from one neutral port to another neutral port, carrying neutral goods between those two ports only, or was a simulated voyage, the cargo being contraband of war, and being really destined for the use of the enemy, and to be introduced into the enemy's country by a breach of blockade by the *Stephen Hart*, or by transshipment from her to another vessel at Cardenas. It is conceded in the argument of the leading counsel for the claimants that if the property was owned by the enemy, and was fraudulently on its way to the enemy as neutral property, it was enemy's property, and was liable to capture, no matter whence it came or whither it was bound; and that, if the vessel were really intending and endeavoring to run the blockade, the property was liable to capture, no matter to whom it belonged or what was its character; but that if it was neutral property, in lawful commerce, it was safe from seizure.

The question whether or not the property laden on board of the *Stephen Hart* was being transported in the business of lawful commerce, is not to be decided by merely deciding the question as to whether the vessel was documented for, and sailing upon, a voyage from London to Cardenas. The commerce is in the destination and intended use of the property laden on board of the vessel, and not in the incidental, ancillary, and temporary voyage of the vessel, which

may be but one of many carriers through which the property is to reach its true and original destination. If this were not the rule of the prize law, a very wide door would be opened for fraud and evasion. A cargo of contraband goods, really intended for the enemy, might be carried to Cardenas in a neutral vessel sailing from England with papers which, upon their face, import merely a voyage of the vessel to Cardenas, while, in fact, her cargo, when it left England, was destined by its owners to be delivered to the enemy by being transshipped at Cardenas into a swifter vessel. And such, indeed, has been the course of proceeding in many cases during the present war. \* \* \*

The law seeks out the truth, and never, in any of its branches, tolerates any such fiction as that under which it is sought to shield the vessel and her cargo in the present case. If the guilty intention, that the contraband goods should reach a port of the enemy, existed when such goods left their English port, that guilty intention cannot be obliterated by the innocent intention of stopping at a neutral port on the way. If there be, in stopping at such port, no intention of transshipping the cargo, and if it is to proceed to the enemy's country in the same vessel in which it came from England, of course there can be no purpose of lawful neutral commerce at the neutral port by the sale or use of the cargo in the market there; and the sole purpose of stopping at the neutral port must merely be to have upon the papers of the vessel an ostensible neutral terminus for the voyage. If, on the other hand, the object of stopping at the neutral port be to transship the cargo to another vessel to be transported to a port of the enemy, while the vessel in which it was brought from England does not proceed to the port of the enemy, there is equally an absence of all lawful neutral commerce at the neutral port; and the only commerce carried on in the case is that of the transportation of the contraband cargo from the English port to the port of the enemy, as was intended when it left the English port. This court holds that, in all such cases, the transportation or voyage of the contraband goods is to be considered as a unit, from the port of lading to the port of delivery in the enemy's country; that if any part of such voyage or transportation be unlawful, it is unlawful throughout; and that the vessel and her cargo are subject to capture, as well before arriving at the first neutral port at which she touches after her departure from England, as on the voyage or transportation by sea from such neutral port to the port of the enemy. \* \* \*

One important circumstance, to show that the cargo of the *Stephen Hart* was intended for the enemy, is the fact that a part of it consisted of 90,000 buttons, marked with the initials, "C. S. A.," which, it is well understood, stand for the words "Confederate States of America," or "Confederate States Army," the buttons being such as are used on army clothing for the three services of an army.

This review of the facts in this case leads to the conclusion that the vessel and her cargo must both of them be condemned. No doubt is left upon the mind that the case is one of a manifest attempt to introduce contraband goods into the enemy's territory by a breach of blockade, for which the vessel must be held liable to forfeiture, as well as her cargo. Chadwick was evidently employed by reason of his being a citizen of the United States, familiar with the enemy's country, and qualified to conduct the vessel into one of the blockaded ports. The vessel was captured in a position convenient for running the blockade. The cargo consisted of arms, munitions of war, and military equipments, and, among them, a large quantity of military buttons, stamped in such a manner as to render them capable of no appropriate use save for the infantry, cavalry, and artillery of the enemy's army, thus showing that the enemy's country was their only appropriate destination. The absence of the manifest and bills of lading is not satisfactorily accounted for, and the want of any invoices and of any charter-party is a circumstance of great weight against the lawfulness of the commerce. The attempt, by the master, to suppress his letter of instructions, and the letter to Helm, the agent of the enemy in Cuba, and the attempt of the mate to conceal the letters which show that the design was that the Stephen Hart should, under his guidance, enter a blockaded port of the enemy, and which also contain specific directions for entering the harbor of Charleston, justify the conclusion that Charleston, or some other port of the enemy, was the real destination of the vessel and her cargo. The absence of any charter-party, and of any instructions from Harris to Captain Dyett, and the entire surrender by Harris of the control of the vessel to the loaders of the cargo, and to the master as their agent, involve the vessel in all the guilt which attaches to the cargo. The object of carrying the flag of the enemy could only have been that it might be used for the purpose of entering the enemy's ports—a conclusion strengthened by the fact that it was thrown overboard at the time of the capture. The charts found on board are charts of such a character as to enable a vessel to enter many of the blockaded ports. The letter concealed by the mate, which contains directions for entering the harbor of Charleston, is one which he had a motive to preserve by concealing, and not to destroy, because, upon the regular papers of the vessel, he must have indulged the hope that she would have been permitted, after a search, to proceed upon the voyage indicated by her papers, and thus that the letter in question would afterwards become useful on a further voyage to the port of the enemy. There is an absence of all papers and circumstances to warrant the conclusion that there was any intent to dispose of the cargo at Cardenas, in the usual way of lawful commerce. The consignee of the entire cargo was the agent of the enemy, and the cargo was laden on board by the agent of the enemy in London. The



asserted ignorance of the master as to the contents of his cargo, and as to the fact that arms are contraband of war, and the ambiguous destination set out in the shipping articles, are circumstances which, with many others, go to swell the volume of suspicion attaching to the enterprise. In addition to all this, there is the positive evidence which has been referred to, particularly of Chadwick and Nellman, as to the actual destination of the cargo. All the material facts of the case, which lead to a condemnation, are proved without any resort to the re-examination either of Leisk or of Chadwick.

This is not a case for further proof, and no application has been made on the part of the claimants to supply any further proof as to any point. There must, therefore, be a decree condemning both vessel and cargo.<sup>45</sup>

#### THE FRAU HOUWINA.<sup>46</sup>

(Imperial Prize Court of France, May 26, 1855. Sirey, 1855, pt. 2, p. 795.)

Whereas, the facts of the case appear from the documents and pleadings to be as follows: That the *Frau Houwina*, a Hanoverian vessel, Captain Rostée, which left Lisbon with Hamburg as ostensible destination, was stopped November 28 of last year by the government cruiser *Phénix* eight miles out at sea, to the west of Cape Roca, under suspicion of unlawful transportation of contraband of war; that the vessel had on board 973 sacks of crude Indian saltpeter, described according to the manifest and bills of lading merely as goods; that the bills of lading relating thereto were signed only by the Captain, and indicate that the lading had been made by Mr. Roiz to his own order and with Hamburg as destination; that these 973 sacks were taken as a whole from a shipment brought from England to Lisbon October 17 last by the *Julius*, from which they had been transshipped to the *Frau Houwina* by Mr. Schaltz, a dealer at Lisbon, to whom they had been consigned by bills in the name of John Esken, of London; that the exportation from England had been effected by means of three custom-house permits under bond engaging to prove discharge in the country of destination, and that to fulfill this engagement Schaltz had obtained from the English consul at Lisbon a certificate attesting, according to his declaration, that the said saltpeter was intended for consumption in that country and was not to be re-exported; finally, that this cargo of saltpeter is claimed by Mr. Wehner in virtue of two duplicate bills of lading, indorsed in blank by Roiz, as being the property of neutral or allied subjects and destined to a neutral port;

As to the law: Inasmuch as saltpeter is an article susceptible of being contraband of war; as contraband of war is subject to seizure

<sup>45</sup> Affirmed on appeal in 3 Wall. 559, 18 L. Ed. 220 (1865).

<sup>46</sup> In Sirey the name of the vessel is spelled *Wrow-Houwina*.

under a neutral flag when it belongs to the enemy or when it is on its way to the territory, armies or fleets of the enemy; as trade in articles of contraband can be presumed to be lawful only on condition of being carried on with the utmost good faith and sincerity, and every dissimulation, fraud or deceit connected therewith must of itself create a presumption that the trade is unlawful; and as it is to this commerce especially that it is important to apply strictly the principle of considering as enemy property articles whose neutral or friendly ownership is not proved by papers found on board;

Applying these principles to this case: Whereas it appears from the evidence, and especially from the declarations of the captain, that the name of Roiz, a salaried employee of Schaltz, was only borrowed for the purpose of concealing the true owner; that therefore the proof of neutral property is not established by any of the papers found on board, and that no other neutral subject can be allowed to establish his rights of ownership outside of and inconsistent with the tenor of the said papers; that the firm of Wienhalt, Wehner & Co. of London claims ownership of the saltpeter by virtue of a simple indorsement in blank, written on the back of one duplicate original of the bills of lading above referred to; that it is clear, however, without examining the value of a blank indorsement in time of war as regards contraband of war, that Roiz could not confer upon anybody more rights than he himself had; nor thus do the right of ownership and a consequent friendly nationality of the saltpeter appear from any paper found on board;

Whereas, if allied subjects can be allowed to establish their rights of property by other means than ship's papers, it is by reason of the favor attaching to them in the prosecution of a common war and because of the dissimulation to which their interests may oblige them to have recourse in order to deceive the enemy; but they cannot invoke this privilege when, as in the present case, they have made use of ruses evidently intended to deceive as well the cruisers of their own nation and those of the allied power, and with greater reason when it appears from their own assertions, admitting them to be sincere, that they were engaged in an unlawful trade contrary to the laws of their own country; inasmuch as the alleged commercial usages relied upon by the claimants to explain these ruses cannot be applied in time of war to shipments of articles of contraband; and could in no case serve to justify the interposition of mere salaried employees such as Roiz; and as they can not explain the dissimulation in respect to the character of the merchandise on the manifest and bills of lading, since the shipper Schaltz himself established by his statements that the shipment was not unknown to the commercial world, and had even been brought to his personal attention by the Lisbon newspapers; that there was thus no need to employ the dissimulation to assure secrecy for a law-

ful commercial speculation, and it could have no other purpose than to elude the vigilance of the cruisers and for an unlawful operation;

Inasmuch as to these presumptions of enemy ownership, sufficient to warrant confiscation of the saltpeter seized on board the *Frau Houwina*, there must also be added those relating to the destination of the vessel; indeed, even if the vessel has been released as a neutral, it is not a necessary consequence that the decision of the Court admitted that the neutral destination assigned the voyage was the true one, since this release would have had to be pronounced also, under the French regulations, in case the vessel was openly destined for an enemy port; as there is ground for supposing that the destination of Hamburg was only apparent and that the *Frau Houwina*, after having discharged its lawful cargo at that port, was to proceed for an enemy Baltic port, in that fact that its departure from Lisbon coincided precisely with the withdrawal of the allied fleets, leaving the Russian ports unblockaded, and that this additional concealment on the ship's papers was only a repetition of a similar fraud by the aid of which this very vessel had been previously sent from Lisbon to *Elsineur* by the same *Schaltz* with a cargo destined in fact for Russia; but as, without reference to such a supposition, the dispatch of the vessel for Hamburg concealed according to every appearance an enemy destination, if not for the vessel at least for the cargo, in view of the notorious fact that the city of Hamburg has received in the course of the last year quantities of saltpeter, either in the form of nitrate of potassium or sodium nitrate, far exceeding its ordinary importation; and as in the month of December last, at the very time when the *Frau Houwina* was to be expected at Hamburg, efforts were made by brokers of that city to obtain from a shipowner of Lübeck a freight contract on a vessel bound for Russia with lead, saltpeter, and sulphur, and as at the end of the following January another shipment of lead and saltpeter, which had left Hamburg by rail for Königsberg, was dispatched from the latter town overland by Russian sledges towards the Russian frontier by way of Kovno;

Inasmuch as, to sum up, a shipment of contraband of war prepared in fraud of the political measures prescribed by an allied government in the interest of a common war, continued under a false name, with dissimulation on the ship's papers, and sent to parts nearer enemy country and serving habitually as a channel for provisions of the enemy, must be made on behalf and to the destination of the enemy, and therefore confiscation of the articles seized should be pronounced by application of articles 1 and 2 of the Regulations of July 26, 1778, and article 53 of the Decree of 2 Prairial, year XI:

[THE PRIZE COURT] decides: The capture of the 973 sacks of saltpeter seized on board the Hanoverian ship *Frau Houwina* by the cruiser *Phénix* of the Imperial Navy is declared valid.

Prize Court: President, M. Boulay.

## II. ULTIMATE DESTINATION

## THE RANNVEIG.

(High Court of Justice, 1920. [1920] Prob. 177.)

Action for the condemnation of ship and cargo. On March 6, 1919, the Norwegian steamship Rannveig, bound from Trondhjem to Stettin with a cargo of salted herrings, was captured by H. M. S. Vidette, and both ship and cargo were put in prize.

Claims for release and for damages and costs were entered by the owner of the Rannveig and by the owners of the cargo, a German fish distributing company, on the grounds that trade between Norway and Germany in fish and fish products had been licensed by the Allied Powers, and that, as the capture took place after the armistice had been concluded between the Allied Powers and Germany, the dispatch of foodstuffs to a German base of supply raised no presumption that they were intended for military use. The license relied on was an agreement concluded between the United States of America and Norway on April 30, 1918, and assented to by Great Britain and other Allied Powers, whereby Norway agreed not to export foodstuffs to Germany with the exception of fish and fish products which it was agreed might be exported in quantities not exceeding 48,000 tons per annum and 15,000 tons in any three months. The fish laden on the Rannveig was within the limits agreed upon. \* \* \*

THE PRESIDENT [Sir HENRY DUKE] read the following judgment: “  
\* \* \*

The first question involved in the decision of the case is that of the efficacy under international law of the agreement of April 30, 1918, and the extent of its operation as an assurance of the allowance of the Norwegian trade with Germany in fish and fish products to which it refers. There is no novelty in the concession or recognition by treaty of special trade privileges or immunities for a contracting party who remains neutral as against another contracting party who becomes or is a belligerent. Numerous treaties to which England was party in the seventeenth and eighteenth centuries contain stipulations of this kind, and they have been sometimes discussed in our Courts. See *The Goede Hoop* (1809) Edw. 327; *The Vryheid* (1778) Hay & Marriott, 188; *The Acteon* (1815) 2 Dods. 48; and *The Twende Brodre* (1801) 4 C. Rob. 33. The sovereign will of the powers engaged affords the only measure of the possible extent of such concessions. A judge exercising jurisdiction in prize has only to determine their meaning and effect when they bear upon claims for condemnation or release; i. e., for some decree or relief which is within the scope of his authority.

Treating the export of fish by the Rannveig, for the moment, as an

“ Part of the opinion is omitted.

act of trade by a Norwegian trader, the question which arises upon the facts is not whether the agreement is in its terms effective to sanction export of fish to Germany, but whether while Germany was a belligerent against the Allies it was effective to sanction the carriage of contraband to a German base of supply. To license such a transaction on the part of an alien friend would be to license an unneutral act whereby he must of necessity lose his character of friend. There is nothing in the terms of the agreement which shows an intention to authorize Norwegian traders to do any act inconsistent with neutrality. The Norwegian trade with Germany in fish which is provided for is, in my opinion, that trade only which is consistent with neutrality, and not trade which is contraband. Applying everyday rules of construction I come to a like conclusion with that which Sir James Marriott expressed in 1778 in his judgment in *The Vryheid*, Hay & Marriott, 188—namely, that a treaty right to trade with the enemy in goods which conditionally are contraband must in the absence of express stipulation be limited to "goods going in the ordinary course of merchandise and for mercantile purposes." I therefore hold that the conveyance of fish from Norway to Stettin, so long as foodstuffs were conditional contraband, was not by the agreement of April 30, 1918, permitted to Norwegian traders.

Whether the armistice which was concluded on November 11, 1918, suspended the operation of the then subsisting proclamations as to contraband can be determined by reference to the actual terms of the armistice without entering upon any detailed discussion of the implications which may or must arise from the conclusion of an armistice. Article 26 of the terms of the armistice is in these words: "The existing blockade conditions set up by the Allied and Associated Powers are to remain unchanged, and all German merchant ships found at sea are to remain liable to capture. The Allies and United States contemplate the provisioning of Germany during the armistice as shall be found necessary." I take it to be a sound proposition that an armistice does not necessarily imply the right to re-provision a beleaguered area or to remove the blockade of a coast: see Hall (7th Ed.) p. 585; Halleck (4th Ed.) vol. 2, p. 351, but I think the question need not be examined in this case, since the terms here agreed upon preclude the contention that the Allied Powers had conceded to Germany any privilege of free importation of foodstuffs to her bases of supply.

So far as regarded traffic by sea to Stettin the armistice did not grant anything to the enemy. Only by opening German trade could it have enlarged the rights reserved to Norwegian citizens under the agreement, and since it did not reopen German trade it is ineffectual as an independent ground of immunity for the present neutral claimants.

Whether a Norwegian owner of fish might have raised effectual objection against rights by capture arising under a blockade set up after the agreement was concluded, I need not consider. These claimants

are not Norwegian subjects. They were not within any class of traders for whose benefit this agreement was made by the Norwegian government. They are simply a German corporation who had purchased foodstuffs in Norway for the German state and were engaged in conveying the same by sea to a German base of supply. It is hard, if not impossible, to find any ground of principle on which a claim on their part can be founded.

As to the cargo, therefore, I come to the conclusion that the claim of the Procurator General must prevail and there must be a decree of condemnation of the herrings as foodstuffs captured in course of transit to an enemy base.

The cargo of the *Rannveig* being contraband, what is the position of her owners? They dispatched their ship not only with full knowledge of the character of the burden and of its destination, but after the plainest possible warning of the risks they ran in so doing. There is no ground for the submission that they were misled. Under such circumstances none of the considerations arise which relieve from the penalty of confiscation shipowners who innocently carry contraband. Having regard to the rule laid down in *The Hakan* (1918) A. C. 148, it is my duty to pronounce condemnation of the *Rannveig* as good and lawful prize.<sup>48</sup>

<sup>48</sup> A Swedish steamship, the *Consul Corfitzon*, was seized as prize in an English port, in September, 1915, while on a voyage from South American ports to Karlskrona, in Sweden.

The consignee, a Swedish subject, claimed the cargo, and alleged by his affidavit that it had been bought by him partly for his tanning business in Sweden, and partly for sale to customers in that country. The question was one of ultimate destination. If the transaction was to end in Sweden, then it was a neutral transaction from beginning to end. If, on the contrary, the intention of the consignee was to send the cargo, in whole or in part, to Germany, the goods could be seized before reaching Sweden, by the application of the doctrine of continuous voyage.

The Privy Council, per Lord Parker of Waddington, in *The Consul Corfitzon*, L. R. [1917] A. C. 550, affirmed the order of the court below for the submission of documents which would "throw light on the nature and course of the appellant's business and the volume of his trade with Germany for some months before the war and since the outbreak of the war." The question being whether the cargo was en route to Sweden or to Germany, the documents were calculated to establish the fact of destination.

"The ease with which, in the circumstances of the modern development of all sorts of transport, goods imported into a neutral country can find their way to the enemy territory, induced the Allies to adopt a rationing policy by which such imports were limited by the average pre-war quantities. In cases where shipments to neutral countries adjacent to enemy states were found to exceed considerably the statistical limits, the onus was thrown upon the claimants to discharge the inference of hostile destination.

"Lord Sterndale, in *The Urna*, April 14, 1919 (transcript from the official shorthand notes), affirmed on appeal [1920], 36 T. L. R. 652, condemned a cargo of dried fruits sent to Denmark on the ground that the imports into this country in the year of seizure were nearly three times higher the annual average before the war, and that the claimants had not rebutted the presumption that the goods were going to the enemy. And the Privy Council, in *The Baron Stjernblad*, held that it was impossible, in the presence of a tenfold increase of the imports of cocoa beans to Sweden, to avoid suspicion or to predicate, with regard to any particular shipment, that a considerable portion

## THE MANUEL ESPALIU.

(French Prize Court, 1916. Translated from MS., Department of State.)

In the name of the French people the Prize Court has rendered the following decision between:

On the one hand, the captain and owners, shippers and consignees of the cargo seized as contraband of war by the French naval authorities on June 13, 1916, on board the Spanish steamer Manuel Espaliu;

And, on the other hand, the Minister of the Navy, acting in the name and as representative of the State and of the rightful claimants of the proceeds of prizes: \* \* \*

Considering the Orders of the 6th of Germinal (March 26), in the year 8 (1800), and of the 2d of Prairial (May 21), in the year 11 (1803);

Considering the Decrees of May 9, 1859, and November 28, 1861;

Considering the Decrees of November 6, 1914, and of April 12, 1916, relative to the application of the Rules of the Declaration of London of 1909, and in force at the time of seizure of the cargo Manuel Espaliu;

Considering the notifications relative to contraband of war published in the Journal Officiel of October 14, 1915, and April 27, 1916;

Considering the notice of opening of prize proceedings inserted in the Journal Officiel of August 12, 1916;

Considering the decision providing a delay, rendered by the Court before passing final judgment, on September 14, 1916;

Having heard M. Chardenet, Commissioner of the Government, in his statements in support of his aforementioned motions, and M. Henri Fromageot, member of the Court, in his report:

THE COURT, after due deliberation:

Whereas, on June 11, 1916, toward 7 p. m., the steamer Manuel Espaliu, under Spanish flag, bound from Barcelona and Tarragona to Genoa, after putting in at Cette, was stopped about two miles south of the island of Port Cros, in the Mediterranean Sea, by one of the battle-ships of the French fleet;

Whereas, in the course of the search, which, according to the official

thereof was not destined to find its way to Germany. (1917) 84 T. L. R. 106. Cf. *The Norne* (1921) 37 T. L. R. 541.

"The same presumption was acted upon by the French Prize Court in confiscating a cargo of wine on the Tiber consigned to Denmark when, according to the statistical evidence, the importations of wine into this neutral country, in the year under review, were eight times higher than the normal pre-war quantity. (1918) Journal Officiel, May 19, 1918, 4356. But, in the case of the Iberia, the court decreed release of the goods to claimants, who proved that the cargo, although exceeding the statistical limits, was really intended for bona fide consumption in Sweden. (1919) Journal Officiel, August 11, 1919, p. 8492." C. J. Colombos, "Cargoes in the Prize Courts of Great Britain, France, Italy and Germany," Journal of Comparative Legislation and International Law (3d Series) vol. III, part IV, pp. 288, 297, October, 1921.

report, was effected on June 12, 1916, in the anchorage of Lavandon because of the roughness of the sea and the darkness, there were found on board in the cargo five lots of goods, to wit: \* \* \*

Whereas, it appears from the documents communicated by the Minister of Foreign Affairs and appended to his aforementioned despatch of October 11, 1916, and especially from his letter of March 29, 1916, to the Director of the Swiss Economic Supervision Company, that according to the constitution of said company, commonly designated by "S. S. S." (Société Suisse de Surveillance), whose object is to guarantee the reality of final Swiss destination of goods imported into this neutral country, it has been agreed between the Swiss Federal Government and the Allied Powers that when goods are imported into Switzerland from overseas, including goods from maritime countries of Europe, the list of which was published in the Journal Officiel of the French Republic on November 15, 1915, and March 4, 1916, they should be accompanied by a certificate, issued by the representatives of the Swiss government and attesting their consignment to the S. S. S.;

Whereas, the goods found on board the steamer Manuel Espaliu constituted by their nature, on the one hand (cork, soap), articles of absolute contraband of war, on the other hand (canned vegetables), articles of conditional contraband of war, according to the provisions of the aforementioned notifications of October 14, 1915, and April 27, 1916;

Whereas, they are included on the lists, likewise aforementioned, of articles whose final destination to Switzerland should be attested by a certificate of consignment to the S. S. S., in order that the sincerity of said destination may be fully recognized;

Whereas, in reality these goods were not accompanied by said certificate;

Whereas, under these conditions of irregular shipment said goods have been declared seized, according to the official report of June 13, 1916; \* \* \*

Whereas, while the irregular conditions under which said cargoes were found on board the Manuel Espaliu at the time of the search could at that time be regarded as a sufficient cause for seizure, it is now proved that the goods were actually consigned to the Swiss Economic Supervision Company and that consequently they are not intended for the enemy;

Whereas, the seizure cannot therefore be declared valid;

Whereas, in compliance with the provisions regarding seizures, as laid down by the Ruling of December 23, 1705, all expenses connected with the prize must be borne by the released cargo;

Decides:

The seizure effected on June 13, 1916, of goods found on board the steamer Manuel Espaliu as per Bills of Lading No. 2, 4, 10 and 13, is



declared null, and all expenses connected with said seizure are to be charged to the account of said goods.

These goods, or in case of requisition, the price of their requisition or of their sale, will be returned to the rightful claimants upon receipt of proof establishing their claims. \* \* \*

## SECTION 6.—VISIT AND SEARCH

### THE MARIA.

(High Court of Admiralty, 1799. 1 C. Rob. 340.)

Sir W. Scott.<sup>50</sup> This ship was taken in the British Channel in company with several other Swedish vessels sailing under convoy of a Swedish frigate, having cargoes of naval stores and other produce of Sweden on board, by a British squadron under the command of Commodore Lawford.

The facts attending the capture did not sufficiently appear to the court upon the original evidence; it therefore directed further information to be supplied, and by both parties.

The additional information now brought in consists of several at-

<sup>49</sup> In *The Lupus*, *Entscheidungen des Oberprisengerichts in Berlin*, 1918, 377 (1917), the Supreme Prize Court of Berlin held that a cargo of pyrites carried upon the Norwegian steamer *Lupus*, en route to Amsterdam, was subject to confiscation, although the bills of lading were to the order of the Netherlands Oversea Trust Company.

The court was of opinion that if the capture had been made by a British, instead of a German man-of-war, the British Prize Court would have held that the pyrites, from which sulphuric acid could be made, would not have remained in Holland, but would have been exported to Germany. In addition, the court was of opinion that the Netherlands Oversea Trust Company had "become entangled in obligations to such an extent that they were compelled under any circumstances to comply with a request of England to relinquish to England goods imported into Dutch ports, and to subject these goods to the jurisdiction of the English Prize Court."

It would appear from the case of *The Lupus*, that the parties to the World War of 1914-1918, started from the standpoint that enemy property—whether it be of enemy origin or enemy owned—is liable to capture, and that it does not cease to be so liable until it has reached the jurisdiction of the country of ultimate destination; that the interposition of a neutral country is immaterial; that the voyage from the port of departure to the country of ultimate destination is in the nature of a continuous voyage, however broken or interrupted by passage through or from a neutral port or country, and that therefore the property is subject to capture in any part of its voyage provided it is not at the time of capture within a neutral jurisdiction.

The principle of continuous voyage, more appropriately called ultimate destination, which had hitherto been principally applied to shipments from a neutral country, was extended to shipments from an enemy port or country. The neutral property of a contraband nature with ultimate destination to the enemy or enemy property with an ultimate destination to a neutral country were alike subject to capture.

<sup>50</sup> Statement of facts and parts of the opinion are omitted.

testations made on the part of the captors, and of a copy of the instructions under which the Swedish frigate sailed, transmitted to the King's proctor from the office of the British Secretary of State for the Foreign Department. On the part of the Swedes some attestations and certificates have been introduced, but all of them applying to collateral matter, none relating immediately to the facts of the capture. On this evidence the court has to determine this most important question; for its importance is very sensibly felt by the court. \* \* \*

In forming that judgment, I trust that it has not escaped my anxious recollection for one moment, what it is that the duty of my station calls for from me, namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out, without distinction, to independent states, some happening to be neutral and some to be belligerent. The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question; a question regarding one of the most important rights of belligerent nations relatively to neutrals.

The only special consideration which I shall notice in favor of Great Britain (and which I am entirely desirous of allowing to Sweden in the same or similar circumstances) is, that the nature of the present war does give this country the rights of war, relatively to neutral states, in as large a measure as they have been regularly and legally exercised, at any period of modern and civilized times. Whether I estimate the nature of the war justly, I leave to the judgment of Europe, when I declare that I consider this as a war in which neutral states themselves have an interest much more direct and substantial than they have in the ordinary, limited, and private quarrels (if I may so call them) of Great Britain and its great public enemy. That I have a right to advert to such considerations, provided it be done with sobriety and truth, cannot, I think, reasonably be doubted; and if authority is required, I have authority—and not the less weighty in this question for being Swedish authority—I mean the opinion of that distinguished person, one of the most distinguished which that country (fertile as it has been of eminent men) has ever produced; I mean

Baron Puffendorff.<sup>51</sup> The passage to which I allude is to be found in a note of Barbeyrac's, on his larger work, L. viii, c. 6, § 8. Puffendorff had been consulted in the beginning of the present century, when England and other states were engaged in the confederacy against Louis XIV, by a lawyer upon the Continent, Groningius, who was desirous of supporting the claims of neutral commerce in a treatise which he was then projecting. Puffendorff concludes his answer to him in these words:

"I am not surprised that the northern powers should consult the general interest of all Europe without regard to the complaints of some greedy merchants, who care not how things go, provided they can but satisfy their thirst of gain. These princes wisely judge that it would not become them to take precipitate measures whilst other nations are combining their whole force to reduce within bounds an insolent and exorbitant power which threatens Europe with slavery and the Protestant religion with destruction. This being the interest of the northern crowns themselves, it is neither just nor necessary that, for the present advantage, they should interrupt so salutary a design, especially as they are at no expense in the affair, and run no hazard." In the opinion, then, of this wise and virtuous Swede, the nature and purpose of a war was not entirely to be omitted in the consideration of the warrantable exercise of its rights relatively to neutral states. His words are memorable. I do not overrate their importance when I pronounce them to be well entitled to the attention of his country. \* \* \*

In considering the case, I think it will be advisable for me, first, to state the facts as they appear in the evidence; secondly, to lay down the principles of law which apply generally to such a state of facts; thirdly, to examine whether any special circumstances attended the transaction in any part of it which ought in any manner or degree to affect the application of these principles.

The facts of the capture are to be learnt only from the captors, for, as I have observed, the claimants have been entirely silent about them, and that silence gives the strongest confirmation to the truth of the accounts delivered by the captors. \* \* \* What then do these attestations (uncontradicted attestations) prove? To my apprehension they prove most clearly these facts:

That a large number of vessels, connected all together with each other, and with a frigate which convoyed them, being bound to different ports in the Mediterranean, some declared to be enemy's ports and others not, with cargoes consisting, amongst other things, of naval stores, were met with, close upon the British coast, by his Britannic

<sup>51</sup> Puffendorff was not actually born in Sweden, but is usually claimed and allowed as a writer of that country, from his employment in it under the king of Sweden. The great work on which his fame is principally built, was given to the world during his residence in that country.

Majesty's cruisers; that a continued resistance was given by the frigate to the act of boarding any of these vessels by the British cruisers, and that extreme violence was threatened in order to prevent it, and that the violence was prevented from proceeding to extremities only by the superior British force which overawed it; that the act being effected in the night, by the prudence of the British commander, the purpose of hostile resistance, so far from being disavowed, was maintained to the last, and complaint made that it had been eluded by a stratagem of the night; that a forcible recapture of one vessel took place, and a forcible capture and detention of one British officer who was on board her; and who, as I understand the evidence, was not released till the superiority of the British force had awed this Swedish frigate into something of a stipulated submission.

So far go the general facts. But all this, it is said, might be the ignorance or perverseness of the Swedish officer of the frigate—the folly or the fault of the individual alone. \* \* \*

Whatever then was done upon this occasion was not done by the unadvised rashness of one individual, but it was an instructed and premeditated act—an act common to all the parties concerned in it; and of which every part belongs to all; and for which all the parties, being associated with one common intent, are legally and equitably answerable.

This being the actual state of the fact, it is proper for me to examine, 2dly, what is their legal state, or, in other words, to what considerations they are justly subject according to the law of nations; for which purpose I state a few principles of that system of law which I take to be incontrovertible.

1st. That the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destinations what they may, because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule, that free ships make free goods, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even

of Hubner himself, the great champion of neutral privileges. In short, no man in the least degree conversant in subjects of this kind has ever, that I know of, breathed a doubt upon it. The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible; but soften it as much as you can, it is still a right of force, though of lawful force—something in the nature of civil process, where force is employed, but a lawful force, which cannot lawfully be resisted. For it is a wild conceit that wherever force is used, it may be forcibly resisted; a lawful force cannot lawfully be resisted. The only case where it can be so in matters of this nature, is in the state of war and conflict between two countries where one party has a perfect right to attack by force, and the other has an equally perfect right to repel by force. But in the relative situation of two countries at peace with each other, no such conflicting rights can possibly coexist.

2dly. That the authority of the sovereign of the neutral country being interposed in any manner of mere force cannot legally vary the rights of a lawfully commissioned belligerent cruiser. I say legally, because what may be given, or be fit to be given, in the administration of this species of law, to considerations of comity or of national policy, are views of the matter which, sitting in this court, I have no right to entertain. All that I assert is, that legally it cannot be maintained, that if a Swedish commissioned cruiser, during the wars of his own country, has a right by the law of nations to visit and examine neutral ships, the king of England, being neutral to Sweden, is authorized by that law to obstruct the exercise of that right with respect to the merchant ships of his country. I add this, that I cannot but think that if he obstructed it by force, it would very much resemble (with all due reverence be it spoken) an opposition of illegal violence to legal right. Two sovereigns may unquestionably agree, if they think fit (as in some late instances they have agreed), by special covenant, that the presence of one of their armed ships along with their merchant ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it any more than with any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force.

The only security known to the law of nations upon this subject, independent of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it. I am not ignorant, that amongst the loose doctrines which modern fancy, under the various denominations of philosophy and philanthropy, and I know not what, have thrown upon the world, it has been within these few years advanced, or rather insinuated, that it might possibly be well if such a security were accepted. Upon such

unauthorized speculations it is not necessary for me to descant. The law and practice of nations (I include partially the practice of Sweden when it happens to be belligerent) give them no sort of countenance; and until that law and practice are new-modelled in such a way as may surrender the known and ancient rights of some nations to the present convenience of other nations (which nations may perhaps remember to forget them, when they happen to be themselves belligerent) no reverence is due to them; they are the elements of that system which, if it is consistent, has for its real purpose an entire abolition of capture in war—that is, in other words, to change the nature of hostility, as it has ever existed amongst mankind, and to introduce a state of things not yet seen in the world, that of a military war and a commercial peace. If it were fit that such a state should be introduced, it is at least necessary that it should be introduced in an avowed and intelligible manner, and not in a way which, professing gravely to adhere to that system which has for centuries prevailed among civilized states, and urging at the same time a pretension utterly inconsistent with all its known principles, delivers over the whole matter at once to eternal controversy and conflict, at the expense of the constant hazard of the harmony of states, and of the lives and safeties of innocent individuals.

3dly. That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search. For the proof of this I need only refer to Vattel, one of the most correct and certainly not the least indulgent of modern professors of public law.<sup>52</sup> \* \* \*

<sup>52</sup> In *The Schooner Nancy*, 27 Ct. Cl. 99 (1892), the court, per Judge Davis, held that it had not been directly determined whether a neutral vessel laden with a neutral cargo is liable to condemnation if captured under enemy convoy. On a review of the cases and of the writings of publicists, the court held that such a vessel is liable to capture if actually and voluntarily under the protection of an enemy.

In *The Ship Rose*, 36 Ct. Cl. 290 (1901), it appeared that the ship resisted search. The court held, according to the headnote, that:

"Grave apprehension of illegal condemnation will not justify a neutral vessel in resisting the right of search by a belligerent," and that "forcible resistance is good ground for condemnation, except in cases where a neutral is justified in defending against extreme violence threatened by a cruiser grossly abusing his commission."

In the case of *The Schooner Endeavor*, 44 Ct. Cl. 242 (1906), it was held that a vessel which had illegally resisted search and escaped, remained liable to condemnation if captured by another privateer on the same voyage. The opinion of Chief Justice Peelle reviews the authorities and is a valuable digest case.

*The Hipsang*, a British and therefore a neutral steamer, carrying a cargo of beans and bean cake, was ordered to stop by a Russian destroyer, and eventually sunk by a torpedo. The case having been heard by the Liban Prize Court, before all the available evidence had been taken the Supreme Court ordered a new hearing. Upon all the evidence, old and new, the court found that the *Hipsang* had refused to obey the order to stop and endeavored to escape, and that shots had been fired at the destroyer. Held, on these facts, that the action of the commander of the destroyer was correct. *The Hipsang* (1910) 1 Hurst and Bray's Russian and Japanese Prize Cases (1912) 21.

## THE MARIANNA FLORA.

(Supreme Court of the United States, 1826. 11 Wheat. 1, 6 L. Ed. 405.)

STORY, Justice, delivered the opinion of the court.<sup>53</sup> \* \* \*

In considering the circumstances, the court has no difficulty in deciding that this is not a case of a piratical aggression, in the sense of the act of Congress. The Portuguese ship, though armed, was so for a purely defensive mercantile purpose. She was bound homewards with a valuable cargo on board, and could have no motive to engage in any piratical act or enterprise. It is true, that she made a meditated, and, in a sense, a hostile attack, upon the *Alligator*, with the avowed intention of repelling her approach, or of crippling or destroying her. But there is no reason to doubt, that this attack was not made with a piratical or felonious intent, or for the purpose of wanton plunder, or malicious destruction of property. It was done upon a mistake of the facts, under the notion of just self-defense, against what the master very imprudently deemed a piratical cruiser. The combat was, therefore, a combat on mutual misapprehension; and it ended without any of those calamitous consequences to life which might have brought very painful considerations before the court.

It has, indeed, been argued at the bar, that even if this attack had been a piratical aggression, it would not have justified the capture and sending in of the ship for adjudication, because foreign ships are not to be governed by our municipal regulations. But the act of Congress is decisive on this subject. It not only authorizes a capture, but a condemnation in our courts, for such aggressions; and whatever may be the responsibility incurred by the nation to foreign powers, in executing such laws, there can be no doubt that courts of justice are bound to obey and administer them.

The other count, which seeks condemnation on the ground of an asserted hostile aggression, admits of a similar answer. It proceeds upon the principle, that, for gross violations of the law of nations on the high seas, the penalty of confiscation may be properly inflicted upon the offending property. Supposing the general rule to be so in ordinary cases of property taken in delicto, it is not, therefore, to be admitted, that every offence, however small, however done under a mistake of rights, or for purposes wholly defensive, is to be visited with such harsh punishments. Whatever may be the case, where a gross, fraudulent, and unprovoked attack is made by one vessel upon another upon the sea, which is attended with grievous loss or injury, such effects are not to be attributed to lighter faults, or common negligence. It may be just, in such cases, to award to the injured party

<sup>53</sup> The facts of the case, the question of damages, and part of the opinion are omitted.

full compensation for his actual loss and damage; but the infliction of any forfeiture beyond this does not seem to be pressed by any considerations derived from public law. \* \* \*

In considering these points, it is necessary to ascertain what are the rights and duties of armed and other ships, navigating the ocean in time of peace. It is admitted, that the right of visitation and search does not, under such circumstances, belong to the public ships of any nation. This right is strictly a belligerent right, allowed by the general consent of nations in time of war, and limited to those occasions. It is true, that it has been held in the courts of this country, that American ships, offending against our laws, and foreign ships, in like manner, offending within our jurisdiction, may, afterwards, be pursued and seized upon the ocean, and rightfully brought into our ports for adjudication. This, however, has never been supposed to draw after it any right of visitation or search. The party, in such case, seizes at his peril. If he establishes the forfeiture, he is justified. If he fails, he must make full compensation in damages.

Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business without interruption; but, whatever may be that business, she is bound to pursue it in such a manner as not to violate the rights of others. The general maxim in such cases is, "*sic utere tuo, ut non alienum lædas.*"

It has been argued, that no ship has a right to approach another at sea; and that every ship has a right to draw round her a line of jurisdiction, within which no other is at liberty to intrude. In short, that she may appropriate so much of the ocean as she may deem necessary for her protection, and prevent any nearer approach.

This doctrine appears to us novel, and is not supported by any authority. It goes to establish upon the ocean a territorial jurisdiction, like that which is claimed by all nations within cannon shot of their shores, in virtue of their general sovereignty. But the latter right is founded upon the principle of sovereign and permanent appropriation, and has never been successfully asserted beyond it. Every vessel undoubtedly has a right to the use of so much of the ocean as she occupies, and as is essential to her own movements. Beyond this, no exclusive right has ever yet been recognized, and we see no reason for admitting its existence. Merchant ships are in the constant habit of approaching each other on the ocean, either to relieve their own distress, to procure information, or to ascertain the character of strangers; and, hitherto, there has never been supposed in such conduct any breach of the customary observances, or of the strictest principles of the law of nations. In respect to ships of war sailing, as

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in the present case, under the authority of their government, to arrest pirates, and other public offenders, there is no reason why they may not approach any vessels descried at sea, for the purpose of ascertaining their real characters. Such a right seems indispensable for the fair and discreet exercise of their authority; and the use of it cannot be justly deemed indicative of any design to insult or injure those they approach, or to impede them in their lawful commerce. On the other hand, it is as clear, that no ship is, under such circumstances, bound to lie by, or wait the approach of any other ship. She is at full liberty to pursue her voyage in her own way, and to use all necessary precautions to avoid any suspected sinister enterprise or hostile attack. She has a right to consult her own safety; but, at the same time, she must take care not to violate the rights of others. She may use any precautions dictated by the prudence or fears of her officers; either as to delay, or the progress or course of her voyage; but she is not at liberty to inflict injuries upon other innocent parties, simply because of conjectural dangers. These principles seem to us the natural result of the common duties and rights of nations navigating the ocean in time of peace. Such a state of things carries with it very different obligations and responsibilities from those which belong to public war, and is not to be confounded with it.

The first inquiry, then, is, whether the conduct of Lieutenant Stockton was, under all the circumstances preceding and attending the combat, justifiable. \* \* \*

Upon the whole, we are of opinion, that the conduct of Lieutenant Stockton, in approaching, and ultimately, in subduing the Marianna Flora, was entirely justifiable. The first wrong was done by her, and his own subsequent acts were a just defence and vindication of the rights and honor of his country.

The next inquiry is, whether the act of sending in the Marianna Flora for adjudication, was, under all the circumstances, unjustifiable, so as to carry with it responsibility in damages. \* \* \*

Upon the whole, it is the opinion of the court, that the decree of the circuit court ought to be affirmed, and it is, accordingly, affirmed, without costs to either party.

Decree accordingly.

## SECTION 7.—EMPLOYMENT OF ARMED VESSELS

## THE FANNY.

(High Court of Admiralty, 1814. 1 Dod. 443.)

This was a question of salvage upon neutral (Portuguese) property, on board a British armed ship, which had been taken by an American schooner, and was afterwards retaken by one of his Majesty's ships of war. The vessel sailed on her outward voyage, under convoy, with a cargo from Liverpool to Rio de Janeiro, where the master increased his crew, by hiring thirty additional men, for the purpose of fighting his way home without the protection of convoy, which he had obtained permission to do from the British admiral commanding on that station. The ship was furnished with a letter of marque, had sixteen guns mounted, with small arms and ammunition in proportion. On her return voyage, with a cargo consisting partly of Portuguese and partly of British property, she was captured on the 17th of April, 1814, by the American schooner, General Armstrong, but did not surrender till after a very severe action, in which the mate was killed and several of the seamen, and the merchant himself, who happened to be on board, was dangerously wounded. The ship and cargo were recaptured on the 10th of May, 1814, by his Majesty's ship, Sceptre, and for this service a salvage was demanded upon the Portuguese, as well as the British property. The demand for salvage was resisted on the part of the Portuguese owners. \* \* \*

Sir W. SCOTT. This ship, having a commission for war, but employed, likewise, for purposes of commerce, sailed under the protection of a British convoy, from Liverpool to Rio de Janeiro, and there obtained permission from the admiral on the station to return home without convoy. Thirty men were hired, and some additional guns were put on board, for the express purpose of enabling the ship to fight her way home; and it was upon the prospect of her being competent to defend herself that the admiral permitted her to sail without convoy. The fact of her being armed must have been notorious at Rio de Janeiro, and consequently within the knowledge of the merchants who put their goods on board. It appears, that the ship actually sustained an engagement, for the witness says, that "she did not surrender till after a very severe action of fifty-five minutes, during which many guns were fired on both sides, and the ship had her second mate killed, four men dangerously wounded, as was also the merchant himself, who happened to be on board, and her standing and running rigging all cut to pieces; so that they had no longer any command of the ship." Being so taken by the Americans, and afterwards

retaken by his Majesty's ship *Sceptre*, the question is, whether the Portuguese lader is entitled to the restitution of his goods absolutely, or subject to the payment of a salvage to the recaptors.

Now, upon principle, I cannot but think that the goods would have been in very great danger of condemnation in an American court of prize. Reference has been made to an act of the American Congress relative to salvage, but I do not think that it can have much bearing on the present case. The act does not define the cases to which it is intended to be applied—that is left to the courts to determine at their discretion. I shall, therefore, lay the American law entirely out of my consideration and consider the case upon the general principle. Is there a high degree of probability (for certainty is not required) that this property would have been condemned, if it had been carried into an American port? In every point of view in which I can see the matter, I cannot help thinking that it would have run a very considerable risk of condemnation; and that the Portuguese merchant would have no very good ground of complaint if it had actually been condemned. The ship being furnished with a letter of marque, is manifestly a ship of war, and is not otherwise to be considered, because she acted also in a commercial capacity. The mercantile character being superadded, does not predominate over or take away the other. There was formerly, indeed, a distinction made between privateers and merchant vessels furnished with a letter of marque, the one being entitled to head-money and the other not; but that distinction has since been entirely done away. A neutral subject is at liberty to put his goods on board a merchant vessel, though belonging to a belligerent, subject, nevertheless, to the rights of the enemy who may capture the vessel; but who has no right, according to the modern practice of civilized states, to condemn the neutral property. Neither will the goods of the neutral be subject to condemnation, although a rescue should be attempted by the crew of the captured vessel, for that is an event which the merchant could not have foreseen. But, if he puts his goods on board a ship of force, which he has every reason to presume will be defended against the enemy by that force, the case then becomes very different. He betrays an intention to resist visitation and search, which he could not do by putting them on board a mere merchant vessel, and so far as he does this he adheres to the belligerent; he withdraws himself from his protection of neutrality, and resorts to another mode of defence; and I take it to be quite clear, that, if a party acts in association with a hostile force, and relies upon that force for protection, he is, *pro hac vice*, to be considered as an enemy.

It is not a sufficient excuse to say, that the Portuguese are not possessed of shipping of their own, sufficient for the whole of their commerce, and are, therefore, under the necessity of making use of those belonging to others. If they choose to take the protection of a hos-

tile force instead of their own neutral character, they must take the inconvenience with the convenience; they must abide by the consequences resulting from the course of conduct which, upon the whole knowledge of the matter, they have thought proper to pursue. It could not, in this case, have been a secret, that force was to be used for the protection of the property. It must have been known to the laders of the cargo, that this ship was to sail as a single ship, and to fight her way home, since a large number of men were openly and publicly collected for the purpose of enabling her to resist a hostile force. I cannot entertain a doubt that the Americans might, upon just and sound principles, have condemned this property. The case which has been cited from the American Reports, is much too indistinct to assist the court in forming its judgment upon the practice of the American court. The ground upon which salvage was there given, does not appear to be of great authority either one way or the other. I decree restitution of this property, on payment of the usual salvage to the recaptor.

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### THE NEREIDE.

(Supreme Court of the United States, 1815. 9 Cranch, 388, 3 L. Ed. 769.)

This was an appeal by Manuel Pinto, from the sentence of the Circuit Court for the District of New York, affirming (pro forma) the sentence of the District Court which condemned that part of the cargo which was claimed by him. The facts of the case are thus stated by the Chief Justice in delivering the opinion of the court.

Manuel Pinto, a native of Buenos Ayres, being in London, on the 26th of August, 1813, entered into a contract with John Drinkald, owner of the ship Nereide, whereof William Bennett was master, whereby the said Drinkald let to the said Pinto the said vessel to freight for a voyage to Buenos Ayres and back again to London, on the conditions mentioned in the charter party. \* \* \*

Under this contract a cargo, belonging in part to the freighter, in part to other inhabitants of Buenos Ayres, and in part to British subjects, was taken on board the Nereide, and she sailed under convoy some time in November, 1813. Her license, or passport, dated the 16th of November, states her to mount 10 guns and to be manned by 16 men. The letter of instructions from the owner to the master is dated on the 24th of November, and contains this passage: "Mr. Pinto is to advance you what money you want for ship's use at River Plate, and you will consider yourself as under his directions so far as the charter party requires."

On the voyage, the Nereide was separated from her convoy, and on the 19th of December, 1813, when in sight of Madeira, fell in with, and after an action of about fifteen minutes, was captured by the

American privateer *The Governor Tompkins*. She was brought into the port of New York, where vessel and cargo were libelled; and the vessel and that part of the cargo which belonged to British subjects were condemned without a claim. That part of the cargo which belonged to Spaniards was claimed by Manuel Pinto, partly for himself and partners, residing in Buenos Ayres, and partly for the other owners residing in the same place. On the hearing, this part of the cargo was also condemned. An appeal was taken to the Circuit Court, where the sentence of the District Court was affirmed, *pro forma*, and from that sentence an appeal has been prayed to this court. \* \* \*

MARSHALL, C. J., after stating the facts of the case, delivered the opinion of the court as follows:<sup>10</sup> \* \* \*

I. Manuel Pinto is admitted to be a native of Buenos Ayres, and to carry on trade at that place in connexion with his father and sister, who are his partners, and who also reside at Buenos Ayres; but it is contended that he has acquired a domicile in England, and with that domicile the English commercial character. \* \* \*

Had the English character been friendly and the Spanish hostile, it would have been a hardy attempt indeed in Mr. Pinto to found, on these circumstances, a claim to a domicile in England.

The question respecting ownership of the goods is not so perfectly clear. The evidence of actual ownership, so far as the claim asserts property existing, at the time, in himself and partners, is involved in no uncertainty. \* \* \* The witnesses examined in *preparatorio*, so far as they know any thing on the subject, all depose to his interest. \* \* \*

This testimony proves, very satisfactorily, the interest of Pinto's house in the property he claims. There is no counter testimony in the cause, except the belief expressed by Mr. Puzey, that for a part of the goods Pinto was agent for the government of Buenos Ayres. \* \* \*

That he should state as his, the property which belonged to a house in Buenos Ayres, whose members all resided at the same place, and of which he was the acting and managing partner, was a circumstance which could not appear important to himself, and which was of no importance in the cause. These trivial and accidental inaccuracies are corrected in his claim and in his test affidavit. The court does not think them of sufficient importance to work a confiscation of goods, of the real neutrality of which no serious doubt is entertained. \* \* \*

Thus far the opinion of the court has been formed without much difficulty. Although the principles, asserted by the counsel, have been sustained on both sides with great strength of argument, they have been found on examination to be simple and clear in themselves.

<sup>10</sup> The statement of facts is abridged and parts of the opinion are omitted.

Stripped of the imposing garb in which they have been presented to the court, they have no intrinsic intricacy which should perplex the understanding.

The remaining point is of a different character. Belligerent rights and neutral privileges are set in array against each other. Their respective pretensions, if not actually intermixed, come into close contact, and the line of partition is not so distinctly marked as to be clearly discernible. It is impossible to declare in favor of either, without hearing, from the other, objections which it is difficult to answer, and arguments which it is not easy to refute. The court has given to this subject a patient investigation, and has endeavored to avail itself of all the aid which has been furnished by the bar. The result, if not completely satisfactory even to ourselves, is one from which it is believed we should not depart were further time allowed for deliberation.

4. Has the conduct of Manuel Pinto and of the *Nereide* been such as to impress the hostile character on that part of the cargo which was in fact neutral? In considering this question the court has examined separately the parts which compose it.

The vessel was armed, was the property of an enemy, and made resistance. How do these facts affect the claim? Had the vessel been armed by Pinto, that fact would certainly have constituted an important feature in the case. But the court can perceive no reason for believing she was armed by him. He chartered, it is true, the whole vessel, and that he might as rightfully do as contract for her partially; but there is no reason to believe that he was instrumental in arming her. The owner stipulates that the *Nereide* "well manned, victualled, equipped, provided and furnished with all things needful for such a vessel," shall be ready to take on board a cargo to be provided for her. The *Nereide*, then, was to be put, by the owner, in the condition in which she was to sail. In equipping her, whether with or without arms, Mr. Pinto was not concerned. It appears to have been entirely and exclusively the act of the belligerent owner.

Whether the resistance, which was actually made, is in any degree imputable to Mr. Pinto, is a question of still more importance. It has been argued that he had the whole ship, and that, therefore, the resistance was his resistance. The whole evidence upon this point is to be found in the charter party, in the letter of instructions to the master, and in the answer of Pinto to one of the interrogatories in preparatorio.

The charter party evinces throughout that the ship remained under the entire direction of the owner, and that Pinto in no degree participated in the command of her. The owner appoints the master and stipulates for every act to be performed by the ship, from the date of the charter party to the termination of the voyage. In no one respect, except in lading the vessel, was Pinto to have any direction of her. The letter of instructions to the master contains full directions for

the regulation of his conduct, without any other reference to Mr. Pinto than has been already stated. That reference shows a positive limitation of his power by the terms of the charter party. Consequently he had no share in the government of the ship. \* \* \*

The next point to be considered is the right of a neutral to place his goods on board an armed belligerent merchantman. That a neutral may lawfully put his goods on board a belligerent ship for conveyance on the ocean, is universally recognized as the original rule of the law of nations. It is, as has already been stated, founded on the plain and simple principle that the property of a friend remains his property wherever it may be found. "Since it is not," says Vattel, "the place where a thing is which determines the nature of that thing, but the character of the person to whom it belongs, things belonging to neutral persons which happen to be in an enemy's country, or on board an enemy's ships, are to be distinguished from those which belong to the enemy."

Bynkershoek lays down the same principles in terms equally explicit; and in terms entitled to the more consideration, because he enters into the enquiry whether a knowledge of the hostile character of the vessel can effect the owner of the goods. The same principle is laid down by other writers on the same subject, and is believed to be contradicted by none. It is true there were some old ordinances of France declaring that a hostile vessel or cargo should expose both to condemnation. But these ordinances have never constituted a rule of public law.

It is deemed of much importance that the rule is universally laid down in terms which comprehend an armed as well as an unarmed vessel; and that armed vessels have never been excepted from it. Bynkershoek, in discussing a question suggesting an exception, with his mind directed to hostilities, does not hint that this privilege is confined to unarmed merchantmen. In point of fact, it is believed that a belligerent merchant vessel rarely sails unarmed, so that this exception from the rule would be greater than the rule itself. At all events, the number of those who are armed and who sail under convoy, is too great not to have attracted the attention of writers on public law; and this exception to their broad general rule, if it existed, would certainly be found in some of their works. It would be strange if a rule laid down, with a view to war, in such broad terms as to have universal application, should be so construed as to exclude from its operation almost every case for which it purports to provide, and yet that not a dictum should be found in the books pointing to such construction.

The antiquity of the rule is certainly not unworthy of consideration. It is to be traced back to the time when almost every merchantman was in a condition for self-defence, and the implements of war were so light and so cheap that scarcely any would sail without them. A belligerent has a perfect right to arm in his own defence; and a neutral

has a perfect right to transport his goods in a belligerent vessel. These rights do not interfere with each other. The neutral has no control over the belligerent right to arm—ought he to be accountable for the exercise of it?

By placing neutral property in a belligerent ship, that property, according to the positive rules of law, does not cease to be neutral. Why should it be changed by the exercise of a belligerent right, universally acknowledged and in common use when the rule was laid down, and over which the neutral had no control? The belligerent answers, that by arming his rights are impaired. By placing his goods under the guns of an enemy, the neutral has taken part with the enemy and assumed the hostile character.

Previous to that examination which the court has been able to make of the reasoning by which this proposition is sustained, one remark will be made which applies to a great part of it. The argument which, taken in its fair sense, would prove that it is unlawful to deposit goods for transportation in the vessel of an enemy generally, however imposing its form, must be unsound, because it is in contradiction to acknowledged law. It is said that by depositing goods on board an armed belligerent the right of search may be impaired, perhaps defeated.

What is this right of search? Is it a substantive and independent right wantonly, and in the pride of power, to vex and harrass neutral commerce, because there is a capacity to do so? or to indulge the idle and mischievous curiosity of looking into neutral trade? or the assumption of a right to control it? If it be such a substantive and independent right, it would be better that cargoes should be inspected in port before the sailing of the vessel, or that belligerent licenses should be procured. But this is not its character.

Belligerents have a full and perfect right to capture enemy goods and articles going to their enemy which are contraband of war. To the exercise of that right the right of search is essential. It is a mean justified by the end. It has been truly denominated a right growing out of, and ancillary to the great right of capture. Where this greater right may be legally exercised without search, the right of search can never arise or come into question.

But it is said that the exercise of this right may be prevented by the inability of the party claiming it to capture the belligerent carrier of neutral property. And what injury results from this circumstance? If the property be neutral, what mischief is done by its escaping a search? In so doing there is no sin even as against the belligerent, if it can be effected by lawful means. The neutral cannot justify the use of force or fraud, but if by means, lawful in themselves, he can escape this vexatious procedure, he may certainly employ them.

To the argument that by placing his goods in the vessel of an armed enemy, he connects himself with that enemy and assumes the hostile character; it is answered that no such connexion exists. The object



of the neutral is the transportation of his goods. His connexion with the vessel which transports them is the same, whether that vessel be armed or unarmed. The act of arming is not his—it is the act of a party who has a right so to do. He meddles not with the armament nor with the war. Whether his goods were on board or not, the vessel would be armed and would sail. His goods do not contribute to the armament further than the freight he pays, and freight he would pay were the vessel unarmed.

It is difficult to perceive in this argument any thing which does not also apply to an unarmed vessel. In both instances it is the right and the duty of the carrier to avoid capture and to prevent a search. There is no difference except in the degree of capacity to carry this duty into effect. The argument would operate against the rule which permits the neutral merchant to employ a belligerent vessel without imparting to his goods the belligerent character.

The argument respecting resistance stands on the same ground with that which respects arming. Both are lawful. Neither of them is chargeable to the goods or their owner, where he has taken no part in it. They are incidents to the character of the vessel; and may always occur where the carrier is belligerent. It is remarkable that no express authority on either side of this question can be found in the books. A few scanty materials, made up of inferences from cases depending on other principles, have been gleaned from the books and employed by both parties. They are certainly not decisive for or against either.

The celebrated case of the Swedish convoy has been pressed into the service. But that case decided no more than this, that a neutral may arm, but cannot by force resist a search. The reasoning of the judge on that occasion would seem to indicate that the resistance condemned the cargo, because it was unlawful. It has been inferred on the one side that the goods would be infected by the resistance of the ship, and on the other that a resistance which is lawful, and is not produced by the goods, will not change their character.

The case of *The Catharine Elizabeth* approaches more nearly to that of *The Nereide*, because in that case as in this there were neutral goods and a belligerent vessel. It was certainly a case, not of resistance, but of an attempt by a part of the crew to seize the capturing vessel. Between such an attempt and an attempt to take the same vessel previous to capture, there does not seem to be a total dissimilitude. But it is the reasoning of the judge and not his decision, of which the claimants would avail themselves. He distinguishes between the effect which the employment of force by a belligerent owner or by a neutral owner would have on neutral goods. The first is lawful, the last unlawful. The belligerent owner violates no duty. He is held by force and may escape if he can. From the marginal note it appears that the reporter understood this case to decide in principle that resistance by a belliger-

ent vessel would not confiscate the cargo. It is only in a case without express authority that such materials can be relied on.

If the neutral character of the goods is forfeited by the resistance of the belligerent vessel, why is not the neutral character of the passengers forfeited by the same cause? The master and crew are prisoners of war, why are not those passengers who did not engage in the conflict also prisoners? That they are not would seem to the court to afford a strong argument in favor of the goods. The law would operate in the same manner on both. It cannot escape observation, that in argument the neutral freighter has been continually represented as arming the *Nereide* and impelling her to hostility. He is represented as drawing forth and guiding her warlike energies. The court does not so understand the case. The *Nereide* was armed, governed, and conducted by belligerents. With her force, or her conduct the neutral shippers had no concern. They deposited their goods on board the vessel, and stipulated for their direct transportation to Buenos Ayres. It is true that on her passage she had a right to defend herself, did defend herself, and might have captured an assailing vessel; but to search for the enemy would have been a violation of the charter party and of her duty. \* \* \*

The *Nereide* has not that centaur-like appearance which has been ascribed to her. She does not rove over the ocean hurling the thunders of war while sheltered by the olive branch of peace. She is not composed in part of the neutral character of Mr. Pinto, and in part of the hostile character of her owner. She is an open and declared belligerent; claiming all the rights, and subject to all the dangers of the belligerent character. She conveys neutral property which does not engage in her warlike equipments, nor in any employment she may make of them; which is put on board solely for the purpose of transportation, and which encounters the hazard incident to its situation; the hazard of being taken into port, and obliged to seek another conveyance should its carrier be captured.

In this it is the opinion of the majority of the court there is nothing unlawful. The characters of the vessel and cargo remain as distinct in this as in any other case. The sentence, therefore, of the Circuit Court must be reversed, and the property claimed by Manuel Pinto for himself, and his partners, and for those other Spaniards for whom he has claimed, be restored, and the libel as to that property, be dismissed.<sup>11</sup> \* \* \*

<sup>11</sup> The concurring opinion of Mr. Justice Johnson and the dissenting opinion of Mr. Justice Story, are omitted. The dissenting opinion is an elaborate and able presentation of the doctrine laid down by Sir William Scott in *The Fanny*, ante, p. 1012.

In *The Atalanta*, 3 Wheat. 409, 4 L. Ed. 422 (1818), the Supreme Court re-examined and confirmed the doctrine laid down in *The Nereide*, that a neutral cargo found on board an armed enemy's vessel is not liable to condemnation as prize of war. The goods in question were found upon a British armed vessel, and the case, as Chief Justice Marshall said, did not "essentially differ

from that of *The Nereide*," and for that reason it was "unnecessary to repeat the reasoning on which that case was decided."

Mr. Justice Johnson, however, delivered an elaborate opinion, to which reference is made, concluding:

"Upon the whole, I am fully satisfied that the decision in the case of *The Nereide* was founded in the most correct principles, and recognise the rule, that lading on board an armed belligerent is not, per se, a cause of forfeiture; as not only the most correct on principle, but the most liberal and honorable to the jurisprudence of this country."

Mr. Justice Story, who had dissented in the case of *The Nereide*, did not dissent from the judgment of the court in the case of *The Atalanta*. Therefore the case of *The Atalanta* may be considered as an appeal from *The Nereide*, and the judgment in *The Atalanta* as a confirmation of *The Nereide* on appeal, and the unanimous opinion of the Supreme Court of the United States.

The importance of the decision was not lost upon James Kent, who said in the first edition of his *Commentaries*, vol. 1, pp. 123, 124, published in 1826:

"The question decided in the case of *The Nereide* is a very important one in prize law, and of infinite importance in its practical results; and it is to be regretted, that the decisions of two courts of the highest character, on such a point, should have been in direct contradiction to each other. The same point afterwards arose, and was again argued, and the former decision repeated, in the case of *The Atalanta*, 3 Wheat. 409, 4 L. Ed. 422 (1818). It was observed, in this latter case, that the rule with us was correct in principle, and the most liberal and honorable to the jurisprudence of this country. The question may, therefore, be considered here as at rest, and as having received the most authoritative decision that can be rendered by any judicial tribunal on this side of the Atlantic."

In *British Consul v. Ship Mermaid*, Bee's Reports, 69, 71, Fed. Cas. No. 1,897 (1795), Judge Bee, speaking for the United States District Court of South Carolina, said:

"The laws of neutrality and nations in no instance, that I know of, interdict neutral vessels from going to sea armed and fitted for defensive war. All American Indianmen are armed, and it is necessary they should be so. \* \* \*

In *William Hooper, Administrator, v. United States*, 22 Ct. Cl. 408 (1887), Judge Davis, speaking for the court, held that armament for defensive purposes was proper, whereas, the case of a vessel armed for aggression and profit as a privateer would be different.

In *The Panama*, 176 U. S. 535, 544, 20 Sup. Ct. 480, 44 L. Ed. 577 (1900), Mr. Justice Gray, speaking for the court, quoted with approval the following language of Portalis, acting as commissioner of the French government:

"For my part, I do not think it is enough to have or to carry arms, to incur the reproach of being armed for war. Armament for war is of a purely offensive nature. It is established when there is no other object in the armament than that of attack, or, at least, when everything shows that such is the principal object of the enterprise; then a vessel is deemed enemy or pirate, if she has no commission or papers sufficient to remove all suspicion. But defence is a natural right, and means of defence are lawful in voyages at sea, as in all other dangerous occupations of life. A ship which had but a small crew, and a considerable cargo, was evidently intended for commerce, and not for war. The arms found on this ship were evidently intended, not for committing acts of rapine or hostility, but for preventing them; not for attack, but for self-defence. The pretext of being armed for war therefore appears to me to be unfounded."

The Council of Prizes, upon consideration of the report of Portalis, adjudged that the capture of the vessel and her cargo was null and void, and ordered them to be restored, with damages. *The Pégou*, or *Pigou*, 2 Pistoye et Duverdy, *Prises Maritimes*, 51 (1900); *Id.*, 2 Cranch, 96-98, 2 L. Ed. 208 and note.

The question arose in the World War (1914-18) whether belligerent merchantmen could arm for defensive purposes, and in case of attack defend themselves. The right so to do was maintained by Great Britain and its allies. It was denied by Germany. It is believed that the views of Great Britain and its allies represented existing law.

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"For my part, I do not think it is enough to have or to carry arms, to incur the reproach of being armed for war. Armament for war is of a purely offensive nature. It is established when there is no other object in the armament than that of attack, or, at least, when everything shows that such is the principal object of the enterprise; then a vessel is deemed enemy or pirate, if she has no commission or papers sufficient to remove all suspicion. But defence is a natural right, and means of defence are lawful in voyages at sea, as in all other dangerous occupations of life. A ship which had but a small crew, and a considerable cargo, was evidently intended for commerce, and not for war. The arms found on this ship were evidently intended, not for committing acts of rapine or hostility, but for preventing them; not for attack, but for self-defence. The pretext of being armed for war therefore appears to me to be unfounded."

The Council of Prizes, upon consideration of the report of Portalis, adjudged that the capture of the vessel and her cargo was null and void, and ordered them to be restored, with damages. *The Pégou*, or *Pigou*, 2 Pistoye et Duverdy, Prises Maritimes, 51 (1800); *Id.*, 2 Cranch, 96-98, 2 L. Ed. 206 and note.

The question arose in the World War (1914-18) whether belligerent merchantmen could arm for defensive purposes, and in case of attack defend themselves. The right so to do was maintained by Great Britain and its allies. It was denied by Germany. It is believed that the views of Great Britain and its allies represented existing law.

## SECTION 8.—TRANSFER OF VESSELS

## THE NOYDT GEDACHT.

(High Court of Admiralty, 1799. 2 C. Rob. 137, note.)

In *The Noydt Gedacht*, *Waalrave*, 23d August, 1799, which was a subsequent case of a small Dutch fishing vessel transferred to the neutral claimant under a condition to reconvey at the end of the war.

THE COURT [SIR WM. SCOTT]. A sale made by an enemy to neutrals, in time of war, must be an absolute unconditional sale. This transfer is evidently done only to cover the property during the war. The vessel continues in the old trade, and is, in every respect, a Dutch vessel. As to the cargo, the value of the property is very small; and it would be of very little benefit to any party to send the case to farther proof. I must, therefore, dispose of it according to the preponderancy of the present evidence. The master, who, I must say, has spoken very ingenuously, says "that the consignees reside at Dort; that he believes the laders have an interest in the cargo now, but that it would become the property of the consignees on the arrival at Dort; and he gives his reason for this belief, that the lader told him so." On this authority the master undertakes to swear that he believes it to be the property of persons for whom it is claimed. It has been settled by repeated decisions that this will not do, that neutrals should take upon themselves the sea risk and danger of the voyage, will not be allowed. In opposition to what the master states, there are only two certificates, which do not, I think, meet the point. What is there sworn may be very true; and yet the master's account true at the same time. I am inclined, therefore, to adhere to the master's account; and, under it, I must condemn this cargo as Dutch property. \* \* \*

<sup>55</sup> The doctrine briefly stated in the principal case is set forth at length and in detail in *The Vigilantia*, 1 C. Rob. 1 (1798), the first of Sir William Scott's cases to be reported by his favorite reporter and successor, Sir Christopher Robinson. It may be said in this connection, that while transfers of merchant vessels during the war are allowed on certain conditions, the sale of war vessels is not recognized. See *The Minerva*, 6 C. Rob. 396 (1807).

*The Georgia*, 7 Wall. 32, 43, 19 L. Ed. 122 (1868), an armed vessel of the Confederate States, was built in Great Britain in 1862-1863. With armament and complement of officers and crew aboard it entered Liverpool in 1864, and, owing to the presence of an American squadron cruising off the British and French coasts, it was unable to put to sea. It was dismantled and sold to a British subject in the port of Liverpool and fitted up for the purposes of commerce.

Upon leaving Liverpool in the summer of 1864, the now merchant vessel was captured by a ship-of-war of the United States and passed before a Prize court, which refused to recognize the validity of the sale. In the course of the opinion of the court, Mr. Justice Nelson said:

"The distinction between the purchase of vessels of war from the belligerent,

## THE BALTICA.

(Privy Council, 1858. 11 Moore, P. C. 141.)

This ship, under Danish colours, was seized by the custom house officers, at the port of Leith, on suspicion of being a Russian ship.

The vessel, under the Russian flag, formerly belonged to Sorensen, Sr., and was sold by him on the 17th of March, 1854, immediately antecedent to the declaration of war between Great Britain and Russia, to the appellant, his son, a Danish subject, resident at Altona, and transferred by a regular bill of sale. Part only of the purchase money was paid, the remainder being agreed to be paid by the earnings of the vessel. Sorensen, Sr., was a Dane by birth, but had long resided at Libau, as Danish consul, where he traded as a merchant. The only distinguishing feature in this case from *The Ariel*, 11 Moo. P. C. 119, was, that at the time of the purchase, *The Baltica* was prosecuting a voyage from Libau to Copenhagen. It appeared that on her arrival in the port of Copenhagen, in the middle of March, she was delivered over to the agent of the appellant, and was admeasured by the Danish custom house officers there, and branded as Danish property. Her flag was also there changed for the Danish flag, and a Danish master and crew engaged to navigate her. She sailed from Copenhagen with a cargo of linseed on the 21st of May, 1854, and arrived at Leith, in Scotland, her port of destination, on the 29th of that month, and was seized on the 31st, by the custom house authorities as prize.

Proceedings consequent upon her seizure were commenced against the vessel in the High Court of Admiralty of England, when the appellant put in a claim as owner of the ship and freight.

The judge of the Court of Admiralty (Right Hon. Dr. Lushington), by his interlocutory decree, dated the 6th of August, 1855 (see case reported, *nom. The Baltica*, 1 Spinks' Prize Cases, 264), condemned the ship, upon the ground that from the fact of the seller being Consul of a neutral state and also a merchant trading in the enemy's country, he was to be regarded as an enemy; moreover, that the transfer was fraudulent and collusive, and intended to defeat the just belligerent rights of Great Britain, and also that the vendor had retained an interest in the ship, part of the purchase money having been agreed to be paid by the earnings of the vessel. The appeal was from this decree.

The appellant insisted upon the bona fides of the purchase and the

in time of war, by neutrals, in a neutral port, and of merchant vessels, is founded on reason and justice. It prevents the abuse of the neutral by partiality towards either belligerent, when the vessels of the one are under pressure from the vessels of the others, and removes the temptation to collusive or even actual sales, under the cover of which they may find their way back again into the service of the enemy."

national character of the purchaser, which had already been established in *The Ariel*, and submitted that that case was not distinguishable, in principle, from the present appeal.

On behalf of the crown it was submitted that the sale was invalid, having been made when the vessel was in transitu.

Their Lordships called upon the crown to distinguish this case from *The Ariel*. \* \* \*

The arguments are fully noticed in the judgment, which was delivered by

THE RIGHT HON. T. PEMBERTON LEIGH. The *Baltica* was one of several Russian ships, which, in the month of March, 1854, shortly before the breaking out of the war between Russia and Great Britain, were sold by Sorensen, Sr., a merchant domiciled in Russia, to his son, Sorensen, Jr., a merchant domiciled in Denmark. These vessels having been condemned in the Court of Admiralty in England, appeals were brought against those sentences; and in the case of *The Ariel*, 11 Moo. P. C. 119, which was selected for the purpose of deciding the general question, it was held by their Lordships that the sale was bona fide; that the property was entirely divested from the vendor, and vested in the vendee before the seizure; that the transfer was complete, and was not a fraud upon any just right of the belligerents, and they, therefore, ordered restitution of the vessel.

In conformity with this decision, the crown officers very properly restored such of the vessels as appeared to them to stand in the same situation with the *Ariel*, but they declined to restore the *Baltica*, considering the case of that vessel to be distinguishable from the rest, on the ground, that the sale of the ship had taken place while she was engaged in the prosecution of a voyage, or, as it is technically termed, while she was in transitu.

In order to determine the validity of this distinction in the circumstances of this case, the present appeal has been brought.

The general rule is open to no doubt. A neutral while a war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port. During a time of peace, without prospect of war, any transfer which is sufficient to transfer the property between the vendor and the vendee, is good also against a captor, if war afterwards unexpectedly break out. But, in case of war, either actual or imminent, this rule is subject to qualification, and it is settled that in such a case a mere transfer by documents which would be sufficient to bind the parties, is not sufficient to change the property as against captors, as long as the ship or goods remain in transitu.

With respect to these principles, their Lordships are not aware that it is possible to raise any controversy; they are the familiar rules of



the English Prize Courts, established by all the authorities, and are collected and stated, principally from the decisions of Lord Stowell, by Mr. Justice Story, in his "Notes on the Principles and Practice of Prize Courts," a work which has been selected by the British government for the use of its naval officers, as the best code of instruction in the prize law. The passages referred to are to be found in pp. 63, 64, of that work.

The only question of law which can be raised in this case, is not whether a transfer of a ship or goods in transitu, is ineffectual to change the property, as long as the state of transitus lasts; but how long that state continues, and when, and by what means, it is terminated.

In order to determine the question, it is necessary to consider upon what principle the rule rests, and why it is that a sale which would be perfectly good if made while the property was in a neutral port, or while it was in an enemy's port, is ineffectual if made while the ship is on her voyage from one port to the other. There seem to be but two possible grounds of distinction. The one is, that while the ship is on the seas, the title of the vendee cannot be completed by actual delivery of the vessel or goods; the other is, that the ship and goods having incurred the risk of capture by putting to sea, shall not be permitted to defeat the inchoate right of capture by the belligerent powers, until the voyage is at an end.

The former, however, appears to be the true ground on which the rule rests. Such transactions during war, or in contemplation of war, are so likely to be merely colourable, to be set up for the purpose of misleading, or defrauding captors, the difficulty of detecting such frauds, if mere paper transfers are held sufficient, is so great, that the courts have laid down as a general rule, that such transfers, without actual delivery, shall be insufficient; that in order to defeat the captors, the possession, as well as the property, must be changed before the seizure. It is true that, in one sense, the ship and goods may be said to be in transitu till they have reached their original port of destination; but their Lordships have found no case where the transfer was held to be inoperative after the actual delivery of the property to the owner. That the transitus ceases, when the property has come into the actual possession of the transferee, is a doctrine perfectly consistent with the decisions in *The Danckebaar Africaan*, 1 Rob. 107, and in *The Negotie en Zeevaart*, Lord's, July 18, 1782, on the authority of which the former case was decided.

The *Danckebaar Africaan* had sailed on a voyage from Batavia to Holland, which country, when the voyage commenced, was at war with Great Britain, and continued so till after the capture and adjudication. The ship and goods were seized on their voyage by British cruisers, and brought to the Cape of Good Hope. They were there claimed by

merchants resident at the Cape, who represented themselves to be the owners, and who insisted, as the fact was, that before the capture, the Cape (previously a Dutch possession) had capitulated to the British forces under a treaty which secured to the capitulants their rights of property. It was contended, therefore, that they were entitled to restitution, on the ground that, at the time of the capture, their character of enemies had ceased, and been changed into that of friends.

Lord Stowell held, that he was bound by the authority of *The Negotie en Zeevaart*, Lord's, July 18, 1782, to condemn the ship and goods which had been seized before they had reached the hands of the owners; relying on a dictum of Lord Camden, "That the ship, as Dutch, could not change her character in transitu;" but he intimated that his opinion might have been different if the ship had come, before capture, into the actual possession of the owners. His language is: "If the vessel had arrived at the Cape, I will not say that, coming actually into the hands of the capitulants, she might not have been protected as property in possession, but being taken possession of before she arrived there as Dutch property, I am bound by the decisions of the Lords, and I think myself obliged to say that her character could not be changed in transitu, and that she must be condemned as Dutch property."

It will be observed that in this case, if the ship had reached the Cape before capture, and come into the possession of the owners, such possession would have been taken before the termination of her regular voyage; for her destination was to Holland; and this circumstance is adverted to by Lord Stowell, who in answer to the argument that the ship was coming to the Cape, and into the possession of the true owners, observes: "There is no decided proof that this ship was coming to the Cape, and if so she is still to be considered as taken merely in transitu towards Holland, where the voyage was clearly to have ended; and in what character? As a Dutch ship in a Dutch port."

Yet, even under these circumstances, he was not prepared to condemn the ship if she had actually come into the hands of the owners.

In the case of *The Vrow Margaretha*, 1 Rob. 338, it is distinctly stated by Lord Stowell that the transitus ceases by the actual delivery of the property. After stating that, by the usage of merchants, a transfer of property in transitu may be made by the execution of proper documents, he proceeds: "When war intervenes, another rule is set up by Courts of Admiralty, which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy." He then assigns the reason for the rule, namely, that if it were otherwise, "all goods ship-

ped in an enemy's country would be protected by transfers which it would be impossible to detect"—and adds: "It is on that principle held, I believe, as a general rule, that property cannot be converted in transitu, and in that sense I recognize it as the rule of this Court."

In the manual already referred to [Notes on the Principles and Practice of Prize Courts], Mr. Justice Story, at page 64, lays down the rule to the same effect in these words: "The same distinction is applied to purchases made by neutrals of property in transitu; if purchased during a state of war, existing or imminent, and impending danger of war, the contract is held invalid, and the property is deemed to continue as it was at the time of shipment until the actual delivery."

Applying these rules to the facts of this case, their Lordships can have no doubt as to the result.

The *Baltica* sailed from Libau, on some day before the 17th of March, 1854 (N. S.), with a cargo of linseed, bound for Leith. On the 17th of March she was transferred by bill of sale (as far as, under the circumstances, such transfer could be effectual) to Sorensen, Jr. She was described as then on a voyage from Libau to Copenhagen. Probably she was intended to call at Copenhagen in the prosecution of her voyage to Leith. There does not seem to have been any motive for misrepresenting her voyage, for her ultimate destination was an English port. She arrived at Copenhagen before the end of March, and possession of her was then taken by Sorensen, Jr., the purchaser. He had her registered as a Danish ship, and she was marked as such by the proper Danish authorities. He detained the ship at Copenhagen till the middle of May. He changed the captain and the crew and the flag, and transferred the command to a Danish master; and under a Danish commander and with a Danish crew, and under the Danish flag, the vessel sailed from Copenhagen for Leith on the 21st of May.

There can be no manner of doubt, therefore, that at this time the ship had come fully into the possession of the purchaser, and thereupon, according to the principles already referred to, the transitu, in the sense in which for this purpose the word is used, had ceased.

But, if it could be held that the transitu continued till the arrival of the ship at Leith, the result in this case would be the same, for the ship actually arrived in Leith Roads on the 29th of May. On the 31st of May, she was towed into Morison's Haven in that port, where her cargo was discharged, which, it seems, has since been given up to the consignee with the consent of the custom house officers.

A seizure, however, was made of the ship, on what particular day does not very distinctly appear; but clearly after she had arrived at her port of destination.

No distinction, therefore, can be made between the *Baltica* and the other ships which have already been restored. Their Lordships will report to Her Majesty their opinion, that the same order should be

made in this case as was made in *The Ariel*; an order for restitution, but without damages, or costs either in the court below or in the Court of Appeal.<sup>56</sup>

### THE ANN GREEN.

(Circuit Court of the United States for Massachusetts, 1812. 1 Gall. 274. Fed. Cas. No. 414.)

STORY, Circuit Judge.<sup>57</sup> \* \* \* It has been further argued, that this capture, being made while the property was in transitu, and war intervening, it is to be considered as enemy's property, because it would have become such upon arrival at the port of destination; and at all events it would have been liable to seizure and confiscation. As to the fact that the property was taken in transitu, I do not perceive how of itself it can affect the rights of the parties either way; nor do I per-

<sup>56</sup> In *The Edna*, 1821, 37 Times L. R. 494, 497, it appeared, according to the headnote, that "American citizens purchased the Mazatlan, then flying the Mexican flag, in 1915, buying and paying for her in entire good faith and changing her name to *Edna*. She had previously borne an enemy character. She was seized during her new ownership by the British navy and afterwards requisitioned by the crown." On this state of facts, it was held that the sale was valid.

The captors alleged, in the language of Lord Sumner, who delivered the opinion of the Privy Council, "that the sale was one which, if not incompetent, yet ought not to be sustained. It is said that such a transaction must be tested by the state of mind in which it is conceived and carried through, and that in the nature of things the relevant state of mind is that of the transferor. The transferee's mind may be honest and yet the impropriety of the transferor's motives may defeat the whole transaction."

To this contention, the Privy Council replied: "It is better to adhere to the settled rules laid down in *The Ariel*, 11 Moore, P. O. 119 (1857) and *The Baltica*, 11 Moore, P. C. 141 (1857). Of course, a vendor may be shown to be so interested in getting rid at all hazards of the appearance of ownership as to lead to the conclusion of fact that he really did what he was most interested in doing, and shed the apparent title while retaining the property. A court would then hold that there was no real sale, not that the sale was real and effectual, but that the vendor's reprehensible state of mind caused the buyer to lose the ship for which he had paid his money."

"It was laid down by their Lordships' Board in *The Ariel*, 11 Moore, 119 (1857), and in *The Baltica*, 11 Moore, 141 (1857) after full discussion, and more recently in the consolidated appeals of *The Kronprinsessan Margareta*, *The Parana*, and *The Rena* (unreported at present), that a neutral can acquire the property in merchandise from an enemy owner, while the merchandise is afloat, if there is an out and out transfer, neither accompanied by elements of unreality nor by any reservation of property therein to the seller, provided that the buyer takes actual delivery and not a mere symbolical delivery by handing over mercantile documents." Per Lord Sumner in *The Vesta* and *Other Vessels*, [1921] 87 Times Law Reports, 505, 507, 508.

See, also, the elaborate case of *The Roelina*, 16 American Journal of International Law, 1922, p. 136 (1919), in which the Prize Court of Belgium decided that a transfer in a blockaded port was invalid, and took occasion to discuss the law on the subject.

<sup>57</sup> The statement of the case is omitted and only so much of the opinion is given as relates to transfer in transitu.

ceive how this property was to have become enemy's property on its arrival. The case proved is, that it was American property consigned for sale only, and not a consignment where the property was, at the time of shipment or of arrival, to belong to the consignee. The cases are, as I think, settled upon just principles, that decide that in time of war, property shall not be permitted to change character in its transit; nor shall property consigned, to become the property of the enemy on arrival, be protected by the neutrality of the shipper. Such contracts, however valid in time of peace, are considered, if made in war or in contemplation of war, as infringements of belligerent rights, and calculated to introduce the grossest frauds. In fact, if they could prevail, not a single bale of enemy's goods would ever be found upon the ocean. \* \* \*

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### THE BENITO ESTENGER.

(Supreme Court of the United States, 1900. 176 U. S. 568, 20 Sup. Ct. 489, 44 L. Ed. 592.)

The Benito Estenger was captured by the United States ship Hornet on June 27, 1898, off Cape Cruz on the south side of the island of Cuba, and was brought into the port of Key West and duly libelled on July 2. The depositions in preparatorio of Badamero Perez, Edwin Cole and Enrique de Messa were taken, and thereafter and on July 27 a claim was interposed by Perez as master of the steamer on behalf of Arthur Elliott Beattie, a British subject, as owner, supported by test affidavits of himself and de Messa. The cause was preliminarily heard on the libel, the depositions in preparatorio and the test affidavits, and sixty days given for further proofs. Accordingly the depositions of the claimant and sundry others were taken on behalf of the claimant, and the testimony of the consul of the United States at Kingston on behalf of the captor. The cause coming on for final hearing, the court entered a decree December 7, 1898, condemning the vessel as lawful prize as enemy property, and ordering her to be sold in accordance with law. Claimant thereupon appealed, and assigned errors to the effect in substance that the court erred in failing to hold that the Benito Estenger was a British merchant ship, duly documented and entitled to the protection of the British flag, and lawfully owned and registered by a subject domiciled in Great Britain; and also in holding that the Benito Estenger was lawful prize of war, inasmuch as she was engaged on a voyage in behalf of the local Cuban junta in Kingston, allies of the United States, and when captured was in the service of the United States, and employed in friendly offices to the forces of the United States. The vessel prior to June 9, 1898, was the property of Enrique de Messa, of the firm of Gallego, de Messa & Co., subjects of

Spain and residents of Cuba. On that day a bill of sale was made by de Messa to the claimant, Beattie, a British subject, and, on compliance with the requirements of the British law governing registration, was registered as a British vessel in the port of Kingston, Jamaica. The vessel had been engaged in trading with the island of Cuba, and more particularly between Kingston and Montego, Jamaica, and Manzanillo, Cuba. She left Kingston on the 23d of June, and proceeded with a cargo of flour, rice, cornmeal and coffee to Manzanillo, where the cargo was discharged. She cleared from Manzanillo at 2 o'clock a. m., June 27, for Montego, and then for Kingston, and was captured at half-past five of that day off Cape Cruz. The principal question was as to the ownership of the vessel and the legality of the alleged transfer, but other collateral questions were raised in respect of the alleged Cuban sympathies of de Messa; service on behalf of the Cuban insurgents in the United States; and the relation of the United States consul to the transactions which preceded the seizure. It was argued that the vessels of Cuban insurgents and other adherents could not be deemed property of the enemies of the United States; that this capture could not be sustained on the ground that the vessel was such property; that the conduct of de Messa in his sale to Beattie was lawful, justifiable, and the only means of protecting the vessel as neutral property from Spanish seizure; and finally, that this court could and should do justice by ordering restitution, under all the circumstances of the case.

Mr. Chief Justice FULLER, after stating the case, delivered the opinion of the court.<sup>55</sup>

If the alleged transfer was colorable merely, and Messa was the owner of the vessel at the time of capture, did the District Court err in condemning the Benito Estenger as lawful prize as enemy property?

"Enemy property" is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law. The general rule is that in war the citizens or subjects of the belligerents are enemies to each other without regard to individual sentiments or dispositions, and that political status determines the question of enemy ownership. And by the law of prize, property engaged in any illegal intercourse with the enemy is deemed enemy property, whether belonging to an ally or a citizen, as the illegal traffic stamps it with the hostile character and attaches to it all the penal consequences. Prize cases, 2 Black, 635, 674, 17 L. Ed. 459; *The Sally*, 8 Cranch, 382, 384, 3 L. Ed. 597; *Jecker v. Montgomery*, 18 How. 110, 15 L. Ed. 311; *The Peterhoff*, 5 Wall. 28, 18 L. Ed. 564; *The Flying Scud*, 6 Wall. 263, 18 L. Ed. 755.

Messa was a Spanish subject, residing at Santiago, and for years engaged in business there. His vessel had a Spanish crew and Spanish officers, and he testified that he was on board of her as supercargo.

<sup>55</sup> Parts of the opinion are omitted.

She had the Spanish flag in her lockers, though she was flying the British flag at the moment, under a transfer, which, as presently to be seen, was colorable and invalid. There was evidence tending to show that Messa sympathized with the Cuban insurgents, but no proof that he was himself a Cuban rebel or that he had renounced his allegiance to Spain. The vessel carried to Manzanillo on this voyage a cargo of provisions, consisting principally of eleven hundred barrels of flour. \* \* \*

Thus far we have proceeded on the assumption that the transfer of the *Benito Estenger* was merely colorable, and this, if so, furnished in itself ground for condemnation. A brief examination of the evidence, in the light of well-settled principles, will show that the assumption is correct. \* \* \*

Transfers of vessels *flagrante bello* were originally held invalid, but the rule has been modified, and is thus given by Mr. Hall, who, after stating that in France, "their sale is forbidden, and they are declared to be prize in all cases in which they have been transferred to neutrals after the buyers could have knowledge of the outbreak of the war," says: "In England and the United States, on the contrary, the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinized, and the transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war." *International Law* (4th Ed.) 525. And to the same effect is Mr. Justice Story, in his *Notes on the Principles and Practice of Prize Courts* (Pratt's Ed.) 63, 2 Wheat. App. 30: "In respect to the transfers of enemies' ships during the war, it is certain that purchases of them by neutrals are not, in general, illegal: but such purchases are liable to great suspicion; and if good proof be not given of their validity by a bill of sale and payment of a reasonable consideration, it will materially impair the validity of a neutral claim; \* \* \* and if after such transfer the ship be employed habitually in the enemy's trade, or under the management of a hostile proprietor, the sale will be deemed merely colorable and collusive. \* \* \* Anything tending to continue the interest of the enemy in the ship vitiates a contract of this description altogether."

The *Sechs Geschwistern*, 4 C. Rob. 100, is cited, in which Sir William Scott said: "This is the case of a ship, asserted to have been purchased of the enemy; a liberty which this country has not denied to neutral merchants, though by the regulation of France, it is entirely forbidden. The rule which this country has been content to apply is; that property so transferred, must be bona fide and absolutely transferred; that there must be a sale divesting the enemy of all further in-

terest in it; and that anything tending to continue his interest, vitiates a contract of this description altogether."

In *The Jemmy*, 4 C. Rob. 31, the same eminent jurist observed: "This case has been admitted to farther proof, owing entirely to the suppression of a circumstance, which if the court had known, it would not have permitted farther proof to have been introduced; namely, that the ship has been left in the trade, and under the management of her former owner. Wherever that fact appears, the court will hold it to be conclusive, because, from the *evidentia rei*, the strongest presumption necessarily arises, that it is merely a covered and pretended transfer. The presumption is so strong, that scarcely any proof can avail against it. It is a rule which the court finds itself under the absolute necessity of maintaining. If the enemy could be permitted to make a transfer of the ship, and yet retain the management of it, as a neutral vessel it would be impossible for the court to protect itself against frauds."

And in *The Omnibus*, 6 C. Rob. 71, he said: "The court has often had occasion to observe, that where a ship, asserted to have been transferred, is continued under the former agency and in the former habits of trade, not all the swearing in the world will convince it that it is a genuine transaction."

The rule was stated by Judge Cadwalader of the Eastern District of Pennsylvania thus: "The rule of decision in some countries has been that, as to a vessel, no change of ownership, during hostilities can be regarded in a prize court. In the United States, as in England, the strictness of this rule is not observed. But no such change of property is recognized where the disposition and control of a vessel continue in the former agent of her former hostile proprietors; more especially when, as in this case, he is a person whose relations of residence are hostile." *The Island Belle*, 13 Fed. Cases, 168. \* \* \*

In *The Soglasie*, Spinks Prize Cases, 104, Dr. Lushington held the *onus probandi* to be upon the claimant, and made these observations: "With regard to documents of a formal nature, though when well authenticated they are to be duly appreciated, it does not follow that they are always of the greatest weight, because we know, without attributing blame to the authorities under which they issue, they are instruments often procured with extraordinary facility. What the court especially desires is that testimony which bears less the appearance of formality—evidence natural to the transaction, but which often carries with it a proof of its own genuineness; the court looks for that correspondence and other evidence which naturally attends the transaction, accompanies it, or follows it, and which when it bears upon the face of it the aspect of sincerity, will always receive its due weight."

In *The Ernst Merck*, Spinks Prize Cases, 98, the sale was to neutrals of Mecklenburg shortly before the breaking out of war, and it was



ruled that the onus of giving satisfactory proof of the sale was on the claimant, and without it the court could not restore, even though it was not called on to pronounce affirmatively that the transfer was fictitious and fraudulent. In that case the vessel was condemned partly because of absence of proof of payment, Dr. Lushington saying: "We all know that one of the most important matters to be established by a claimant is undoubted proof of payment."

To the point that the burden of proof was on the claimant see also *The Jenny*, 5 Wall. 183, 18 L. Ed. 693; *The Amiable Isabella*, 6 Wheat. 1, 5 L. Ed. 191; *The Lilla*, 2 Cliff. 169, Fed. Cas. No. 15,600; *Story's Prize Courts*, 26.

We think that the requirements of the law of prize were not satisfied by the proofs in regard to this transfer, and on all the evidence are of opinion that the court below was right in the conclusion at which it arrived.

Decree affirmed.

Mr. Justice SHIRAS, Mr. Justice WHITE, and Mr. Justice PECKHAM dissented.

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### THE DACIA.

(French Council of State, 1916. *Journal Officiel*, January 14, 1917, p. 498.)

The President of the French Republic, acting on the report of the Division of Legislation, Justice, and Foreign Affairs,

In view of the summary appeal and the detailed memorandum, presented by Mr. Breitung, of Marquette, Michigan, U. S. A., and registered with the Secretary General of the Council of State, September 23, 1915, and February 23, 1916, petitioning for annulment of a decision of August 3 and 4, 1915, of the Prize Court, which decreed good and valid the capture of the steamer *Dacia* by the French auxiliary cruiser *Europe* on February 27, 1915,

Wherein the stated legal grounds of the appeal are that under article 56 of the Declaration of the Naval Conference of London of February 26, 1909, which was declared applicable by France to the present war, the transfer to a neutral flag of a vessel that was enemy property is valid and can be sustained as against the belligerents even if the transfer is made after the outbreak of hostilities, provided that it is proved that the purchaser of the vessel took a substantial and legitimate interest, and that the passing of the title and the transfer of flag were not effected for the purpose of evading the consequences that enemy character of a ship involves; that in fact the petitioner acquired the *Dacia* only because the steamer was bought at an advantageous price and was necessary to him to carry on his maritime business; that, moreover, he can not be required to prove that the vendor, the Hamburg-American Company, was influenced by considerations not connect-

ed with the risk of capture; that it had, moreover, a certain interest in getting rid of a ship that was already old; that the fact that a contract had been made by a business agent for the carriage of a cargo of cotton to Bremen by the Dacia while still under the German flag and before the petitioner had bought it cannot prejudice the latter; that said contract to which he was not a party can not be pleaded against him, and that the Dacia, as soon as it became his property, was laden for Rotterdam, a neutral port; that, moreover, the fact that a vessel, after transfer of flag, continues to ply on the same routes as before, does not raise a presumption that the transfer is null, in accordance with the decision made when the Declaration of London of 1909 was drafted; wherefore, the petitioner asks that the transfer of the Dacia from the German flag to the American flag be declared valid, and that the French government pay the petitioner: (1) The value of the vessel illegally seized, and of its different fittings and furnishings, the total to be fixed by inventory; (2) the sum of 300,000 francs by way of damages for the unjustified capture of the vessel, according to article 64 of the Declaration of London; (3) damages to be fixed by inventory to repair the loss sustained as a consequence of the detention of the vessel, at the rate of \$2,000 a day from February 27 to May 10, 1915, and according to a figure to be determined after the latter date; (4) a sum to be fixed later for freight and demurrage; \* \* \*

In view of the Declaration of London of February 26, 1909, concerning the law of maritime warfare, together with the Decree of November 6, 1914, applying the rules of the said Declaration with certain amendments and additions; \* \* \*

In view of the Decree of July 7, 1916, repealing that of November 6, 1914;

Whereas, the Prize Court, in declaring good and valid the capture of the steamer Dacia by the French auxiliary cruiser Europe on February 27, 1915, was of opinion that the transfer to a neutral flag of this vessel, bought from the German Hamburg-American Navigation Company by Mr. Breitung, an American citizen, could not, having regard to the circumstances in which it was made, be operative as against the belligerents, by reason of the provisions of article 56 of the Declaration of London of February 26, 1909, as follows: "The transfer of an enemy vessel to a neutral flag effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed;" \* \* \*

Whereas, it is unnecessary to pronounce upon the regularity of the transfer of title of the Dacia or that of its registry under the American flag, as it does not appear anywhere in the examination nor in any evidence produced by Mr. Breitung that the sale of the Dacia to him by the Hamburg-American Company was not caused principally by fear of seeing the vessel seized and captured by the navies of the

Allied Powers from the moment of its first voyage; whereas, a contrary presumption arises especially, first, from the fact that the Hamburg-American Company, whose commercial fleet was by reason of the war partly laid up in American ports, had an interest to gain in alienating the units composing this fleet to the advantage of ressortissants of a neutral state, the validity of such sale being conditioned on an authorization for the vessel to fly the flag of the United States; and secondly, from the fact that the contract of affreightment of January 17, 1915, between Mr. Breitung and the firm of Tom Owens & Co. to transport a cargo of eleven thousand bales of cotton destined for Germany on the *Dacia* was only a confirmation, with a few modifications, of a contract of the same nature entered into through a Mr. Egon von Novelty the preceding December 9 before the sale of the vessel, respecting the same quantity of cotton to be shipped to Bremen on the *Dacia* for the account of the same shippers; that the circumstance relied upon by the petitioner that according to the agreement of January 17, 1915, the vessel was laden not for the port of Bremen but for the neutral port of Rotterdam, did not at all change the nature of the transaction, as the final destination of the cargo was not modified;

Whereas, in these circumstances, the Prize Court has correctly given judgment that such a transfer to a neutral flag, having for its object to permit enemy trade and to withdraw the vessel from the risk of capture, was not admissible against the captor state, and that therefore Mr. Breitung had no grounds on which to rest a claim for the annulment of the decision decreeing the capture of the steamer *Dacia* good and valid;

Having heard the Council of State, decrees:

Article 1. The appeal of Mr. Breitung is dismissed. \* \* \*

<sup>55</sup> In *The Dacia*, French Prize Court, 1915, *Journal Officiel*, September 28, 1915, p. 6914, from which an appeal was taken the learned reporter, Mr. Henri Fromageot had said:

"But whereas, when, at the time article 56 of the Declaration of London was being prepared, certain proposals had been made to condition solely upon good faith the validity of the transfer of the flag with respect to belligerents, a difference of opinion was manifested on the subject of the meaning of the term 'good faith' proposed as the criterion of validity; whereas, the United States delegation appeared to hold that good faith existed if the contract relating to the transfer was sincere and definitive, and bore no evidence of anything fictitious or irregular; but the German and English interpretations of good faith included the absence, among the reasons of the transfer, of any intention to protect the ship from the consequences of the right of capture; whereas, on this point, according to the interpretations, as well as according to the original text offered for adoption at the Naval Conference of London, as No. 35 of the subjects for discussion, the transfer could be regarded as valid only if there was reason to believe that it would have been effected just the same had the war not occurred (*Blue Book*, pp. 183 and 260);

"Whereas, it is the latter interpretation that the framers of the Declaration of London decided upon in adopting the text of the above mentioned topic of discussion, at the same time indicating the possibility of evidence in rebuttal, except in certain cases not bearing upon the present case;

"Whereas, the report presented to the conference with regard to the vari-

## CHAPTER XVIII

### ADJUDICATION OF PRIZE

#### SECTION 1.—CONDEMNATION<sup>1</sup>

##### THE HULDAH.

(High Court of Admiralty, 1801. 3 C. Rob. 235.)

This was one of several cases of ships and cargoes carried into St. Domingo, and proceeded against in a court of admiralty, which was held not to be vested with competent authority to proceed in prize causes. In consequence of that mistake, original proceedings were

ous provisions, especially Article 56 of the Declaration, clearly indicated that the transfer in order to be valid as against belligerents should not have been actuated by the existence of the war (Blue Book, p. 326, and page 212), but, for example, by inheritance;

"Whereas, this view was adopted by German legislation (Prize Regulations of Sept. 30, 1909, c. 2, art. 12, Reichsgesetzblatt, August 8, 1914) according to which the transfer is valid only when the captor is convinced 'that the transfer would have been made even had the war not broken out, for example, through inheritance or building contract'; by Austrian legislation (Service Regulations for the I. and R. Navy, May 2, 1913, § art. 3) which simply reproduces the text of article 56 of the Declaration of London; by Russian legislation (Prize Regulations, March 27, 1896, art. 7) according to which it must be proved that the transfer was not made in order to protect enemy property; by British legislation, which made the Declaration of London applicable during the war in the same terms as the French decree of November 6, 1914, cited above (Order in Council, Oct. 29, 1914); and by Italian jurisprudence and legislation (Decree of June 3, 1915, Gaz. Uff. No. 150 of June 15, 1915); \* \* \* \* \*

"Whereas, it is proven that not only had the ship, after its transfer, continued its commerce with the enemy as before, thus bringing it within other analogous cases (case of *The Jemmy* in England, July 17, 1801, 6 Rob. 81, 1 English Prize Cases, 837; case of *The Benito Estenger*, in the United States, March 5, 1900, 176 U. S. 538, 20 Sup. Ct. 489, 44 L. Ed. 592; Story, Notes on the Principles and Practice of Prize Courts, [Pub. by Pratt, 1854] p. 63), but that at the time of its capture it was accomplishing the very voyage for which it had been chartered when it was under the German flag and in view of which it had been transferred to a neutral flag;

"Whereas, such a transfer to a neutral flag with the object of carrying on enemy trade and of protecting the ship from capture cannot be valid against belligerents. \* \* \* \* \*

In the case of *The Daksa*, L. R., [1917] App. Cas. 398, it appeared that a sale had been made previous to war, in order to evade capture by the French. As the sale had not been made in order to escape capture at the hands of the British, it was held to be valid and the vessel released.

<sup>1</sup> It was the practice of the High Court of Admiralty to restore property under the amount of one hundred pounds without the expense of a formal claim, to avoid disproportionate expenses. In *The Mercurius*, 5 C. Rob. 127, 128 (1804), the counsel requested the court "to allow the same indulgence to

instituted afterwards in the High Court of Admiralty, on the petition of the claimants, by a monition calling on the captors to proceed to adjudication.

The claim, in the present case, was not given till a year and nine months after the sentence of condemnation passed in the court of St. Domingo. The captors appeared under protest.

In support of the protest, the King's Advocate and Arnold. It will be a case of great hardship on the captors, if they should be obliged to answer at this distance of time, when distribution has actually been made. The court of St. Domingo, under which they have hitherto proceeded, was properly constituted as a civil Court of Admiralty, and his Majesty's instructions were addressed to it as a prize court; but, by a mistake, no warrant had been issued to give it a prize jurisdiction against France and Holland, although there had been a prize warrant against Spain. Owing to this oversight alone it is, that the acts which have been done therein are mere nullities. The captors knew nothing of this defect of jurisdiction; they proceeded regularly, and obtained condemnation. \* \* \*

On the other side, Lawrence and Swabey.

\* \* \* The court has already determined that the prize proceedings of the court of St. Domingo are to be taken as nullities; and that all claims for property carried in there are to be considered as if no proceedings had taken place. It is a fundamental principle of maritime jurisprudence, that the claimant was bound to go to the tribunal to which the captor had carried his property. He could not be supposed to know whether it was a competent jurisdiction or not; it lies on the captor to institute right proceedings in a proper place; and if he does not, from whatever cause it may arise, the claimant cannot be

a property estimated only at 100 guineas." Sir William Scott, however, held that "it was necessary to confine this indulgence to some definite amount; that whatever was the sum fixed, there would be always other sums just exceeding that, which might not be distinguishable in principle; at the same time that it was necessary to adhere to the rule laid down."

"Treating the proceedings in the District Court as in admiralty, they are without validity. The admiralty jurisdiction of the District Court extends only to seizures on navigable waters, not to seizures on land. The difference is important, as cases in admiralty are tried without a jury, whilst in cases at law the parties are entitled to a jury, unless one is waived. *United States v. The Betsey, and Charlotte*, 4 Cranch, 443, 2 L. Ed. 673 (1808); *The Sarah*, 8 Wheat. 391, 5 L. Ed. 644 (1823)." *U. S. v. Winchester*, 99 U. S. 372, 374, 25 L. Ed. 479 (1878), per Field, J.

"By the law of nations, as recognized and administered in this country, when movable property in the hands of the enemy, used, or intended to be used, for hostile purposes, is captured by land forces, the title passes to the captors as soon as they have reduced the property to firm possession; but when such property is captured by naval forces, a judicial decree of condemnation is usually necessary to complete the title of the captors. 1 Kent, Com. 102, 110; Halleck's International Law, c. 19, § 7, and chapter 30, § 4; *Kirk v. Lynd*, 106 U. S. 315, 317, 1 Sup. Ct. 296, 27 L. Ed. 198 (1882)." *Oakes v. U. S.*, 174 U. S. 778, 786, 19 Sup. Ct. 864, 43 L. Ed. 1169 (1898), per Gray, J. See *Commodore Stewart's Case*, p. 1039.

precluded from seeking redress at any time when he may receive the necessary information, and finds an opportunity of so doing. Till prize has been brought to adjudication before a competent court, the claimant is not barred by time, and cannot come too late to be heard. The captors, in this instance, have not obtained the sentence of a competent court; without that, no laches of the claimant can give them a title, unless it could be said also, that a common pirate could obtain a title by such forbearance. It is impossible to sustain this protest as a bar to our claim, unless one of these three things could be maintained; either that the sentence of this court could proceed to affirm the sentence of an incompetent court, or unless it could condemn, without any proceeding, (the object of the protest being to bar us from any proceeding at all); or unless it could leave the property in the hands of these persons, as held by a just title, without any proceedings whatever.

Sir W. SCOTT. This is a very hard case on the captors; but I do not think it is in my power to relieve them from the necessity of proceeding to adjudication. During the existence of the prize commission, there is no fixed and definite time by which the party can be said to be legally barred from calling on the captor to proceed to adjudication, although it may be proper to hold, that there must exist a time which would work such an effect; but I know of no prescribed limitation against the admission of a claim, nor of any other means by which the captor can protect himself but by applying to a court of competent jurisdiction. If he neglects to apply to any tribunal, he would be guilty of a great misdemeanor; if, through misapprehension, he applies to an improper tribunal, though he may defend himself against the charge of a misdemeanor, he cannot protect himself from the call of the claimant to proceed to adjudication before a competent tribunal. In this case there is no imputation of misconduct; the captor went to a court which was sitting at St. Domingo, apparently with competent authority; in that court he obtained a sentence of condemnation, and distribution has taken place in consequence of it. But that court having no authority, those proceedings are null and of no legal effect whatever. On the other hand, it was the duty of the claimant to have brought this matter before the court as soon as he could, as it is always in the power of the claimant to compel the captor to proceed, if he neglects to do so himself. It might, perhaps, appear to the claimant, who is not bound to look to the nature of the jurisdiction, by an obligation equal to that of the captor, that the court was not incompetent; it might be a common error. In that case it would be something to show that he had entered an appeal. The appeal, it is true, could not have been received, as it came from a court which had no legal existence; but it would have proved the parties to have used diligence, which might be material, if questions of costs and damages should arise. There existed something of difficulty, a sort of cloud of uncer-

tainty on the minds of persons as to the competency of the court, which might account for some part of this delay. However, the claimant has now applied to this court; and I am of opinion that the court is under the legal duty of admitting the claim, and that it cannot relieve the captor from the obligation of proceeding to adjudication.

Protest overruled.

An absolute appearance being given for the captors, the cause was heard on the merits, when the court decreed restitution of the principal part of the cargo belonging to the owner of the ship.

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### COMMODORE STEWART'S CASE.

(Court of Claims of the United States, 1864. 1 Ct. Cl. 118.)

CASEY, C. J., delivered the opinion of the court.

The claimant sets forth in his petition that, on the 20th February, 1815, he was a captain in the navy of the United States and was in command of the United States frigate Constitution. That on that day he overtook, on the high seas, about sixty leagues from the island of Madeira, the British ships-of-war Cyane and Levant and engaged them; and, after a sharp conflict of forty minutes, they surrendered to him and he took possession of them as prizes of war. He proceeded with them and his own ship to the island of St. Iago, in the possession of the troops, and subject to the dominion of the prince regent of Portugal, with whom the United States were then at peace, and who had issued a declaration of neutrality between the belligerents—the United States and Great Britain.

Having come to anchor in the port of Praya, on the 10th of March, 1815, and while he was preparing to divest himself of the prisoners taken on the Cyane and Levant by sending them to Barbadoes, he discovered on the following day, off the port, a squadron consisting of three British ships-of-war, the Leander, New Castle, and Acasta; but which, in consequence of the prevalence of a dense fog, were not discovered until within three miles, and standing in for anchorage. Being apprehensive that the enemy would not respect the immunity afforded by a neutral port, Captain Stewart put to sea with the Constitution and his prizes, and the squadron immediately gave chase. After about an hour's chase, finding the Cyane sailing dull and dropping down on the Acasta, he signalled her to tack, which she immediately did, doubled the rear of the enemy and afterwards arrived safely at New York. The enemy took no notice of the Cyane's change of course, but continued the pursuit of the Constitution and Levant. Soon after he discovered the Levant dropping down in the same way that the Cyane had done, and he ordered her also to tack, which she did. The enemy continued the chase after her, cut off her retreat, and forced her back into the port of Praya, where she came to anchor

close to the battery. She was in this position when the enemy's ships stood in, fired at her, and forced her to surrender, took possession of her and carried her out of the harbor, without the Portuguese authorities attempting to hinder or prevent them, or offering any resistance or remonstrance to the violation of the neutral rights and sovereignty of Portugal. \* \* \*

The petition also avers that he and those for whom he claims are citizens of the United States, and can have no redress against the Portuguese government, from whom the indemnity is due; that it was and is the duty of the United States to prosecute and enforce the claim, on their behalf, against Portugal, and on the recovery of the amount to distribute the same to him, his officers and crew; that there was a convention between the two governments in 1851 for the adjustment of the claims of citizens of the United States against Portugal, in which this claim was not included, and that by having relinquished the claim without the authority or consent of claimants, or failed to prosecute and enforce it, the United States became liable to pay it themselves.

The fifth and sixth sections of the Act of Congress approved 23d April, 1800 (1 Stat.), in force at the time of the capture of these vessels, gave the captors the whole of the captured vessels, where they were superior in force to the vessel making the capture. The *Cyane* was libelled in the Admiralty Court at New York and duly condemned as good and lawful prize to the captors. The claimant contends that by the capture of the *Levant* the prize vested in him and his crew; that the recapture under the circumstances alleged was illegal, and that Portugal was liable to the United States, and they to the claimants, for the value of the prize.

To this petition the solicitor for the United States has demurred, and assigns for cause of demurrer:

1st. That the petition sets forth no valid ground of claim.

2d. That it does not appear that the United States had released Portugal, or relinquished any claim the plaintiffs have upon her for indemnity. \* \* \*

The argument on behalf of the claimants assumes that the captors had a right and title to the captured ship, and of which they were illegally divested or deprived.

There is no doubt if this vessel had reached a port of the United States she would have been condemned as a good prize to the claimants; for the *Cyane*, taken in the same engagement and at the same time, was actually so condemned. The title to property lawfully taken in war may, upon general principles, be considered as immediately divested out of the original owner and transferred to the captor. As

\* The question concerning capture in neutral waters is omitted. For this question, see ante, p. 848.



to personal property, it is considered as lost to the owner as soon as the enemy has acquired a firm possession, which is in general considered as taking place after the lapse of twenty-four hours, or after the booty has been carried into a place of safety, *infra præsidia*. Gro-tius, Lib. III, c. 6, § 3; Id. c. 9, § 14; Klüber, *Droit des Gens Moderne de l'Europe*, § 254; Vattel, bk. III, c. 14, § 196; c. 14, § 209; Heffter, *das Europäische Völkerrecht*, § 136.

It is upon authorities like the foregoing that the right and title of the claimants in the present case is predicated. But these general expressions refer to the time when the title of the original owner is divested, rather than when the right of the individuals making the capture vests. Attention for a moment to the foundation and origin of the right of the individual to the captured property will assist us in the solution of this question. That right is acquired not in virtue of the seizure of it as enemies' property, but by grant of the sovereign whose commission the captor bears. Judge Story says: "It is now clear that all captures in war inure to the sovereign, and can become private property only by his grant." *The Emulous*, 1 Gall. 569, Fed. Cas. No. 4,479; 11 East, 619.

The right to all captures from the earliest times has vested primarily in the sovereign, and no individual can have any interest in a prize, whether made by a public or private armed vessel, except that which he receives from the bounty of the state. *Law of Maritime Warfare*, p. 374; Valin, *Com. II*, 235; Bynk. c. 17; Sir L. Jenkins' *Work*, p. 714. An interest in a prize can only be derived from the government. 1 Phillips on Insurance, 182, § 320; *The Joseph*, 1 Gall. 558, Fed. Cas. No. 7,533; 11 East, 428. It is even denied that the individual captors, prior to condemnation, have any insurable interest in the captured property. *Routh v. Thompson*, 11 East, 432; *De Vause v. Steele*, 6 Bingh. N. C. 370; *Lucena v. Crawford*, 3 B. & P. 75; 5 B. & P. 323; *Crawford v. Hunter*, 8 T. Rep. 13.

The principle applicable to this case to be extracted from the authorities cited, is, that by the capture of this ship the property to it vested in the United States, and whatever right to or title in it the claimants acquired must be derived from their sovereign authority. Such a grant is set up under the act of Congress approved the 23d April, 1800, § 5, which is as follows:

"The proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall, when of equal or superior force to the vessel or vessels making the capture, be the sole property of the captors; and when of inferior force, shall be divided equally between the United States and the officers and men making the capture." Bright. Dig. p. 665, pl. 78.<sup>3</sup>

<sup>3</sup> An "Act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States," approved March 3, 1899, re-  
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The property of the original owner cannot be considered as fully divested until there has been a condemnation by a regular prize tribunal having jurisdiction of the subject-matter. Until such adjudication is made, the right of recapture continues, as well as the right of post-liminii. And in case the captured vessel escapes, is recaptured, or is voluntarily discharged, the jurisdiction of the prize court is lost, and all rights acquired by the capture are divested. 1 Kent's Com. 359. The Supreme Court of the United States say: "The right of capture is a limited right, is derived from the law, and is subject to all the restrictions the law imposes, and is to be exercised in the manner in which its wisdom has prescribed." The *Thomas Gibbons*, 8 Cranch, 421, 3 L. Ed. 610.

The question of prize may always be contested, either on account of the character of the vessel or cargo, the conduct of the captors, or the place and circumstances where and under which the capture was made; and until their right is established by the sentence of a competent tribunal, the captors are not invested with the property. *Vincen's Exposition Raisonnée de la Législation Commerciale*, c. 17.

A citizen may seize the property of an enemy wherever found, and it rests with the sovereign whether he will ratify and consummate the capture by proceeding to condemnation. *Per Story, J., The Emulous*, 1 Gall. 566, Fed. Cas. No. 4,479.

These authorities are very full and conclusive that this capture, whatever right it conferred or property it changed, was in favor of the United States. It remains to inquire what property or interest the individual captors acquired by the surrender of the ship and her conveyance to this neutral port. The claimants contend that under the act cited they were once invested with the right to the vessel, that it operated as an immediate transfer of the right of the United States to them. Such a position is assumed, we think, without due attention to the form of the grant and the character of the grantor. It being the grant of a sovereign, it is contrary to the general rule to be taken most strongly against the grantee and in favor of the grantor. It can only take effect when its stipulations, limitations, and conditions have been complied with. The act prescribes that those vessels or cargoes "which shall be adjudged good prize" shall be the property of the

pealed "all provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war." 30 U. S. Stat. at Large, 1004, 1007.

The laws for the distribution of prize moneys, bounty and salvage, as they exist in Great Britain at the present time, are to be found in Order in Council of February 6, 1917 (*London Gazette*, February 9, 1917, p. 1373); Proclamation of February 10, 1919 (*London Gazette*, February 11, 1919, p. 2148); and Order in Council of April 27, 1918 (*London Gazette*, May 3, 1918, p. 5355).

captors. This, of course, upon the rule we have stated, excludes all such as have not been adjudged good prize; for *expressio unius, est exclusio alterius*. The title depends upon a grant, and must conform to it and comply with its conditions. The condition in this case is, that it shall be brought in and condemned as lawful prize before any title accrues. Chief Justice Taney says: "All captures *jure belli* are for the benefit of the sovereign under whose authority they are made; and the validity of the seizure, and the question of prize or no prize, can be determined in his own courts only upon which he has conferred jurisdiction to try the question." *Jecker v. Montgomery*, 13 How. 515, 14 L. Ed. 240. To the same effect is the judgment and opinion of Sir William Scott. That eminent admiralty judge says: "All grants of the sovereign are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives, rights, and emoluments of the sovereign being conferred upon him for great purposes and for public use, it shall not be intended that such prerogatives, rights, and emoluments are diminished by any grant beyond what such grant by necessary and unavoidable construction shall take away." *The Rebekah*, 1 C. Rob. 230.

The case which bears most strongly on the question in hand is the judgment of the same great jurist in the case of *The Elsebe*, 5 Rob. 173. \* \* \*

If these principles are sound, and we think they are sustained by the strongest reasons and the highest authorities, it must follow that this suit cannot be maintained by this claimant, for want of title to and interest in the subject-matter in respect of which the claim is made.

By the seizure of the ships they acquired a right to carry them into a port of this country for adjudication. It is the condemnation under the act which gives the interest, and not the seizure. The capture vests it in the United States—the condemnation in the captors. It follows, as a necessary consequence from this, that there never having been a condemnation by a competent tribunal, there never has been any legal right vested in the claimants. Nor could there be any such, for it required the judgment of a competent prize tribunal to vest that right in them under the act of Congress. No other court is competent to supply the want of it, because that is an essential condition of the grant, and cannot be supplied by anything else. What follows then? Simply this, that when the *Levant* was permitted to be unlawfully recaptured by the Portuguese government, in violation of the rights of hospitality, as well as her neutrality, the sole right to and interest in the captured prize was in the United States alone. The injury was committed against her rights; and whether she should demand reparation in any form, or to any extent, was a matter to be dictated and controlled by considerations of public interest and policy alone, and

not by any considerations of private interest or grievance, for none existed. \* \* \*

We, therefore, are compelled to sustain the demurrer and dismiss the petition.<sup>4</sup>

## SECTION 2.—PRIZE COURTS—AUTHORITY AND JURISDICTION

### LINDO v. RODNEY.

(King's Bench, 1782. 2 Doug. 613, note.)

LORD MANSFIELD.<sup>5</sup> Many persons, in the same case, under the same circumstances, upon the same ground, have severally applied for a prohibition, to stop the judge of the Admiralty from proceeding upon a monition, issued in the usual form, in order to the condemnation of goods, wares, merchandizes, arms, stores, and ammunition, taken and seized, by His Majesty's land and sea forces, under the command of Admiral Rodney and General Vaughan, at the island of St. Eustatius, and its dependencies, upon the surrender of the said island of St. Eustatius, and its dependencies, on or about the 3d of February last; and citing all persons to shew cause, why they should not be pronounced to have belonged, at the time of the capture and seizure, to our enemies, and as goods of enemies, or otherwise liable to confiscation, be adjudged, and condemned, as good and lawful prize.

Elias Lindo claims part of these goods, as belonging to him, a British subject, and as to them, prays a prohibition; and, by his suggestion, among other things, he avers;

That Sir George Rodney and General Vaughan, upon the 3d of

<sup>4</sup> For another occasion on which this famous frigate appeared in court, see *The Constitution*, L. R. 1878-79, 4 Prob. Div. 39 (1879), ante, p. 310, note.

For a description of the naval battle out of which Commodore Stewart's claim arose, see *Ira Nelson Hollis, The Frigate Constitution 198-215* (1900).

It may be of interest to note that Stewart remained in active service until he was retired as senior commodore in 1856 and flag officer in 1860; that on July 16, 1862, he was commissioned rear admiral in his eighty-fourth year, and that he remained on waiting orders until his death, in 1869. His fighting qualities as well as his name appeared in his grandson, the late Charles Stewart Parnell.

In *The Nuestra Señora de Regla* 108 U. S. 92, 103, 2 Sup. Ct. 287, 27 L. Ed. 662 (1882), the Supreme Court, per Chief Justice Waite, said:

"The duty of a captor is to institute judicial proceedings for the condemnation of his prize without unnecessary delay, and if he fails in this the court may, in case of restitution, decree demurrage against him as damages. This rule is well settled. *Slocum v. Mayberry*, 2 Wheat. 1, 4 L. Ed. 169 (1817); *The Apollon*, 9 Wheat. 362, 6 L. Ed. 111 (1824); *The Lively*, 1 Gall. 315, Fed. Cas. No. 8,403 (1812); *The Corrier Maratimo*, 1 O. Rob. 287 (1799)."

<sup>5</sup> Parts of the opinion are omitted.

February, in a hostile manner, seized upon, and took possession of, the island of St. Eustatius, with everything whatsoever therein being (open hostilities then subsisting between the King and the States), and that the goods claimed were taken upon land, in the said island of St. Eustatius.

The ground upon which the prohibition is prayed, is; that the goods were taken upon land, which appears upon the face of the monition, and is averred by the suggestion.

The only question then is, whether the goods being taken on land, though in consequence of a surrender to ships at sea, excludes the only prize jurisdiction known in this kingdom?

This question naturally leads to an enquiry into the nature of this jurisdiction, exercised by the judge of the Admiralty, exclusively of every other judicature of every kind except upon appeal.

Upon the motion being made, I directed, in court, a search to be made into the books of the Admiralty, especially during the reign of Queen Elizabeth; I also got a search made myself. And one of the registers informed us, in court, during the argument, that there are no Prize Act books farther back than 1643; no sentences farther back than 1648.

The register has not been able to search farther back than 1690. The prior records are in confusion, illegible, and no index.

It appears that this jurisdiction in matters of prize (whether it be coeval with the Court of Admiralty, or, which is much more probable, of a later institution, beyond the time of memory), though exercised by the same person, is quite distinct.

He is appointed Judge of the Admiralty by a commission under the Great Seal, which enumerates particularly, as well as generally, every object of his jurisdiction; but not a word of prize.

To constitute that authority, or to call it forth, in every war, a commission under the Great Seal issues to the Lord High Admiral, to will and require the Court of Admiralty, and the lieutenant and judge of the said court, his surrogate or surrogates, and they are hereby authorized and required, to proceed upon all and all manner of captures, seizures, prizes, and reprisals, of all ships and goods, that are, or shall be, taken; and to hear and determine, according to the course of the Admiralty, and the law of nations.

A warrant issues to the judge accordingly.

The monition, and other proceedings, are in his name, with all his titles of office, rank, and degree; adding, emphatically, as the authority under which he acts, the following words: "And also to hear and determine all and all manner of causes, and complaints, as to ships and goods seized and taken as prize, specially constituted and appointed."

The Court of Admiralty is called the Instance Court; the other the Prize Court.

The manner of proceeding is totally different.

The whole system of litigation and jurisprudence in the Prize Court is peculiar to itself; it is no more like the Court of Admiralty than it is to any court in Westminster Hall.

From 8 Eliz. c. 5, it appears that, in civil and marine causes, there were many appeals, which the statute restrains to one to the King in Chancery, to be finally decided by delegates. But prize is not a civil and marine cause; and the appeal lies to commissioners, consisting of the Privy Council.

A thing being done upon the high sea, don't exclude the jurisdiction of the courts of common law. For seizing, stopping, or taking, a ship, upon the high sea, not as prize, an action will lie; but for taking, as prize, no action will lie. The nature of the question excludes, not the locality. This was explained in the case of *Le Caux v. Eden*.

The end of a Prize Court is, to suspend the property till condemnation; to punish every sort of misbehaviour in the captors; to restore instantly, *velis levatis* (as the books express it, and as I have often heard Dr. Paul quote), if, upon the most summary examination, there don't appear a sufficient ground; to condemn finally, if the goods really are prize, against every body, giving every body a fair opportunity of being heard. A captor may, and must, force every person interested to defend, and every person interested may force him to proceed to condemn, without delay.

These views cannot be answered in any court of Westminster Hall, and, therefore, the courts of Westminster Hall never have attempted to take cognizance of the question, "prize or not prize"; not from the locality of being done at sea, as I have said, but from their incompetence to embrace the whole of the subject.

As to plunder, or booty, in a mere continental land war, without the presence or intervention of any ships, or their crews, it never has been important enough to give rise to any question about it. It is often given to the soldiers upon the spot; or wrongfully taken by them, contrary to military discipline. If there is any dispute, it is regulated by the commander in chief. There is no instance, in history or law, ancient or modern, of any question before any legal judicature, ever having existed about it, in this kingdom. To contend that such plunder was within the rules and jurisdiction of the Prize Court, might be opposed by the subject matter, the nature of the jurisdiction, the person to whom it is given, and the rules by which he is judge. Therefore, the counsel have confined their argument to reprisals ashore, by a naval force; at least, I shall consider it as so confined, without entering into any question about booty, in a mere land war; as to which I have no light to go by, and it is not now necessary to be decided. *Neque teneo, neque dicta refello.*

The question then is, whether such a capture ashore, by a fleet of ships, and the land and sea forces aboard, in consequence of a

previous surrender of the place, is within the jurisdiction of the Court of Prize.

Two general objections have been relied upon.

1. That, though it were given and immemorially exercised, yet it cannot subsist, because contrary to the Statutes of 13 and 15 Ric. II, and 2 Hen. IV.

2. If there is no objection from these statutes to the existence of such a jurisdiction, that it is not given by immemorial usage, or the true construction of the commission.

As to the first: \* \* \* The view, purport, and tendency of the statutes, is to prevent the Admiralty from trying matters triable at law. The taking a ship upon the high sea is triable at law to repair the plaintiff in damages: but a taking on the high sea, as prize, is not triable at law to repair the plaintiff in damages. The nature of the ground of the action—prize or not prize—not only authorizes the Prize Court, but excludes the common law.

These statutes don't exclude the common law in any case, and they confine the Admiralty by the locality of the thing done, which is the cause of action; it must be done upon the high sea.

If done in ports, havens, or rivers, within the body of a county of the realm, the Admiralty is excluded. But the Prize Court has uniformly, without objection, tried all captures in ports, havens, etc., within the realm. It happens often. We all remember several cases. Ships, not knowing of hostilities, come in by mistake. Upon the declaration of war, or hostilities, all the ships of the enemy are detained in our ports, to be confiscated as the property of the enemy, if no reciprocal agreement is made. They can only be condemned in the Court of Prize.

What is still more extensive, foreign ports, or harbours, are not the high sea, any more than the shore, but numberless captures made there, have been condemned as prize.

I am of opinion, that these statutes have no view, or relation to the subject of prize: consequently there arises from them no objection.

2. The second objection is, that the jurisdiction is not given.

I will consider this objection in three points of view.

(1) Upon the words of the commission.

(2) Upon the reason of the thing.

(3) Upon authorities and usage.

1. As to the first; the commission certainly has in view captures by ships. Hostilities are committed by ships and the men aboard, at sea, or ashore; a fight begins; the vanquished runs ashore; gets the goods out; is pursued ashore; and the goods are taken.

A fort, or town, is taken by the force of ships at sea, and is ransomed; or plate, money, and valuable effects taken.

The means this country has of annoying, and making reprisals upon an enemy, is by naval expeditions. There never was, there never will

be, one, no, not a single ship, which has not a view to operations upon land, if occasion should offer. They are often the main view; Sir George Rooke, at Vigo; Admiral Vernon, at Porto Bello and Cartagena; Lord Anson, in the South Seas; Sir George Pocock, at the Havannah; many last war to Martinico, Guadaloupe, and other places; Commodore Johnston the other day.

In many old treaties, some of which I shall mention by and by, the usual stipulation is, that the subjects of the one prince shall do no injury or violence to the subjects of the other, by land or sea, or in fresh waters, or in port. It is not by accident, therefore, that the words of the commission are general—all manner of captures, seizures, prizes, and reprisals of all ships and goods. It don't say—upon the sea. It don't say—Goods in the ship. "Reprisals" is the most general word that can be used.

In causes civil and marine, to give jurisdiction to the Court of Admiralty, the libel must allege the cause of suit to be done upon the high sea, and, therefore, if that had been the intention of the commission, or the rule of law, it would certainly have been so expressed in the commission.

2. The reason of the thing requires the words should be general.

It is, as I have said, in the view of every ship, much more of every fleet, which sails to make reprisals, to act on shore. There is no place of note which can be attacked, where neutral or British subjects do not reside, or have property, or where the enemy may not colourably borrow their names.

If it is not within the jurisdiction of the Prize Court, consider the consequence to the captors, to the claimants, and to the state.

The captors are in a miserable condition indeed. The prize cannot be condemned. If granted, it cannot be shared. Every officer and sailor may be liable to actions without number. The taking cannot be disputed. To disprove the property, they can only have witnesses from abroad, who cannot be compelled to come. The grounds upon which the Prize Court condemns or acquits, cannot be read at law; and, in every action where the plaintiff recovers to the value of a farthing, the captor must pay the costs.

Colourable claimants might easily ruin the captors, through their want of the means of defence.

It would be equally mischievous to fair claimants. They could not have their property restored instantly, upon their own papers, books, and affidavits. They must make formal proof. And the owners or crew of a privateer all the while might be spending the effects.

But to the state the consequences would be still more mischievous.

No distinction can be made between British and neutrals. If the jurisdiction is null by the statutes, or never was given, it can no more be exercised in the case of a neutral, than in the case of a subject.

By the law of nations, and treaties, every nation is answerable to



the other for all injuries done, by sea or land, or in fresh waters, or in port. Mutual convenience, eternal principles of justice, the wisest regulations of policy, and the consent of nations, have established a system of procedure, a code of law, and a court for the trial of prize. Every country sues in these courts of the others, which are all governed by one and the same law, equally known to each. The claimant is not obliged to sue the captors for damages, and undergo all the delay and vexation to which he may think himself liable, if he sues by a form of litigation, of which he is totally ignorant, and subjects his property to the rules and authority of a municipal law, by which he is not bound.

In short, every reason which created a Prize Court as to things taken upon the high seas, holds equally when they are thus taken at land. The original cause of taking is here at sea. The force which terrified the place into a surrender was at sea. If they had resisted, the force to subdue would have been from the sea.

Mr. Figgott candidly said, it would be spinning very nicely, to contend, if the enemy left their ship, and got ashore with money, were followed upon land, and stripped of their money, that this would not be a sea capture. I agree with him, but I cannot distinguish that case from this. Both takings are literally upon land. In both the prey is, as it were, killed at sea, and taken upon land. Here the capture of the goods on land is the immediate consequence of the surrender at discretion to a sea force.

Would a sum paid by capitulation upon land have made it a sea or a land prize?

Cui bono should all this subtlety be spun, when the reason for a jurisdiction to judge a capture at sea, and such a capture at land, is exactly the same?

### 3. Authorities and immemorial usage.

In 1498, a treaty, entitled "*Confirmatio Tractatus contra spolia maritima, et pro deprædatoribus coercendis*," between Henry VII and Louis XII, confirming one before made with Charles VIII (13 Hen. VII, Rymer, vol. 12, p. 690); and, in 1526, another between Henry VIII and Francis I (17 Hen. VIII, Rymer, vol. 14, p. 147). \* \* \*

These treaties demonstrate the jurisdiction of prize in the Admiralty and Commissioners of Appeal then, to have been pretty much as it is now. Ships of war are to give security to do no injury or violence by land or sea, or in fresh waters, or in any port. When they return with prize, they are to disclose it, if they have taken any thing by sea or land from the subjects of either prince. If they have taken from the subjects, lands, kingdoms, or dominions, of either, instant restitution to be made, with costs and damages. If taken from the subject, in the land of an enemy, to be restored. If taken from the land of either prince, though the goods of an enemy, to be restored: it is a breach and violation of his territory. A capture of Admiral

Boscawen upon the land and shore of the king of Portugal occasioned much discussion.

It manifestly appears from these treaties, that the jurisdiction equally extended to goods taken by ships or their crews on land and at sea. They shew too, that no property vests in any goods taken at sea or on land, by a ship or her crew, till a sentence of condemnation as good and lawful prize; which continues law to this day. \* \* \*

In the reign of Queen Elizabeth, it is well known that a buccaneering war was carried on by private adventurers, and that, in the Spanish West Indies, considerable prize was taken on land.

Dr. Wynne said, the commissions to fit out ships against the enemy, expressly authorize the persons to whom they are granted to take the enemy's goods by land as well as by sea.

He cited one, by way of instance, in the 37th of Elizabeth, 1595 (Rymer, vol. 16, p. 2751). A commission to Robert Crosse, giving full power, in hostile manner, as well by land as sea, to invade, take, stay, and destroy, any ships or goods of the king of Spain, his subjects, or adherents.

"And such ships, goods, jewels, bullion, or any other riches as they shall take in them, we do strictly charge and command you to see that they be safely preserved from spoil, and to be brought home in good order into our realm of England."

They were to seize goods by land and sea. All they seized they were to bring to England. No property vested till condemnation. They could only be condemned by the Prize Court of Admiralty. They, therefore, most certainly were so condemned, though the proceedings are lost.

In the reign of Queen Elizabeth, and former reigns, many special commissions issued, to inquire into depredations by violators of treaties, and the law of nations, which are to be seen in Rymer. But the most ancient instrument shews a prize jurisdiction, either inherent or by commission, in the admiral. It is a letter from Edward III to the king of Portugal (Rymer, vol. 6, p. 15), and recites a complaint, that the admiral, before whom the goods were judicially demanded, determined, that they should not be restored, as having been taken in war.

Since the reign of Queen Elizabeth no special commission appears to have issued; but the Judge of the Admiralty, either by virtue of an inherent power, or the king's commission, or both, has solely exercised the jurisdiction of prize.

I will conclude with three propositions.

1. That, so far back as particular cases can be traced, which is for a century, the Admiralty has judged of, and condemned, goods taken on land as prize, as well as goods taken on sea.

2. That every common-law authority to be found on the subject allows and supports the jurisdiction.

3. That the Legislature has, in many Acts of Parliament, recognized and referred to it, as clear, certain, and undoubted. \* \* \*

If the question had been doubtful, arguments from utility and public convenience ought to have turned the scale. It could answer no good end, and must produce inextricable mischief, to captors, claimants, and the state, if goods taken upon land by ships, should not be within the prize jurisdiction.

The merits are no part of this question. If the captors have done wrong, in substance, or in manner, the Judge of Admiralty, and, if he err, the Lords of Appeal, have full power to make ample reparation. They give satisfaction even to an enemy prisoner, who is illiberally plundered, or personally ill treated.

As we are all clearly of the opinion I deliver, we ought not to contribute to the injustice and mischief which may be occasioned to many persons, from giving liberty to declare in prohibition, and the parties know, they are not finally barred by our judgment. They may apply for a prohibition to every court in Westminster Hall.

Therefore, we are all of opinion, that the rule should be discharged.

\* \* \*

\* In *Novion v. Hallett*, 16 John. (N. Y.) 327 (1819), Chancellor Kent examined with great thoroughness the jurisdiction of the Court of Admiralty, and, after citing *Lindo v. Rodney*, 2 Doug. 613, note, 615 (1782), *Le Caux v. Eden*, 2 Doug. 594 (1781), and other cases, held according to the headnote, that:

"No action at common law lies for an illegal capture on the high seas, as prize of war; and no irregularity or misconduct of the captor, in the subsequent disposition of the prize, can confer jurisdiction as to the original taking, or is, in itself, a ground of action at common law.

"Jurisdiction, in cases of prize, and of everything incidental, and consequential thereto, belongs exclusively to the admiralty.

"And piracy, and piratical captures, with all their incidents, are exclusively of admiralty cognizance.

"It makes no difference that the capturing vessel was fitted out in a port of the United States, in violation of our neutrality, or an act of Congress; and in such case the District Courts of the United States have a clear and indisputable jurisdiction."

This opinion is especially valuable to the American, because in its course the Chancellor examines, upon principle and authority, the attempts of courts of the American states to exercise jurisdiction in the matter of prize, and holds that prize jurisdiction is vested exclusively in the federal courts of the United States.

In the *Matter of Certain Craft Captured on the Victoria Nyanza*, L. R. [1919] Prob. Div. 83, 87, 88 (1918), it was held, following the cases of *Lindo v. Rodney*, 2 Doug. 613, note, 615, (1782), and *Le Caux v. Eden*, 2 Doug. 594 (1781), that the right of prize is not limited to property on the sea, and that enemy craft captured on an inland lake (the Victoria Nyanza in Africa), are subject to condemnation as prize. In the course of his opinion Lord Sterndale said:

"It appears fairly clear that there is no settled practice by which captures on inland waters are excluded from the law of prize. On February 21, 1917, the Italian Prize Court sitting at Rome condemned as lawful prize two river steamers employed in navigation from the port of Cervignano on the river Aussa, some miles from its mouth, to Grado, on the Gulf of Trieste, and Trieste. The case itself is perhaps not entirely in point, as it proceeded to a certain extent upon the doctrine of reprisals, and it does not seem quite clear whether the actual seizure was at Cervignano or at Grado, which is on the

## THE ZAMORA.

(Privy Council, 1916. [1916] 2 A. C. 77.)

LORD PARKER OF WADDINGTON.<sup>7</sup> On April 8, 1915, the *Zamora*, a Swedish steamship bound from New York to Stockholm with a cargo of grain and copper, was stopped by one of His Majesty's cruisers between the Faroe and Shetland Islands and taken for purposes of search first to the Orkney Islands and then to Barrow-in-Furness. She was seized as prize in the latter port on April 19, 1915, and in due course placed in the custody of the marshal of the Prize Court. It is admitted, on the one hand, that the copper was contraband of war, and, on the other hand, that the steamship was ostensibly bound for a neutral port. The question whether either steamship or cargo was lawful prize must therefore depend on whether the steamship had a concealed or ulterior destination in an enemy country, or whether the copper was by means of transshipment or otherwise, in fact, destined for the enemy.

On May 14, 1915, a writ was issued by His Majesty's Procurator General claiming confiscation of both vessel and cargo, and on June 14, 1915, the President, at the instance of the Procurator General, made an order under Order XXIX, r. 1, of the Prize Court Rules giving leave to the War Department to requisition the copper, but subject to an undertaking being given in accordance with the provisions of Order XXIX, r. 5. This appeal is from the President's order of June 14, 1915.

It will be convenient in the first place to consider the precise terms of Order XXIX of the Prize Court Rules. In so doing it must be borne in mind that though the order in terms applies to ships only, it is by virtue of Order I, r. 2, of the Prize Court Rules equally applicable to goods. The first rule of Order XXIX provides that where it is made to appear to the judge on the application of the proper officer of the Crown that it is desired to requisition, on behalf of His Majesty, a ship in respect of which no final decree of condemnation has been made, he shall order that the ship be appraised, and upon an undertaking being given in accordance with rule 5 of the order, the ship shall be released and delivered to the Crown. The third rule of the order provides that where in any case of requisition under the order it is made to appear to the judge on behalf of the Crown that the ship is required for the service of His Majesty forthwith, the judge may order the same to be forthwith released and delivered to the

Gulf of Trieste. In the course of the judgment, however, reference is made to a decision of the German Prize Court, in which some Belgian ships moored in the port of Duisberg, many miles up the Rhine, were condemned; and also to the case of *The Primula* [*Entscheidungen des Oberprisengerichts in Berlin*, 1918, p. 17 (1915)], a Russian vessel which was seized on the river Trave between Lübeck and Travemünde. I do not know the particulars of the case as to the captures at Duisberg, but I think I may accept the statement of the Italian court that the German court recognized the legality of the seizure."

<sup>7</sup> The statement of facts and parts of the opinion are omitted.

Crown without appraisal. In such a case the amount payable by the Crown is to be fixed by the judge under rule 4 of this order. The fifth rule of the order provides that in every case of requisition under the order an undertaking in writing shall be filed by the proper officer of the Crown for payment into court on behalf of the Crown of the appraised value of the ship or of the amount fixed under rule 4 of the order, as the case may be, at such time or times as the court shall declare that the same or any part thereof is required for the purpose of payment out of court.

The first observation which their Lordships desire to make on this order is that the provisions of rule are *prima facie* imperative. The judge is to act in a certain way whenever it is made to appear to him that it is desired to requisition the vessel or goods in question on His Majesty's behalf. If this be the true construction of the rule and the judge is, as a matter of law, bound thereby, there is nothing more to be said and the appeal must fail. If, however, it appear that the rule so construed is not, as a matter of law, binding on the judge, it will have, if possible, to be construed in some other way. Their Lordships propose, therefore, to consider in the first place whether the rule construed as an imperative direction to the judge is to any and what extent binding.

The Prize Court Rules derive their force from Orders of His Majesty in Council. These orders are expressed to be made under the powers vested in His Majesty by virtue of the Prize Court Act, 1894, *or otherwise*. The act of 1894 confers on the King in Council power to make rules as to the procedure and practice of the Prize Courts. So far, therefore, as the Prize Court Rules relate to procedure and practice they have statutory force and are, undoubtedly, binding. But Order XXIX, r. 1, construed as an imperative direction to the judge is not merely a rule of procedure or practice. It can only be a rule of procedure or practice if it be construed as prescribing the course to be followed if the judge is satisfied that according to the law administered in the Prize Court the Crown has, independently of the rule, a right to requisition the vessel or goods in question, or if the judge is minded in exercise of some discretionary power inherent in the Prize Court to sell the vessel or goods in question to the Crown. If, therefore, Order XXIX, r. 1, construed as an imperative direction be binding, it must be by virtue of some power vested in the King in Council otherwise than by virtue of the act of 1894. It was contended by the Attorney General that the King in Council has such a power by virtue of the royal prerogative, and their Lordships will proceed to consider this contention.

The idea that the King in Council, or indeed any branch of the executive, has power to prescribe or alter the law to be administered by courts of law in this country is out of harmony with the principles of our Constitution. It is true that, under a number of modern stat-

utes, various branches of the executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in courts of common law or equity. It is, however, suggested that the manner in which Prize Courts in this country are appointed and the nature of their jurisdiction differentiate them in this respect from other courts.

Prior to the Naval Prize Act, 1864, jurisdiction in matters of prize was exercised by the High Court of Admiralty, by virtue of a commission issued by the Crown under the Great Seal at the commencement of each war. The commission no doubt owed its validity to the prerogative, but it cannot on that account be properly inferred that the prerogative extended to prescribing or altering the law to be administered from time to time under the jurisdiction thereby conferred. The courts of common law and equity in like manner originated in an exercise of the prerogative. The form of commission conferring jurisdiction in prize on the Court of Admiralty was always substantially the same. Their Lordships will take that quoted by Lord Mansfield in *Lindo v. Rodney* (1782) 2 Doug. 612, note, 614, note, as an example. It required and authorized the Court of Admiralty "to proceed upon all and all manner of captures, seizures, prizes, and reprisals, of all ships and goods, that are, or shall be, taken; and to hear and determine, according to the course of the Admiralty, and the law of nations." If these words be considered, there appear to be two points requiring notice, and each of them, so far from suggesting any reason why the prerogative should extend to prescribing or altering the law to be administered by a Court of Prize, suggests strong grounds why it should not.

In the first place, all those matters upon which the court is authorized to proceed are, or arise out of, acts done by the sovereign power in right of war. It follows that the King must, directly or indirectly, be a party to all proceedings in a Court of Prize. In such a court his position is in fact the same as in the ordinary courts of the realm upon a petition of right which has been duly filed. Rights based on sovereignty are waived and the Crown for most purposes accepts the position of an ordinary litigant. A Prize Court must of course deal judicially with all questions which come before it for determination, and it would be impossible for it to act judicially if it were bound to take its orders from one of the parties to the proceedings.

In the second place, the law which the Prize Court is to administer is not the national or, as it is sometimes called, the municipal law, but the law of nations—in other words, international law. It is worth while dwelling for a moment on this distinction. Of course, the Prize Court is a municipal court, and its decrees and orders owe their validity

to municipal law. The law it enforces may therefore, in one sense, be considered a branch of municipal law. Nevertheless, the distinction between municipal and international law is well defined. A court which administers municipal law is bound by and gives effect to the law as laid down by the sovereign state which calls it into being. It need inquire only what that law is, but a court which administers international law must ascertain and give effect to a law which is not laid down by any particular state, but originates in the practice and usage long observed by civilized nations in their relations towards each other or in express international agreement. It is obvious that, if and so far as a Court of Prize in this country is bound by and gives effect to Orders of the King in Council purporting to prescribe or alter the international law, it is administering not international but municipal law; for an exercise of the prerogative cannot impose legal obligation on any one outside the King's dominions who is not the King's subject. If an Order in Council were binding on the Prize Court, such court might be compelled to act contrary to the express terms of the commission from which it derived its jurisdiction.

There is yet another consideration which points to the same conclusion. The acts of a belligerent power in right of war are not justiciable in its own courts unless such power, as a matter of grace, submit to their jurisdiction. Still less are such acts justiciable in the courts of any other power. As is said by Story, J., in the case of *The Invincible*, 2 Gall. 28, 44, Fed. Cas. No. 7,054, "the acts done under the authority of one sovereign can never be subject to the revision of the tribunals of another sovereign; and the parties to such acts are not responsible therefor in their private capacities." It follows that but for the existence of Courts of Prize no one aggrieved by the acts of a belligerent power in times of war could obtain redress otherwise than through diplomatic channels and at the risk of disturbing international amity. An appropriate remedy is, however, provided by the fact that, according to international law, every belligerent power must appoint and submit to the jurisdiction of a Prize Court to which any person aggrieved by its acts has access, and which administers international as opposed to municipal law—a law which is theoretically the same, whether the court which administers it is constituted under the municipal law of the belligerent power or of the sovereign of the person aggrieved, and is equally binding on both parties to the litigation. It has long been well settled by diplomatic usage that, in view of the remedy thus afforded, a neutral aggrieved by any act of a belligerent power cognizable in a Court of Prize ought, before resorting to diplomatic intervention, to exhaust his remedies in the Prize Courts of the belligerent power. A case for such intervention arises only if the decisions of those courts are such as to amount to a gross miscarriage of justice. It is obvious, however, that the reason for this rule of diplomacy would entirely vanish if a Court of Prize, while nominally ad-

ministering a law of international obligation, were in reality acting under the direction of the executive of the belligerent power.

It cannot, of course, be disputed that a Prize Court, like any other court, is bound by the legislative enactments of its own sovereign state. A British Prize Court would certainly be bound by acts of the imperial legislature. But it is none the less true that if the imperial legislature passed an act the provisions of which were inconsistent with the law of nations, the Prize Court in giving effect to such provisions would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper function as a Prize Court. Even if the provisions of the act were merely declaratory of the international law, the authority of the court as an interpreter of the law of nations would be thereby materially weakened, for no one could say whether its decisions were based on a due consideration of international obligations, or on the binding nature of the act itself. The fact, however, that the Prize Courts in this country would be bound by acts of the imperial legislature affords no ground for arguing that they are bound by the executive orders of the King in Council.

In connection with the foregoing considerations, their Lordships attach considerable importance to the report dated January 18, 1753, of the committee appointed by His Britannic Majesty to reply to the complaints of Frederick II of Prussia as to certain captures of Prussian vessels made by British ships during the war with France and Spain, which broke out in 1744. By way of reprisals for these captures the Prussian King had suspended the payment of interest on the Silesian loan. The report, which derives additional authority from the fact that it was signed by Mr. William Murray, then Solicitor General, afterwards Lord Mansfield, contains a valuable statement as to the law administered by Courts of Prize. This is stated to be the law of nations, modified in some cases by particular treaties. "If," says the report, "a subject of the King of Prussia is injured by, or has a demand upon any person here, he ought to apply to your majesty's courts of justice, which are equally open and indifferent to foreigner or native; so, vice versa, if a subject here is wronged by a person living in the dominions of His Prussian Majesty, he ought to apply for redress in the king of Prussia's courts of justice. If the matter of complaint be a capture at sea during war, and the question relative to prize, he ought to apply to the judicatures established to try these questions. The law of nations, founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in case of violent injuries directed or supported by the state, and justice absolutely denied in re minime dubia by all the tribunals and afterwards by the prince. Where the judges are left free, and give sentence according to their conscience, though it should be erroneous,



that would be no ground for reprisals. Upon doubtful questions different men think and judge differently; and all a friend can desire is, that justice should be impartially administered to him, as it is to the subjects of that prince in whose courts the matter is tried." The report further points out that in England "the Crown never interferes with the course of justice. No order or intimation is ever given to any judge." It also contains the following statement: "All captures, at sea, as prize, in time of war, must be judged of in a Court of Admiralty, according to the law of nations and particular treaties, where there are any. There never existed a case where a court, judging according to the laws of England only, took cognizance of prize, \* \* \* it never was imagined that the property of a foreign subject, taken as prize on the high seas, could be affected by laws peculiar to England." \* This report is, in their Lordships' opinion, conclusive that in 1753 any notion of a Prize Court being bound by the executive orders of the Crown, or having to administer municipal as opposed to international law, was contrary to the best legal opinion of the day.

The Attorney General was unable to cite any case in which an Order of the King in Council had as to matters of law been held to be binding on a Court of Prize. He relied chiefly on the judgment of Lord Stowell in the case of *The Fox*, Edw. 311, 2 Eng. P. C. 61. The actual decision in that case was to the effect that there was nothing inconsistent with the law of nations in certain Orders in Council made by way of reprisals for the Berlin and Milan Decrees, though if there had been no case for reprisals the orders would not have been justified by international law. The decision proceeded upon the principle that, where there is just cause for retaliation, neutrals may by the law of nations be required to submit to inconvenience from the acts of a belligerent power greater in degree than would be justified had no just cause for retaliation arisen, a principle which had been already laid down in *The Lucy*. Edw. 122.

The judgment of Lord Stowell contains, however, a remarkable passage quoted in full in the court below, which refers to the King in Council possessing "legislative rights" over a Court of Prize analogous to those possessed by Parliament over the courts of common law. At most this amounts to a dictum, and in their Lordships' opinion, with all due respect to so great an authority, the dictum is erroneous. It is, in fact, quite irreconcilable with the principles enunciated by Lord Stowell himself. For example, in *The Maria*, 1 C. Rob. 340, 350, 1 Eng. P. C. 152, 153, a Swedish ship, his judgment contains the following passage: "The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations: but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would

\* See *Collectanea Juridica*, vol. 1, pp. 138, 147, 152.

determine the same question if sitting at Stockholm: to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character." It is impossible to reconcile this passage with the proposition that the Prize Court is to take its law from Orders in Council. Moreover, if such a proposition were correct the court might at any time be deprived of the right which is well recognized of determining according to law whether a blockade is rendered invalid either because it is ineffective, or because it is partial in its operation: see *The Franciska*, 10 Moo. P. C. 37, 2 Eng. P. C. 346. Moreover, in *The Lucy*, Edw. 122, above referred to, Lord Stowell had, in effect, refused to give effect to the Order in Council on which the captors relied.

Lord Stowell's dictum gave rise to considerable contemporaneous criticism, and is definitely rejected by Sir R. Phillimore (*International Law* [3d Ed.] vol. 3, § 436). It is said to have been approved by Story, J., in the case of *Maisonnaire v. Keating*, 2 Gall. 324, Fed. Cas. No. 8978, but it will be found that Story, J.'s remarks, on which some reliance seems to have been placed by the President in this case, are directed not to the liability of captors in their own Courts of Prize, but to their liability in the Courts of other nations. He is in effect repeating the opinion he expressed in the case of *The Invincible*, 2 Gall. 28, Fed. Cas. No. 7054, to which their Lordships have already referred. An act, though illegal by international law, will not on that account be justiciable in the tribunals of another power—at any rate, if expressly authorized by order of the sovereign on whose behalf it is done.

Their Lordships have come to the conclusion, therefore, that, at any rate prior to the Naval Prize Act, 1864, there was no power in the Crown, by Order in Council, to prescribe or alter the law which Prize Courts have to administer. It was suggested that the Naval Prize Act, 1864, confers such a power. Under that act the Court of Admiralty became a permanent Court of Prize, independent of any commission issued under the Great Seal. The act, however, by section 55, while saving the King's prerogative on the one hand, saves, on the other hand, the jurisdiction of the court to decide judicially and in accordance with international law. Subject, therefore, to any express provisions contained in other sections, it leaves matters exactly as they stood before it was passed. The only express provisions which confer powers on the King in Council are (1) those contained in section 13 (now repealed and superseded by section 3 of the Prize Court Act, 1894), conferring a power of making rules as to the practice or procedure of Prize Courts, and (2) those contained in section 53, conferring power to make such orders as may be necessary for the better execution of the act.

Their Lordships are of opinion that the latter power does not extend to prescribing or altering the law to be administered by the court, but merely to giving such executive directions as may from time to time be necessary. In all respects material to the present question the law therefore remains the same as it was before the act, nor has it been affected by the substitution under the Supreme Court of Judicature Acts, 1873 and 1891, of the High Court of Justice for the Court of Admiralty as the permanent Court of Prize in this country.

There are two further points requiring notice in this part of the case. The first arises on the argument addressed to the board by the Solicitor General. It may be, he said, that the court would not be bound by an Order in Council which is manifestly, contrary to the established rules of international law, but there are regions in which such law is imperfectly ascertained and defined; and, when this is so, it would not be unreasonable to hold that the court should subordinate its own opinion to the directions of the executive. This argument is open to the same objection as the argument of the Attorney General. If the court is to decide judicially in accordance with what it conceives to be the law of nations, it cannot, even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfill its function as a Prize Court and justify the confidence which other nations have hitherto placed in its decisions.

The second point requiring notice is this: It does not follow that, because Orders in Council cannot prescribe or alter the law to be administered by the Prize Court, such court will ignore them entirely. On the contrary, it will act on them in every case in which they amount to a mitigation of the Crown rights in favour of the enemy or neutral, as the case may be. As explained in the case of *The Odessa*, [1916] A. C. 145, the Crown's prerogative of bounty is unaffected by the fact that the proceeds of the Crown rights or Admiralty droits are now made part of the Consolidated Fund, and do not replenish the Privy Purse. Further, the Prize Court will take judicial notice of every Order in Council material to the consideration of matters with which it has to deal, and will give the utmost weight and importance to every such order short of treating it as an authoritative and binding declaration of law. Thus, an order declaring a blockade will *prima facie* justify the capture and condemnation of vessels attempting to enter the blockaded ports, but will not preclude evidence to show that the blockade is ineffective and therefore unlawful. An order authorizing reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of His Majesty's advisers, are the best or only means of meeting the emergency; but this will not preclude the right of any party aggrieved to contend, or the right of the court to hold, that these means are unlawful, as entailing on neu-

trials a degree of inconvenience unreasonable, considering all the circumstances of the case. Further, it cannot be assumed, until there be a decision of the Prize Court to that effect, that any executive order is contrary to law, and all such orders, if acquiesced in and not declared to be illegal, will, in the course of time, be themselves evidence by which international law and usage may be established. See Wheaton's *International Law* (4th English Ed.) pp. 25 and 26.

On this part of the case, therefore, their Lordships hold that Order XXIX, r. 1, of the Prize Court Rules, construed as an imperative direction to the court, is not binding. Under these circumstances the rule must, if possible, be construed merely as a direction to the court in cases in which it may be determined that, according to international law, the Crown has a right to requisition the vessel or goods of enemies or neutrals. There is much to warrant this construction, for the Order in Council, by which the Prize Court Rules were made, conforms to the provisions of the Rules Publication Act, 1893, and on reference to that act it will be found inapplicable to Orders in Council, the validity of which depends on an exercise of the prerogative. It is reasonable, therefore, to assume that the words "or otherwise," contained in the Order in Council, refer to such other powers, if any, as the Crown possesses of making rules, and not to powers vested in the Crown by virtue of the prerogative.

The next question which arises for decision is whether the order appealed from can be justified under any power inherent in the court as to the sale or realization of property in its custody pending decision of the question to whom such property belongs. It cannot, in their Lordships' opinion, be held that the court has any such inherent power as laid down by the President in this case. The primary duty of the Prize Court (as indeed of all courts having the custody of property the subject of litigation) is to preserve the res for delivery to the persons who ultimately establish their title. The inherent power of the court as to sale or realization is confined to cases where this cannot be done, either because the res is perishable in its nature, or because there is some other circumstance which renders its preservation impossible or difficult. In such cases it is in the interest of all parties to the litigation that it should be sold or realized, and the court will not allow the interests of the real owner to be prejudiced by any perverse opposition on the part of a rival claimant. Such a limited power would not justify the court in directing a sale of the res merely because it thought fit so to do, or merely because one of the parties desired the sale or claimed to become the purchaser.

It remains to consider the third, and perhaps the most difficult, question which arises on this appeal—the question whether the Crown has, independently of Order XXIX, r. 1, any and what right to requisition vessels or goods in the custody of the Prize Court pending the decision of the court as to their condemnation or release. \* \* \*

\* For the part of the opinion here omitted, see ante, p. 733.

On the whole question their Lordships have come to the following conclusion: A belligerent power has by international law the right to requisition vessels or goods in the custody of its Prize Court pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations. First, the vessel or goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate release. And, thirdly, the right must be enforced by application to the Prize Court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable. \* \* \*

It remains to apply what has been said to the present case. In their Lordships' opinion the order appealed from was wrong, not because, as contended by the appellants, there is by international law no right at all to requisition ships or goods in the custody of the court, but because the judge had before him no satisfactory evidence that such a right was exercisable. \* \* \*

The proper course, therefore, in the present case, is to declare that upon the evidence before the President he was not justified in making the order the subject of this appeal, and to give the appellants leave, in the event of their ultimately succeeding in the proceedings for condemnation, to apply to the court below for such damages, if any, as they may have sustained by reason of the order and what has been done under it. Their Lordships will humbly advise His Majesty accordingly; but inasmuch as the case put forward by the appellants has succeeded in part only, they do not think that any order should be made as to the costs of the appeal.\*

\* The English Prize Court is not only one of large jurisdiction, but it has the power to open its decisions where substantial injustice would otherwise result. Thus, in the case of *The Bolivar*, L. R. [1916] 2 A. C. 203, 205 (1916), the Privy Council, per Lord Parker of Waddington, held that the court was justified in setting aside "its own judgments of condemnation so as to let in bona fide claims by parties who have not in fact been heard, and who have had no opportunity of appearing. This power is discretionary, and should not be exercised except where there would be substantial injustice if the decree in question were allowed to stand, and where the application for relief has been promptly made."

In *Hooper, Adm'r, v. United States*, 22 Ct. Cl. 408, 454, 455 (1887), Davis, J., said:

"The burden of proof in prize proceedings is on the seized vessel. The authorities concur in this general statement, but the principle is not technical and is not to be pushed beyond its proper natural intent. Seized vessels always appear before the court under the taint of suspicion; that taint it is incumbent upon them to remove, as it is in their power alone to do so. What the court looks for is the fact. If it appear that the vessel was innocently pursuing an honest and legal voyage, whether that appear by papers or otherwise, then the vessel should be released. No particular papers, no specified character of evidence is marked out and defined as indispensable to attain

this end. A case is easily supposable in which a merchant vessel has lost its papers by an accident, or by theft, or by robbery committed by a pirate or privateer, or through suppression by the captor, and it would not be admitted—the fact of their non-production being explained, and the vessel's honest character being shown—that because some particular document was not on board she therefore should be condemned and confiscated. The onus probandi is on the captured vessel; which means no more than that she must explain away suspicious circumstances."

Viscount Tiverton in "The Principles and Practice of Prize Law," p. 91 (1914), says:

"The law of what evidence may be tendered has been entirely changed by the new rules. Formerly the only evidence which could be tendered in the first instance was the affidavit as to ship papers, the ship papers themselves, and the answers to standing interrogatories sworn by some person from the captured ship. The court would, however, always admit further evidence if it was satisfied that such evidence was false and fraudulent."

The Rules of Court in Prize Proceedings, issued provisionally August 5, and as statutory rules September 17, 1914, provide in Order II, (a) 3, that proceedings for condemnation shall be instituted in the name of the crown, but with the consent of the crown causes may be conducted by the captors.

In Order XV, 2, it is provided that the cause shall be heard upon:

"(a) The affidavit as to ship papers, and the ship papers, if any, exhibited thereto; (b) upon the affidavits of the officers of the ship concerned in the capture; (c) the depositions of the witnesses, if any, examined before the hearing, whether such witnesses belong to the captured ship or are tendered on behalf of the captors or of any other party; (d) the evidence given at the hearing of any witnesses, whether on behalf of the captors or of any other party; and (e) such further evidence, if any, as may be admitted by the Judge." Manual of Emergency Legislation Comprising All the Acts of Parliament, Proclamations, Orders, etc., Passed and Made in Consequence of the War, to September 30, 1914, pp. 256 et seq.

In *The Parchim*, L. R. [1918] App. Cas. 157, 160 (1917), the Privy Council declared that "it is well settled that the enemy character of goods seized as prize is to be determined by property, and not by risk."

In *The Prinz Adalbert*, L. R. [1917] Appeal Cases, 586 (1917), it was held by Lord Sumner that the question whether the property has passed depends upon intention, and is a question of fact.

In *The Sydland*, L. R. [1917] Prob. Div. 161, note 162 (1916) Sir Samuel Evans held that "the named 'consignee' must be a real and genuine consignee in the business and commercial sense. The fact that a person who happens to be in existence is named, if he be merely a nominee without any interest, or dummy consignee, is not enough."

"In the Prize Court the neutral trader is not in the position of a person charged with a criminal offence and presumed to be innocent unless his guilt is established beyond reasonable doubt. He comes before the Prize Court to show that there was no reasonable suspicion justifying the seizure or to displace such reasonable suspicion, as in fact exists. The state of the captors is necessarily unable to investigate the relations between the neutral trader and his correspondents in enemy or neutral countries, but the neutral trader is or ought to be in a position to explain doubtful points. If his goods had no such destination as would subject them to condemnation by the Prize Court, it is his interest to make full disclosure of all the details of the transaction. Only if his goods had such destination can it be his interest to conceal anything or leave anything unexplained. If he does conceal matters which it is material for the court to know, or if he neglect to explain matters which he is or ought to be in a position to explain, or if he puts forward unsatisfactory or contradictory evidence in matters the details of which must be within his knowledge, he cannot complain if the court draws inferences adverse to his claim and condemns the goods in question." Per Lord Parker of Waddington in *The Louisiana*, L. R. [1918] App. Cas. 461, 464, 465 (1918).

"The inference to be attached to documentary evidence is so strong in France that the Conseil d'Etat has, in the cases of *The Gorontalo*, Journal Officiel, May 10, 1917, p. 3714 (1917), and *The Iberia*, Journal Officiel, June

## THE ANICHAB and other Vessels and Craft.

(High Court of Justice, 1919. [1919] Prob. 329.)

Action for the condemnation of a number of tugs, lighters and other craft and material as enemy property.

The property seized, which for the most part belonged to the German Woermann Line, was seized at various places in the course of the campaign in German Southwest Africa. A claim was entered on behalf of the Woermann Line for the release of all the craft and material owned by them on the ground that it was not liable to condemnation as prize. \* \* \*

THE PRESIDENT (LORD STERNDALE).<sup>10</sup> This is a curious case, and raises questions which now first come before me. The crown asks for condemnation of some tugs, lighters, rafts and other property, including buoys and some rope fenders, belonging to the Woermann Line, also some craft supposed to be the property of the German government and craft the property of other persons. Most of the craft and articles had been at the port of Swakopmund, which is a little north of Walfisch Bay, or at Luderitzbucht, which is considerably south of that place. When they were seized, some of them at any rate were at a place called Omaruru, which is about 148 miles from the coast, and others were at Otavi, which is about 310 miles from the coast.

The first question that arises is in respect of the tugs and other craft which were still at or about these ports at the time when occupation was taken of them by the South African forces. Possession was taken during the hostilities which took place between the government of the Union of South Africa and the government of Ger-

14, 1921, p. 6802 (1921), reversed the decision of the court below upon production by claimants of further documents, which they had not presented before, and which, added to the evidence filed in the first instance, were judged sufficient to establish their ownership on the goods." C. J. Colombos, "Cargoes in the Prize Courts of Great Britain, France, Italy and Germany," *Journal of Comparative Legislation and International Law* (3d Series) vol. 3, pt. 4, pp. 286, 290 (October, 1921).

"In countries where the Civil Code is more strongly the basis of municipal law than it is in Great Britain the evidence derived from the ship's papers outweighs all other considerations. \* \* \* At one time it was considered to be the established rule in France that the evidence of property must come exclusively from the documents found on board. This was the principle embodied in the *Règlement* of July 26, 1778. During the last war, however, the appellate tribunal (the *Conseil d'Etat*) has decreed, by a liberal interpretation of the old practice, that claimants will be receivable in invoking, besides the ship's papers, any other documents capable of substantiating their eventual rights of ownership. \* \* \* The Boeroe, *Journal Officiel*, December 24, 1917, p. 10555 (1917)." C. J. Colombos, "Cargoes in the Prize Courts of Great Britain, France, Italy and Germany," *Journal of Comparative Legislation and International Law* (3d Series) vol. 3, part 4, pp. 286, 289, 290 (October, 1921).

<sup>10</sup> Part of the opinion is omitted.

man Southwest Africa, being part of the general hostilities existing between the British and German governments at that time. The incidents which preceded the taking possession of these goods are not fully detailed in the evidence that I have before me; but I gather that one of these ports, at any rate, had been bombarded by a British cruiser, and I take it that a portion of the British forces was conveyed on transports to these ports. How the rest of the forces arrived at the various spots I have not been told. I think Luderitzbucht was occupied somewhere about September, 1914, and Swakopmund in January, 1915. At that time there were found some of the tugs and craft which had been afloat in these two harbours. Some of the craft were afloat; some were beached below high water; others of the craft were beached above high water. In some cases they had been beached for the purpose of repairs, or because they were not required at the moment; and in some cases I think they had been beached in consequence of the approach of the Union forces, and in order that they might be to that extent safe. When the Union forces took possession of these ports, I am satisfied that they also took possession of all these craft, which were then either afloat or beached above or below the high water line, and that, therefore, there was a seizure at that time.

The first question that arises is whether those craft are the subject of maritime prize. I cannot have any doubt that they are, subject to the question of the Hague Convention, with which I shall deal hereafter. It does not seem to me to matter in the least whether the vessels or the craft—because some of these could hardly be called vessels—which are being used for navigation upon the seas, not the high seas necessarily, but upon the seas, either coastwise or on the high seas, were at the moment in the water or on the beach. It does not seem to me to matter whether the possession of them was taken by somebody who was a commissioned officer of His Majesty's Navy, or somebody who was operating under the authority of the crown for the purpose of hostilities which involves taking possession of enemy property at sea. They are craft which were intended for navigation, either coastwise or on the high sea; and, therefore, the belligerent is entitled to seize them. The fact that they have been beached either above or below high water can no more defeat his right to seize them than in the case of goods which have come across the sea and have been put into warehouses in the port to which they were destined, or, like the oil in *The Roumanian*, [1916] 1 A. C. 124, pumped into tanks which are within the ambit of the port. I do not know whether these places, Swakopmund or Luderitzbucht, have any defined limits as a port or not; but certainly for the purposes of prize, if it be a question of being within the port, I should say that all these craft, beached as they were, were just as much within the port, and, therefore, just as much seizable as the craft which were afloat. \* \* \*

Therefore, to my mind, those craft which were taken afloat or



beached, either above or below high water line, at either of these places, are good and lawful prize, and should be condemned as such.

But now comes a very different question, and a much more difficult one on which I have great doubt. It arises in these circumstances. When the Union troops were approaching, whether they approached by land or by sea, a number of these lighters were put on rail and sent up to the interior of the country. I think some were sent about 100 miles, and some were sent about 300 miles, and some possibly to other places at different distances. The bulk of them were at Otavi and at Omaruru. They were taken up to Omaruru in August and September, 1914, and to Otavi in March and April, 1915. Between the time of September, 1914, when Luderitzbucht was occupied, and January, 1915, when Swakopmund was occupied, there is a blank, and I am told nothing at all as to what the Crown were doing, or what the operations were, until Omaruru was captured on June 20 and Otavi on July 1, 1915. The only information before the court is the affidavit of the Secretary to the Admiralty, Sir Oswyn Murray, in which he says that: "His Majesty's military forces operating under the government of the Union of South Africa in German Southwest Africa, occupied Luderitzbucht on September 19, 1914, and Swakopmund on January 14, 1915, both those places being on the coast of that Protectorate. And in the course of their operations in the said German Protectorate the said forces occupied the northern section of the railway lines from Swakopmund to Otavi and found and seized at Omaruru, 148 miles inland, six lighters, and at Otavi, 310 miles inland, a launch and some lighters, rope fenders and other matters."

That suggests to me, when it is said that the forces occupied the northern section of the railway lines from Swakopmund to Otavi, that they were approaching that section of railway from the land and not from the sea, and it suggests to me a land operation. The first part that would be occupied would be the southern part, which adjoins the coast line, and that might have been occupied early; it may only mean that it was not until June and July that they occupied the northern part, and so were in possession of the whole—I do not know. It is left very vague, and I do not know exactly what it means. But that is the only evidence I have. Upon that the position stands in this way. There was an occupation of the two places on the coast in September, 1914, and in January, 1915, respectively. No doubt operations of some kind were going on in the meantime. What they were I have not been told. Six months afterwards, speaking roughly on June 20, Omaruru was captured, and on July 1 Otavi was captured, and captured by the military forces. At these places there were found, not afloat, not in the river—the river was not passable, as I understand—but ashore, these lighters and other things, which had been taken up there, no doubt for the purpose of avoiding capture, and had remained there until, as a result of the climate and of the necessity of

keeping them damp in order to avoid their becoming cracked and the seams opening altogether, one of them at any rate had become quite covered with vegetation. The vegetation on the others does not seem to have been quite so luxuriant.

The question is whether they still remained at the time they were seized—and for the purposes of my judgment I am going to take the date given by Sir Oswyn Murray as the date of seizure, namely, the date when these two places were occupied—the subject of maritime prize. I should not have any right to doubt—and I have not any doubt—that Lord Parker was correct in saying, as he did in *The Roumanian*, [1916] 1 A. C. 124, that if property is liable to seizure at sea, and the enemy succeeds in getting ashore and escaping with his property, the belligerent who is trying to capture it has a right to pursue him and to take the property from him. I do not wish to throw the slightest doubt on that proposition. It was contended that I ought to treat this as a case of that kind, which is called sometimes a case of hot pursuit. This hot pursuit took six months, if it was a hot pursuit. I do not mean by that to say for a moment that the forces might not have been in hot pursuit all the time, and they might have been getting on as fast as they could after these craft to try and get them; but I have no evidence that they were. It is just as consistent on the evidence before me that that expedition and these operations might have ceased for a time, and a new operation begun. I do not suggest it was so; I do not know. All I know is, that after the first taking possession of the ports, there was an interval of about six months before these craft were taken at places respectively 150 and 300 miles up the country and were taken on land by military forces. It does not seem to me, in those circumstances, that they are the subject of maritime prize. I do not think it matters that they are craft that can be, and no doubt when they come into the possession of their former owners will be, put into the water again. They are property on land. They are taken by the land forces in land operations, and therefore I do not think they are the subject of maritime prize.

With regard to the lights and other property seized in the interior there must be an order of release so far as concerns release as prize—they must be released from the Prize Court.<sup>11</sup> \* \* \*

<sup>11</sup> Affirmed on appeal, [1921] 88 Times Law Reports, 183.

For the jurisdiction of German Prize Courts, see *The Eemland and Gaasterland*, *Entscheidungen des Oberprisengerichts in Berlin*, 1918, 388 (1917).

These were Dutch, and therefore neutral, steamers, sunk on February 22, 1917, in the North Sea, by a German steamer, because they were found in a part of the Sea declared by the German proclamation of February 4, 1917, to be a barred zone. They had been insured, and the insurance companies brought suit for damages for the destruction of the vessels.

The Prize Court dismissed the suit on the ground that German Prize Courts could only deal with matters laid before them by the Admiralty Staff. In the course of its opinion, it is said:

"According to the construction of Prize Court procedure in the Regulations

of the Prize Court, the surrender of the prize to the Prize Administration, or, if the capture did not lead to the confiscation of the prize, the transmission of the prize report prompted by the Admiralty Staff, or, in default thereof, of communications to the Prize Court, is the necessary basis and prerequisite for the initiation of the proceedings. Communications or allegations of private parties interested in the matter are not sufficient, and can not give rise to the public summons inviting a justification of claims, prescribed by paragraph 26 of the Prize Court Regulations, which summons forms the basis for prize proceedings."

In regard to the jurisdiction of the court, and the reason why it was incompetent in the present instance, the opinion says:

"The real competence of the Prize Courts is not decided by standards of international law but only by national law. Therefore, prize jurisdiction is variously ordered in different countries. For the competency of the German Prize Courts, the German Prize Court Regulations in connection with the Prize Regulations are the only deciding factor. According to paragraph 1 of the Prize Court Regulations the competency of the court consists in deciding on the legality of prizes made in a war; and prizes in the sense of the Prize Court Regulations are, according to paragraph 2, understood to comprise enemy or neutral merchantmen as well as enemy or neutral merchandise found on such steamers, in so far as they are confiscated, in the exercise of prize law. The Prize Regulations determine the nature of prize law. But these regulations contain provisions with regard to the destruction of merchantmen only in so far as this destruction occurs after the confiscation (capture) of the ship and for the reason that the ship was considered hostile or equivalent thereto, or that it was carrying contraband, was violating a blockade or was guilty of unneutral aid. If the destruction of a merchantman occurs for any other reason and without confiscation of the ship as a prize, the said destruction may, to be sure, be considered a war measure; but it can not be regarded as an act in accordance with prize law, and the Prize Courts are not competent to pass judgment on the legality of such an act.

"This opinion also formed the basis of the decision of the Superior Prize Court of April 27, 1917, in the matter of the Dutch fishing steamer *Geertruida* (No. 71 of the present series [Id. 302]). In that case the ship was destroyed by a German U-boat because the commander and the crew of the latter assumed that the fishing steamer was armed and was attempting to make an attack upon the U-boat which was prompted by no measures of the Prize Law. Since the U-boat intended merely to ward off and defeat this attack the Superior Prize Court in that case, too, denied the prerequisites of a prize case and consequently the competency of the Prize Courts."

In *The United Combed Wool Spinning Mills of Schaffhausen & Derendingen*, Ms. Department of State, translation, 16 *American Journal of International Law* (1922) p. 142 (1917), the French Prize Court refused to assume jurisdiction of three boxes of woolen fabrics sent overland to be loaded on the Dutch steamer *Ary Scheffer*, at Havre. They were seized in the railroad station at Havre before their embarkation.

## JECKER et al. v. MONTGOMERY.

(Supreme Court of the United States, 1851. 13 How. 498, 14 L. Ed. 240.)

Mr. Chief Justice TANEY delivered the opinion of the court.

This case arises upon the capture of the ship *Admittance* during the late war with Mexico, by the United States sloop of war *Portsmouth*, commanded by Captain Montgomery.

The *Admittance* was an American vessel, and after war was declared, sailed from New Orleans with a valuable cargo, shipped at that place. She cleared out for Honolulu, in the Sandwich Islands; and was found by the *Portsmouth* at Saint Jose, on the coast of California, trading, as it is alleged, with the enemy.

Before this capture was made a prize court had been established at Monterey, in California, by the military officer, exercising the functions of governor of that province, which had been taken possession of by the American forces. A chaplain, belonging to one of the ships of war on that station, was appointed Alcalde of Monterey, and authorized to exercise admiralty jurisdiction in cases of capture. The court was established at the request of Commodore Biddle, the naval commander on that station, and sanctioned by the President of the United States, upon the ground that prize crews could not be spared from the squadron to bring captured vessels into a port of the United States. And the officers of the squadron were ordered to carry their prizes to Monterey, and libel them for condemnation in the court above mentioned, instead of sending them to the United States.

In pursuance of this order the *Admittance* was carried to Monterey, and condemned by the court as lawful prize; and the vessel and cargo sold under this sentence. The seizure at Saint Jose was made on the 7th of April, 1847, and the ship and cargo condemned on the 1st of June, in the same year. \* \* \* <sup>12</sup>

In relation to the proceedings in the court at Monterey, which is the subject of the first demurrer, the decision of the Circuit Court is correct.

All captures *jure belli* are for the benefit of the sovereign under whose authority they are made; and the validity of the seizure and the question of prize or no prize can be determined in his own courts only, upon which he has conferred jurisdiction to try the question. And under the Constitution of the United States the judicial power of the general government is vested in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish. Every court of the United States, therefore, must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States. And neither the President nor any military officer can establish a court

<sup>12</sup> Only that portion of the opinion dealing with the validity of the court constituted under such circumstances to entertain and to decide the question of prize, is here printed.

in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases, nor to administer the laws of nations.

The courts, established or sanctioned in Mexico during the war by the commanders of the American forces, were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize. And the sentence of condemnation in the court at Monterey is a nullity, and can have no effect upon the rights of any party. \* \* \*

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### SECTION 3.—EFFECT OF PRIZE DECISIONS

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#### HUGHES and CORNELIUS.

(King's Bench, 1682. Skinner, 59.)

The case between Hughes and Cornelius was, a ship was Dutch built, and after made an English ship, the master was Dutch, some of the seamen English, and two Dutch: there being war between France and Holland, the French seise the ship, as a Dutch ship, and condemn her as a Dutch ship in the Court of Admiralty in France; she is there sold, and after coming into England, the first owner seises her, and the other brings trover, and a special verdict was found; but the Court would not suffer it to be argued, but ordered judgment to be entered for the plaintiff; for they said, that sentences in Courts of Admiralty ought to bind generally according to *jus gentium*; and that if we did not observe the sentences given abroad, they would not observe ours, which would be a general inconvenience; and if the merchant in this case had received wrong, he ought to apply to the Admiralty and council, this being a matter of government; and that the King if he saw cause would send to his Ambassador Leiger in France, who would take care that right should be done; and that if right be not done, then the King would grant letters of marque and reprisal; and in this case they remembered Cottington's case.

## THE FLAD OYEN.

(High Court of Admiralty, 1799. 1 C. Rob. 135.)

This was a case of an English prize ship carried into a neutral country, and there sold, under a sentence of condemnation by the French consul, and taken, the 12th of January, 1798, on a voyage from Bergen to St. Martins. The claim was given on behalf of the purchaser, a Danish merchant.

The King's Advocate having opened the general circumstances of the case,

THE COURT said: This is a case in which I must call on the counsel for the claimant to begin.

Arnold and Sewell. The title to this vessel can scarcely be called in question on any doubts respecting the property, or the actual transfer. There are all the usual proofs of property on board, and the transfer is described to have been made in the most open manner, by public auction. The only ground on which it can be disputed, therefore, must be on the legality of such a sale; and, for that purpose, it is contended that a sentence of condemnation is essential to the transfer of prize ships, and that a legal condemnation did not pass on this occasion. But it nowhere appears what are the forms and circumstances necessary to make this a legal act. A condemnation took place, and under the person delegated by the French nation to exercise this function. There is no reason to contend that the name and process of an Admiralty Court are necessary, as long as the proceedings are held under the public authority of the belligerent country, and are conformable to the law of nations. \* \* \*

The practice of our own country, also, has in many instances proceeded on this principle. English captors have taken their prizes into Lisbon and Leghorn, and condemnations have passed upon them lying there. In the last war, they carried them to Nice; and there was an instance of a ship, the Favorite, carried into this very port of Bergen, and condemned. On these grounds, it is submitted, this practice cannot be impeached as illegal, and the claim to the property in question, transferred under it, must therefore be admitted.

Sir W. Scott.<sup>14</sup> This is the case of a ship taken by a French privateer, and carried into the port of Bergen in Norway, where it appears she underwent a sort of process, which terminated in a sentence of condemnation, pronounced by the French consul; and under that sentence, she is asserted to have been transferred to the present neutral proprietor. \* \* \*

But another question has arisen in this case, upon which a great deal of argument has been employed; namely, whether the sentence

<sup>14</sup> Parts of the opinion are omitted.

of condemnation which was pronounced by the French consul, is of such legal authority as to transfer the vessel, supposing the purchase to have been bona fide made? I directed the counsel for the claimants to begin; because, the sentence being of a species altogether new, it lay upon them to prove that it was nevertheless a legal one.

It has frequently been said, that it is the peculiar doctrine of the law of England to require a sentence of condemnation, as necessary to transfer the property of prize; and that according to the practice of some nations twenty-four hours, and according to the practice of others bringing *infra presidia*, is authority enough to convert the prize. I take that to be not quite correct; for I apprehend, that by the general practice of the law of nations, a sentence of condemnation is at present deemed generally necessary,<sup>15</sup> and that a neutral purchaser in Europe, during war, does look to the legal sentence of condemnation as one of the title deeds of the ship, if he buys a prize vessel. I believe there is no instance in which a man having purchased a prize vessel of a belligerent, has thought himself quite secure in making that purchase, merely because the ship had been in the enemy's possession twenty-four hours, or carried *infra presidia*; the contrary has been more generally held, and the instrument of condemnation is amongst those documents which are most universally produced by a neutral purchaser; that if she has been taken as prize, it should appear also that she has been, in a proper judicial form, subjected to adjudication.

Now, in what form have these adjudications constantly appeared? They are the sentences of courts acting and exercising their functions in the belligerent country; and it is for the very first time in the world, that in the year 1799, an attempt is made to impose upon the court a sentence of a tribunal not existing in the belligerent country, but of a person pretending to be authorized within the dominions of a neutral country; in my opinion, if it could be shown, that, regarding mere speculative general principles, such a condemnation ought to be deemed sufficient, that would not be enough; more must be proved; it must be shown that it is conformable to the usage and practice of nations.

A great part of the law of nations stands on no other foundation; it is introduced, indeed, by general principles, but it travels with those general principles only to a certain extent; and, if it stops there, you are not at liberty to go farther, and to say, that mere general speculations would bear you out in a further progress. Thus, for instance, on mere general principles it is lawful to destroy your enemy, and mere general principles make no great difference as to the manner by which this is to be effected; but the conventional law of mankind, which is evidenced in their practice, does make a distinction, and al-

<sup>15</sup> 1 Kent, Comm. 108; *The Santa Cruz*, 1 C. Rob. 50 (1798); *La Nereyda*, 8 Wheat. 108, 5 L. Ed. 574 (1823); *The Ceylon*, 1 Dod. 119 (1811).

lows some, and prohibits other modes of destruction; and a belligerent is bound to confine himself to those modes which the common practice of mankind has employed, and to relinquish those which the same practice has not brought within the ordinary exercise of war, however sanctioned by its principles and purposes.<sup>16</sup>

Now, it having been the constant usage, that the tribunals of the law of nations in these matters shall exercise their functions within the belligerent country; if it was proved to me in the clearest manner, that on mere general theory such a tribunal might act in the neutral country, I must take my stand on the ancient and universal practice of mankind, and say that as far as that practice has gone, I am willing to go, and where it has thought proper to stop, there I must stop likewise.

It is my duty not to admit, that because one nation has thought proper to depart from the common usage of the world, and to meet the notice of mankind in a new and unprecedented manner, that I am on that account under the necessity of acknowledging the efficacy of such a novel institution, merely because general theory might give it a degree of countenance, independent of all practice from the earliest history of mankind. The institution must conform to the text law, and likewise to the constant usage of the matter; and when I am told, that before the present war, no sentence of this kind has ever been produced in the annals of mankind, and that it is produced by one nation only in this war, I require nothing more to satisfy me, that it is the duty of this court to reject such a sentence as inadmissible.

Having thus declared that there must be an antecedent usage upon the subject, I should think myself justified in dismissing this matter without entering into any farther discussion. But even if we look farther, I see no sufficient ground to say, that on mere general principles such a sentence could be sustained; proceedings upon prize are proceedings in rem, and it is presumed, that the body and substance of the thing is in the country which has to exercise the jurisdiction. I have not heard any instances quoted to the contrary, excepting in a very few cases which have been urged, argumentatively, in the way which is technically called *ad hominem*, being cases of condemnations of British prizes carried into the ports of Lisbon and Leghorn; but in those the condemnations were pronounced by the High Court of Admiralty in England. The only cases are of two ships carried into foreign ports, and condemned in England by this court; the very infrequency of such a practice shows the irregularity of it. Upon cases in the practice of other nations antecedent to the present war, the advocates have been silent.

Now, as to these condemnations of prizes carried to Lisbon and Leghorn, it has been said, that if the courts of Great Britain venture

<sup>16</sup> See 1 Kent, Comm. 2, 8.



this degree of irregularity, other countries have a right to go farther. That consequence I deny. The true mode of correcting the irregular practice of a nation is, by protesting against it, and by inducing that country to reform it. It is monstrous to suppose, that because one country has been guilty of an irregularity, every other country is let loose from the law of nations, and is at liberty to assume as much as it thinks fit.

Upon these ports of Lisbon and Leghorn it is to be remarked, that they have a peculiar and discriminate character, a character that to a certain degree assimilates them to British ports. The British exist there in a distinct character, under the protection of peculiar treaties; and with respect to Portugal, those treaties go so far as to engage, that if a ship belonging to one country shall be brought by its enemy into the ports of another, which happens to be at peace, this neutral country shall be bound to seize that ship, and restore it to its ally. To be sure no covenant can have more the effect of giving the ports of England and Portugal a reciprocal relation of a very peculiar sort—to make the British ports Portuguese ports, and the Portuguese ports British ports to a certain degree. Now, unless I am given to understand that peculiar treaties between France and Denmark have impressed such a distinctive character upon the port of Bergen, I cannot allow that it can be considered, on the mere footing of general neutrality, to be a French port, exactly in the same manner in which London may be considered as a Portuguese port, or Lisbon as a British port.

But supposing this possible, still it would not follow that such condemnations could be pleaded as authorities in the present case; because, in the first place, the validity of such condemnations themselves may be the subject of reasonable doubt, for it by no means appears that the enemy, or neutrals, who might have an interest in contesting them, have ever acknowledged their validity. Whoever purchases under such sentences must be content to purchase them subject to all the questions that may arise upon their sufficiency.

But, 2dly, supposing that no doubts could be entertained respecting the sufficiency of such sentences, it by no means follows that the efficacy of the present sentence can be supported. There the tribunal is acting in the country to which it belongs, and with whose authority it is armed. Here a person, utterly naked of all authority except over the subjects of his own country, and possessing that merely by the indulgence of the country in which he resides, pretends to exercise a jurisdiction in a matter in which the subjects of many other states may be concerned. No such authority was ever conceded by any country to a foreign agent of any description residing within it; and least of all could such an authority be conceded in the matter of prize of war—a matter over which a neutral country has no cognizance whatever, except in the single case of an infringement of its own territory, and in which such a concession of authority cannot be made

without departing from the duties, and losing the benefits, of its neutral character.

Mark the consequences which must follow from such a pretended concession. Observe in the present case how it would affect the neutral character of the ports in the north! If France can station a judge of the Admiralty at Bergen, and can station there its cruisers to carry in prizes for that judge to condemn, who can deny that to every purpose of hostile mischief against the commerce of England, Bergen will differ from Dunkirk, in no other respect than this, that it is a port of the enemy to a much greater extent of practical mischief. To make the ports of Norway the seats of the French tribunals of war, is to make the adjacent sea the theatre of French hostility.

It gives one belligerent the unfair advantage of a new station of war, which does not properly belong to him; and it gives to the other the unfair disadvantage of an active enemy in a quarter where no enemy would naturally be found. The coasts of Norway could no longer be approached by the British merchant with safety, and a suspension of commerce would soon be followed by a suspension of amity.

Wisely, therefore, did the American Government defeat a similar attempt made on them, at an earlier period of the war. They knew that to permit such an exercise of the rights of war, within their cities, would be to make their coasts a station of hostility.<sup>17</sup>

Whether the government of Denmark has shown equal vigilance in observing, or equal indignation in repelling the attempt, is more than I am warranted to assert. But though the publicity of the transaction in the town of Bergen may subject the police of that place to some degree of observation, I see nothing in the papers which issue immediately from the royal authority that at all affects the government itself with the knowledge and approbation of the fact; and indeed it would be indecent to suppose that a country, standing upon the footing of ancient and friendly alliance to this country, could have given its sanction to a measure so full of hostility to its friend, and of possible inconvenience to itself. I must, therefore, deem the act of this French consul a licentious attempt to exercise the rights of war within the bosom of a neutral country, where no such exercise has ever been authorized.

I am of opinion, upon the whole, that this ship must be restored to the British owners upon the usual salvage. \* \* \*

<sup>17</sup> The incident referred to was the attempt in 1793 of the French minister, Citizen Genêt, to offer commissions to citizens of the United States to cruise in the service of France against Great Britain, to fit out privateers, to set up French consular prize courts, so that prizes brought in could be condemned in American ports, and otherwise to employ the territory of this country for belligerent purposes. 5 Moore, Int. Arb. 4404-4411; H. Taylor, A Treatise on International Public Law, § 608. See, also, Hall, Int. Law, § 213.

## ODDY v. BOVILL.

(King's Bench, 1802. 2 East, 473.)

In the war between Great Britain and France, Spain was in 1799 an ally of the latter power. A prize was taken by a French privateer, carried into a port of Spain, and condemned as enemy's property by a French court sitting in Spain.<sup>18</sup>

LAWRENCE, J. The question is, Whether this sentence of condemnation be conclusive evidence that the property insured was British, and consequently, that the warranty of its being neutral was not complied with? The argument was attempted to be carried into a wider field than we think it fit now to enter into, since the case of *Hughes v. Cornelius*, T. Ray. 473, Skin. 59, and 2 Show. 232, and a long string of authorities which have followed that decision. We must now therefore take it for granted, that if this sentence were given by a court of competent jurisdiction, it is conclusive upon the point then in judgment, namely, against the neutrality of the property. The case of *The Flad Oyen* has been made the basis of the argument, to show, that unless the prize court were constituted according to the law and practice of nations, it could have no jurisdiction. If there were no other case on the subject determined by the same learned judge, to explain how far he meant to go in that case, it might be doubtful, from some expressions there used, whether it did not extend to a case circumstanced like the present: but if we look at his other decisions on this subject, particularly in that of the *Christopher*, 2 C. Rob. 209, though I do not mean to say that it is directly in point, it sufficiently appears from the reasons assigned by him in giving judgment, to what extent he meant the doctrine laid down by him in *The Flad Oyen* case should be understood; and that he did not intend to deny the legality of such sentences of condemnation by the captors in the country of a co-belligerent or ally in the war; because, as he observes, there is a common interest between such on the subject, and both governments may be presumed to authorize any measures conducing to give effect to their arms, and to consider each other's ports as mutually subservient. This very question appears to have arisen in several subsequent cases, and in the case of *The Betsy Kruger*, in August, 1800, seems to have been considered by the advocates as so thoroughly understood and settled, that the question of law was waived, as one not to be discussed; and the court, proceeding on the ground that the condemnation was legal, directed further proof to be made of the fact of the transfer. We find then this question already determined by a court having peculiar jurisdiction in cases of this sort, of which we have only incidental jurisdiction. That determination therefore is as conclusive on us, as to the proper rule of decision, as a judgment of

<sup>18</sup> Short statement substituted for that of original report.

the common law courts on a question of real property would be on the civil law courts.

LE BLANC, J. The subsequent cases referred to are explanatory of the opinion delivered by Sir W. Scott in the case of *The Flad Oyen*, and show that he considered that there was a material distinction between a sentence of condemnation, pronounced by the authority of the capturing country in the state of a co-belligerent, and one so pronounced in a neutral country. Now this is the case of a sentence of condemnation in the country of a belligerent power, an ally of the captors, and is exactly like the cases of *The Harmony*, 2 Rob. 210, note, *The Adelaide*, Id., and *The Betsy Kruger*, Id. The first was a condemnation by the French commissary of marine at Rotterdam, of a British prize taken and carried into Helvoetsluys, which was in the country of a belligerent ally; which was so far considered as different from the case of such a court sitting in a neutral country, that the neutral claimant was directed to go into proof of the merits as to the transfer, reserving the question of law. And in the last-mentioned case of the *Betsy Kruger*, the point was considered to be so settled, that the advocates waived the discussion of it, and the court considered the condemnation as legal. That I consider as a case directly in point, to support the legality of a condemnation in the country of a belligerent ally. This court therefore must decide the question consistently with the opinion of a court of peculiar jurisdiction on the same point, until we are told by a superior tribunal that that determination was improper.

Judgment of nonsuit.

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#### DAGLEISH v. HODGSON.

(Court of Common Pleas, 1831. 5 Moo. & P. 407.)

Lord Chief Justice TINDAL now delivered the judgment of the court as follows:<sup>10</sup>

The principal question in this case is, whether the sentence of condemnation of the brig *George*, and her cargo, in the Prize Court at Monte Video, dated the 13th of December, 1826, is to be received in our courts as conclusive evidence of the fact, that the ship was captured in attempting to break the blockade of Buenos Ayres? For, if that is to be taken as a fact conclusively proved, then the plaintiffs in this action are in no condition to recover; not upon the count for capture and detention, because such capture was occasioned by the voluntary act of the master, in violation of the law of nations; nor upon the count for barratry, because it appears upon the whole evidence, that the master, supposing him to have broken the blockade, acted honestly and bona fide; his conduct being attributable rather to ignorance, or

<sup>10</sup> Statement of the case omitted as the judgment sufficiently states the facts.

want of caution, than to such fraudulent design as is necessary to constitute the crime of barratry.

The general law upon this subject is well known, that the sentence of a foreign Court of Admiralty, of competent jurisdiction, is binding upon all parties, and in all countries, as to the fact upon which the condemnation proceeded, where such fact appears on the face of the sentence, free from doubt and ambiguity. But it is, at the same time, as well established, that, in order to conclude the parties from contesting the ground of condemnation in an English court of law, such ground must appear clearly upon the face of the sentence; it must not be collected by inference only, or left in uncertainty, whether the ship was condemned upon one ground, which would be a just ground of condemnation by the law of nations, or on another ground, which would amount only to a breach of the municipal regulations of the condemning country. The cases of *Fisher v. Ogle*, 1 Camp. 418, and *Calvert v. Bovill*, 7 Term Rep. 523, are express authorities to this point: and the sentence of condemnation in the latter case bears a strong resemblance to that in the present. There, Lord Chief Justice Kenyon said: "If, indeed, that court had stated in their sentence, that they condemned the goods, because they were British property, I should have considered myself bound by their sentence; but they have assigned other reasons for their adjudication. The express grounds of the sentence of condemnation are, that the ship was destined for one of the West India Islands; that she was hired and loaded at London, and had a certain quantity of gunpowder on board: therefore they condemned her and her cargo as good prize." The sentence in that case was: "Forasmuch as the true destination of the said vessel was for the English islands, having been hired and loaded at London, and that there has been found on board her eighty barrels of gunpowder, the court declares the said brig to be a good prize for the benefit of the captors."

Now, looking at the adjudicatory part of this sentence, which is the important part for the discovery of the precise ground of condemnation, it is in these terms, viz.: "From all which, and from what the documents state, I judge the said brig *George* and her cargo to be good and lawful prize to the capturers."

The words "from all which" refer us back to the premises, to discover the grounds of the sentence; and, in these premises, we find enumerated three distinct statements: First, "that it plainly appears from all the documents, that the brig sailed from Liverpool knowing of the blockade, and which the captured do not even deny, nor that her destination was Buenos Ayres, at a short distance from which she was taken; secondly, that, for the reason last given, she ought to be considered as violating the blockade; thirdly, that the ship had not even the plausible excuse of coming to Monte Video first, and thereby complying with the published instructions." Now, upon referring to these premises, we think we cannot safely infer that the precise ground of

condemnation was the attempt to break the blockade. The first statement refers to the illegality of the ship's destination from Liverpool to Buenos Ayres, then being under blockade. It is impossible to say with certainty that the sentence may not have proceeded on that ground, in part, if not altogether. It is more than probable it did so; for, in another part of the premises, the judge reverts to this statement in these terms: "Forasmuch as besides not doing away the proof that Buenos Ayres was the first port the shipment was destined for, in itself criminal." But, if this was the ground on which the sentence proceeded in the first place, it is no ground for condemnation by the law of nations, unless there was an intention to violate the blockade; and, in the next place, the sentence leaves untouched the question of fact, whether the blockade was broken, or attempted to be evaded. If it formed an ingredient in the judgment of the Brazilian Court of Admiralty, no one can say how much it weighed with them, or that, if this ground of condemnation had been out of the case, the court intended to rely on the fact of the blockade being broken as their ground of adjudication. Again, in the latter part of the preamble to the sentence, the judge refers to a non-compliance with published instructions, as a charge against the master of the ship. What these instructions are, does not appear; whether some regulations ordained by their own authority or not, is uncertain. But, if this, which is no ground of condemnation by the general law of nations (*Mayne v. Walter*, E. T. 22 Geo. III; *Park on Insur.* [6th Ed.] 474), operated on the mind of the foreign judge to condemn the ship and cargo, there is an end again to the conclusive finding of the fact, that the ship violated the blockade of Buenos Ayres.

Still further, the terms in which the fact of the violation of the blockade is adverted to in the preamble of the sentence, are far from direct and declaratory, but afford, at most, an inference that the judge felt himself warranted in drawing such a conclusion. "For this reason," says the judge, "she ought to be considered as violating the blockade, and which she would have effected but for the diligence of the captors."

Under a sentence, therefore, expressed with so much doubt and ambiguity as to the real ground on which it proceeded, we hold ourselves at liberty to determine, whether, upon the evidence given at the trial, such violation of the blockade did in fact take place or not; and, upon that question, we are satisfied on the evidence, that the captain did not break, nor did he intend to break the blockade, but that he honestly intended to obtain instructions from the blockading squadron, not having been before warned off by any of the Brazilian cruisers.

The only remaining objection that has been insisted on against the plaintiffs' right to recover is, that the voyage in question was an illegal voyage in its commencement, because the ship was destined to a port which was notified to be under blockade. But that this was not an illegal voyage was determined so lately by the Court of King's Bench

(*Naylor v. Taylor*, 9 Barn. & Cress. 718; s. c., 4 Man. & Ry. 526), upon a voyage described in the policy in the very same terms as the present, and under circumstances so precisely similar, that it is unnecessary for us to say more, than that we entirely concur with the judgment there given, founded, as it is, upon the authority of Lord Stowell's judgment in the case of *The Shepherdess*, 5 Rob. Adm. 262.

We therefore think the verdict should stand, and that judgment should be entered for the plaintiffs.

Judgment for the plaintiffs.

### CUSHING v. UNITED STATES.

(Court of Claims of the United States, 1886. 22 Ct. Cl. 1.)

DAVIS, J., delivered the opinion of the court.<sup>20</sup> \* \* \*

The jurisdictional act requires us to inquire into illegal condemnations, and it is urged on behalf of the defendants that all condemnations by the French courts are final and conclusive upon this court if the French court had jurisdiction. Many citations are made in support of this contention, among them the case of *Baring and Others v. The Royal Exchange Assurance Company*, 5 East, 99 et seq., which may be taken as a fair illustration.

The American ship *Rosanna*, insured by the defendants, was captured and condemned by the French, whereupon plaintiffs sued on the policy and recovered. Lord Ellenborough, C. J., interrupting the argument, said:

"Does not this [French] sentence of condemnation proceed specifically on the ground of infraction of treaty between America and France in the ship not having those documents with which in the judgment of the French court the American was bound by treaty to be provided? I do not say that they have construed the treaty rightly; on the contrary, suppose them to have construed it ever so iniquitously; yet, having competent jurisdiction to construe the treaty, and having professed to do so, we [the court] are bound by that comity of nations which has always prevailed amongst civilized states to give credit to their adjudication where the same question arises here upon which the foreign court has decided. After arguing for hours, we must come to the same conclusion at last, that the French court has specifically condemned the vessel for an infraction of treaty which nega-

<sup>20</sup> The facts of the case are omitted, and only part of the opinion is given relating to decisions of prize courts. In this connection reference should be made to the elaborate and closely reasoned opinion on the finality of judgments of prize courts, delivered by the celebrated William Pinkney, Commissioner, in *The Betsey*, 3 Moore, Int. Arb. 3180-3206 (1797). Mr. Wheaton pronounced Pinkney's opinions (delivered while a member of the Board of Commissioners under article VII of Jay's Treaty, November 19, 1794) "finished models of judicial eloquence, uniting powerful and comprehensive argument with a copious, pure, and energetic diction."

tives the warranty of neutrality. Then, having distinctly adjudged the vessel to be good prize upon a ground within their jurisdiction, unless we deny their jurisdiction, we are bound to abide by that judgment. Whenever a case occurs of a condemnation by a foreign court on the ground of *ex parte* ordinances only, without drawing inferences from them to show an infraction of treaty between the nation of the captors and captured, and referring the judgment of the court to the breach of treaty, I shall be glad to hear the case argued, whether such ordinances are to be considered as furnishing rules of presumption only against the neutrality, or as positive laws in themselves, binding other nations *proprio vigore*."

The decision of the English court, then, goes to this extent, that in an action between individuals the decree of the French court which had jurisdiction is final; so would it also be final as to the vessel, and the purchaser at the confiscation sale could rest upon the decree as good title against all the world.

But all this does not affect the position of the United States government against the government of France.

Lord Ellenborough says that no matter how iniquitous the construction given the treaty by the French court, he, as a judge, is bound to follow it. But so is not the government of the United States. That government could have objected either that the court was corrupt, or that there existed no treaty, or that there had been manifest error in construing it. All such questions may be outside the right of a court to consider, but they are within the right and form part of the duty of the political branch of the government. If the French court, acting within its jurisdiction, construed the treaty iniquitously, the courts might not have power to remedy the wrong, but the owner had a right to appeal to his government for redress, and that government, when convinced of the justice of his complaint, was bound to endeavor to redress it.

The decree is an estoppel on the courts, but it is no estoppel on the government; in fact, the right to diplomatic interference arises only after the decree is rendered. Of course, precedents for cases of this kind are not to be found in the reports of courts, for no such case can, in the nature of things, come before a court unless by virtue of a special and peculiar statute, such as that under which we now act; but diplomatic history is full of them.

Rutherforth (*Institutes*, vol. II, c. 9, p. 19), speaking of the right of a state to proceed in prize, says:

"This right of the state to which the captors belong to judge exclusively is not a complete jurisdiction. The captors, who are its own members, are bound to submit to its sentence, though this sentence should happen to be erroneous, because it has a complete jurisdiction over their persons. But the other parties in the controversy, as they are members of another state, are only bound to submit to its sentence as far as this sentence is agreeable to the law of nations, or to



particular treaties, because it has no jurisdiction over them in respect either of their persons or of the things that are the subject of the controversy. If justice, therefore, is not done them, they may apply to their own state for a remedy; which may, consistently with the law of nations, give them a remedy either by solemn war or by reprisals. See Dana's Wheaton, 391." This brings us naturally to another point, admitted as a general principle, that appeal should be prosecuted to the court of last resort before there can be diplomatic intervention.

The exceedingly able British-American commission which sat in Washington in 1872 not only unanimously decided that they had jurisdiction in prize cases in which the decision of the ultimate appellate tribunal of the United States had been had, a conclusion in which even the agent of the United States concurred, but also that they had jurisdiction when the claimant had not pursued his remedy to the court of last resort, provided satisfactory reasons were given for the failure to appeal. Papers relating to the Treaty of Washington, vol. VI, pp. 88-90. To this last conclusion the American commissioner dissented; but even he held that a misfeasance or default of the capturing government, by which means an appeal was prevented, was sufficient to excuse the failure to appeal. *Id.* 92.

The rights of the prize courts are the rights of the capturing state. These courts are its agents, deputed by it to examine into the conduct of its own subjects before becoming answerable for what they have done, and the right ends when their conduct has been thoroughly examined. Therefore the state has a right to require that the captor's acts be examined in all the ways which it has appointed for this purpose, and on this principle is founded the doctrine that the complainant, unless he exhaust his appeal, shall be held to confess the justice of the decision. This pre-supposes, first, that there are appellate courts; second, that they are open to the complainant freely and honestly. The captor has no right to insist for his own protection upon the fulfillment of a form which he by his own acts prevents.

There is also a distinction, not often clearly drawn, between the validity of a claim *per se* and the right to enforcement. The justice of the claim is founded upon the injustice of the sentence. The appeal does not affect the merits of the claim; it does not palliate or destroy any wrong done; but it is simply a course provided for the captor's protection that he may fully examine into the acts of his own agents, through his other agents, the courts.

"The whole proceeding, from the capture to the condemnation, is a compulsory proceeding *in invitum* by the state in its political capacity, in the exercise of war powers, for which it is responsible, as a body politic, to the state of which the owner of the property is a citizen." Dana's Wheaton, note 186.

Therefore the capturing state may waive such a demand, and not insist upon exhausting its right to further investigation, and may waive it by failing to provide an appellate tribunal, or by preventing

recourse to it, or in any other way which shows an intention not to insist upon this right of examination; but appeal or no appeal, the validity of the claim is founded upon the injustice to the claimants.

All writers lay down the principle that appeal should be taken from the inferior to the superior tribunal before resort by the injured government to measures of redress; but this principle is always coupled with the extreme measures of war and reprisals (see Rutherford, *supra*; Grotius, bk. III, c. 2, §§ 4, 5), and there is no assertion in the writers that illegal capture necessarily does not found an international claim, even when appeal has not been taken.<sup>21</sup> \* \* \*

<sup>21</sup> In *Wheelwright v. Depeyster*, 1 Johns. (N. Y.) 471, 473, 474, 482, 485, 486, 3 Am. Dec. 345 (1806), the court had occasion to consider the nature and effect of prize decisions rendered in foreign countries. Chief Justice Kent delivered a long and careful opinion which is summarized in the following extract from the headnote:

"Belligerents cannot establish prize courts in a neutral country; nor can they make any sale of their prizes there, unless authorized by treaty. The property in goods captured cannot be transferred so as to divest the right of the original owner, unless by a sentence of condemnation by a court of competent jurisdiction. The court of the sovereign of the captor is the only competent tribunal to decide on the validity of captures. Prize courts proceed in rem, and cannot adjudicate on a prize lying in a foreign port, or out of the jurisdiction of the captor or his ally. Page v. Lennox, 15 Johns. (N. Y.) 172 (1818); *Hudson v. Guestier*, 4 Cranch, 293, 2 L. Ed. 625 (1808), 6 Cranch, 281, 3 L. Ed. 224 (1810). Courts of common law, though they cannot inquire into the direct question of prize, may, in a question of property, decide whether the condemnation or sale has been made by a court of competent authority. See *Rose v. Himely*, 4 Cranch, 241, 2 L. Ed. 608 (1808)."

This learned and admittedly competent judge said in the course of his opinion:

"It is requisite that a sentence of condemnation be given by a court of the sovereign of the captor, before a title to the prize can be transferred. See [*The Nostra de Conceicao*] 5 C. Rob. Adm. Rep. 294 (1804); *The Falcon*, 6 Rob. Adm. Rep. 194-198 (1805); [*Booth et al. v. Schooner L'Esperanza*] 1 Bee's Adm. Rep. 92, 93, Fed. Cas. No. 1,647; [*Sasportas v. Jennings and Woodrop*] 1 Bay (S. C.) 478 (1795). This excellent rule has been long known and established in the English admiralty, as appears by the case of *Terremoulin v. Sandys*, Carth. 423, 12 Mod. 143 (1697), and it seems now to be equally recognized on the continent as part of the law and practice of nations. The case of *The Flad Oyen*, 1 Rob. 135 (1799), and of *The Henrick & Maria*, 4 Rob. 43 (1799); *Heinec. de nav. ob. vet. mer. veh. comm. sec. 16*; *Azuni's Maritime Law*, vol. 2, p. 242. Our own government, also, adopted the rule during the Revolutionary War, and bound itself to observe it. \* \* \*

"We are not to examine into the validity of the capture, but we must look so far as to see whether the condemnation was by a tribunal competent to pronounce it in the given case; and if that is once ascertained, I agree that we must admit the defense to be conclusive. See [*Rose v. Himely*] 4 Cranch, 241, 2 L. Ed. 608 (1808), s. p. In the case of *Oddy v. Bovill*, 2 East, 473 (1802), a similar question arose, as to the legality of a French prize court sitting in Spain, and no objection was raised as to the competency of the Court of King's Bench to sustain the inquiry; and in the case of *Havelock v. Rockwood* [8 Term Rep. 268 (1799)], the same court did not hesitate to declare, that the French Court of Admiralty at Bergen was illegal. \* \* \*

"I cannot entertain a doubt but that we have authority to inquire, and are bound to say, whether the foreign court was, by the law of nations, competent to pass the sentence in question, and, having determined that it was not, that such sentence cannot avail in the present case."

THE BRUSSELS.<sup>22</sup>

(Prize Court of Belgium, 1919. *Moniteur Belge*, November 6, 1919, 5894.)

See ante, p. 777, for a report of the case.

## SECTION 4.—FREIGHT; LIENS.

## THE VROW HENRICA.

(High Court of Admiralty, 1903. 4 C. Rob. 343.)

This was a case of a Danish vessel taken on a voyage from Valencia to London. The ship had been restored with freight to be a charge on the cargo, which was condemned, but the proceeds not being sufficient to pay the freight and the expenses of the captor, it was prayed, on the part of the neutral ship, that the priority of payment might be given to freight, on the authority of *The Bremen Flugge*, 4 C. Rob. Adm. Rep. 90. \* \* \*

The court expressed itself disposed to hold the rule laid down in *The Bremen Flugge* to be the proper rule; but as the matter had been again argued, it directed the cases cited to be looked into, and reserved the judgment for farther deliberation.

Sir W. SCOTT. I have considered the cases which I directed to be looked up, and I see no reason to alter the opinion which I before expressed, that freight is, in all ordinary cases, a lien which is to take place of all others. The captor takes cum onere. It is the allowed privilege of neutral trade to carry the property of the enemy, subject to its capture, and to the temporary detention of his vessel; and if the party does not prevaricate, or conduct himself in any respect with ill faith, he is entitled to his freight. This is the rule which I am disposed to apply in all cases of neutral ships carrying on their ordinary commerce. It is the general rule, which may, nevertheless, be

<sup>22</sup> In the course of the decision in the principal case reference is made to *The Midsland*, *Moniteur Belge*, October 25, 1919, 5699 (1919), and *The Gelderland*, *Id.*, October 30, 1919, 5772 (1919), translation, 16 *American Journal of International Law*, p. 129.

The headnote prefixed to *The Midsland*, as reported in *Revue de Droit International et de Législation Comparée* (3d sér.) T. I, 119 (1920), states the case sufficiently for present purposes:

"The condemnation of a neutral vessel pronounced by the Prize Court of a belligerent may form the basis for new rights to the advantage of the opposing belligerent who in his turn captures this vessel. In this case there exists on the part of the captor state no obligation to restore the vessel to its original proprietor when, as a result of its adjudication by an enemy Prize Court, it has definitively become enemy property. This is especially the case when, as a result of this adjudication, the vessel has been detained for a long time by the enemy authorities, and used by them for operations of war."

liable to be altered by circumstances. There is one class of cases to which I think it ought not to be applied; I mean the case of ships, carrying on a trade between ports of allied enemies; a trade which may be said to arise in a great measure out of the circumstances of the war, though not altogether; I say not altogether, because such a trade exists in a limited degree in times of peace.

In such a course of trade, although the court has not altogether refused freight to the neutral ship, yet it may not think it unreasonable, that the captor should, in preference, be entitled to his expenses, inasmuch as the nature of such a trade cannot but very much influence the judgment which he must unavoidably form of his duty to bring in the cargo for adjudication. In the present case, the voyage is not between the ports of allied enemies, but between the ports of two belligerents, from Valencia to London. That constitutes, I think, a sort of middle case, with respect to the obligation by which the captor might conceive himself bound to bring the cargo to adjudication. There might be a presumption, undoubtedly, that the property belonged to the enemy exporter. But there is a foundation, also, for presuming that it might belong to the consignee, and that it would not have been sent on a destination to this country, but under the protection of a license.

It is, therefore, a case of a mixed nature, to which I shall apply a sort of a middle judgment. I will allow the captor his law expenses, and direct the other expenses to be postponed to the payment of freight.

### THE ROLAND.

(High Court of Justice, 1915. 1 British and Colonial Prize Cases, 188.)

Cause for condemnation of a part cargo of tobacco as prize.

Sir SAMUEL EVANS (THE PRESIDENT), after dealing with several parcels of the Roland's cargo, in respect of which no appearance had been entered, and which he accordingly condemned, said: \* \* \*

Looking at the whole of the transactions disclosed by the documents put before me, I find that the whole of this property, fifty hogsheads of tobacco, was bought by Rudolf Hach & Co. for the joint adventure, and that one-fourth belongs to C. H. Suhling of Bremen. The result, therefore, is that one-fourth part of the fifty hogsheads is enemy property, and I decree condemnation of it accordingly. It follows also that the other three-fourths, belonging to neutrals, must be released to them.

Now comes a further important question which will affect other cases as well, namely, as to whether the captors of the vessel are entitled as against the cargo which has been released—here three-fourths of the fifty hogsheads—to some freight.

The Crown claim to have a lien for the freight alleged to be payable in respect of the portion of the cargo released, and to have it paid before the release. The argument on behalf of the Crown is that the

shipowners are, by the German commercial law, entitled to some freight in respect of this released cargo, although it was not, and cannot be, delivered in Germany at the port of destination, and that as captors they are entitled to what the ship has earned as well as to the ship herself. \* \* \*

Whenever a captor brought goods to the port of actual destination according to the intent of the contracting parties, he was held entitled to the freight, on the ground that the contract had been fulfilled, but in all other cases he was held not entitled to freight, although the ship might have performed a very large part of her intended voyage.

The rule was laid down in *The Fortuna* (1802) 4 C. Rob. 278, 1 Eng. P. C. 392, and *The Vrow Anna Catharina* (1806) 6 C. Rob. 269, 1 Eng. P. C. 552, and some exceptions which emphasized the rule were dealt with in *The Diana* (1803) 5 C. Rob. 67, 1 Eng. P. C. 424, and *The Vrouw Henrietta* (reported in a note to *The Diana* at page 75, and in 1 Eng. P. C. at page 427).

I have been asked to abandon this rule where, according to the contract, it appears that some freight might be recoverable where only part of the intended voyage has been covered. So far as I know, the rule has never been departed from; and in a collection of cases published in America in 1906 it is still regarded as the rule of International Prize Law. See Scott's Cases on International Law, pp. 63. and 632.

Evidence was given before me as to the German commercial law, to the effect that some freight, depending on distances, times, expenses, risks, etc., is recoverable by the shipowner or person entitled to the freight in certain cases (captures as prize included) where the whole intended voyage has not been performed. I have looked at a translation of the sections of the code referred to, and it seems to me that many serious questions of law might be raised in an action to recover such freight. I was not informed, and I do not know, whether such an action has ever been brought in Germany, in cases where ships have been captured—most probably, almost certainly, not.

The principle which gave birth to the rule referred to was not whether any and what sum could be recovered at law under the terms of the particular contract of affreightment. The rule was based on the broad business ground that the goods had not been carried to the place where the contracting parties intended them to be delivered, and disposed of. \* \* \*

The old rule, as stated above, must, in my opinion, still be adhered to as part of the Law of Nations. This parcel of the cargo, namely, three-fourths of the fifty hogsheads, will therefore be released to the neutral owners without carrying the burden of any freight.

## THE ANTONIA JOHANNA.

(Supreme Court of the United States, 1816. 1 Wheat. 159, 4 L. Ed. 60.)

Appeal from the Circuit Court for the District of North Carolina. This was the case of a Russian ship, captured on the 2d of June, 1814, by the privateer Herald, on a voyage from London to St. Michaels, and brought into the port of Wilmington, N. C., for adjudication. The ship was chartered by Messrs. Burnett & Co., a mercantile firm at London, for a voyage from London to St. Michaels, thence to Fayal, thence to St. Petersburg or any port in the Baltic, and thence to return to London, at the stipulated freight of one thousand guineas. The ship and cargo were libelled as prize of war, and, upon the hearing in the district court, that part of the cargo which was not claimed was condemned. The residue of the cargo, excepting one moiety of certain packages, claimed on behalf of Messrs. Ivens & Burnett, a mercantile firm at St. Michaels, was restored. The whole freight was decreed to be paid to the master, and charged exclusively upon the proceeds of the property condemned, and the moiety of the property restored to Messrs. Ivens & Burnett. From so much of this decree as respected the controversy between the captors and the claimants of the cargo, an appeal was interposed to the circuit court, where the decree was affirmed, and the cause was brought, by appeal from the latter decree, to this court. \* \* \*

STORY, J., delivered the opinion of the court, and, after stating the facts, proceeded as follows: \* \* \*

The next inquiry is, as to the freight decreed to the master. As no appeal was interposed to the decree of the district court, allowing the whole freight for the whole voyage, the question, whether more than a pro rata freight was due (a question which would otherwise have deserved grave consideration), does not properly arise. The only discussion which can now be entertained, is, whether the freight so decreed ought not to have been charged upon the whole cargo, instead of being charged upon a portion of it. And we are all of opinion that it was properly a charge upon the whole cargo. Although capture be deemed, in the prize courts, in many cases, equivalent to delivery, yet the captors cannot be liable for more than the freight of the goods actually received by them. The capture of a neutral ship, having enemy's property on board, is a strictly justifiable exercise of the rights of war. It is no wrong done to the neutral, even though the voyage be thereby defeated. The captors are not, therefore, answerable in poenam to the neutral for the losses which he may sustain by a lawful exercise of belligerent rights. It is the misfortune of the neutral, and not the fault of the belligerent. By the capture, the captors are substituted in lieu of the original owners, and they take the property cum onere. They are, therefore, responsible for the freight which then attached upon the property, of which the sentence of condemnation ascertains them to be the rightful owners succeeding to the former pro-

prietors. So far the rule seems perfectly equitable; but to press it further, and charge them with the freight of goods which they have never received, or with the burden of a charter party into which they have never entered, would be unreasonable in itself, and inconsistent with the admitted principles of prize law. It might, in a case of justifiable capture, by the condemnation of a single bale of goods, lead the captors to their ruin by loading them with the stipulated freight of a whole cargo.

On the whole, we are all of opinion, that the decree of the circuit court ought to be affirmed, except so far as it charges the freight upon the property condemned, and the moiety claimed by Messrs. Ivens & Burnett; and as to this, it ought to be reversed, and that the freight should be decreed to be a charge upon the whole cargo, to be paid by each parcel thereof, in proportion to its value.

Décreé affirmed, except as to the freight.<sup>23</sup>

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### THE CARLOS F. ROSES.

(Supreme Court of the United States, 1900. 177 U. S. 655, 20 Sup. Ct. 803, 44 L. Ed. 929.)

The Carlos F. Roses was a Spanish bark of 499 tons, hailing from Barcelona, Spain, sailing under the Spanish flag, and officered and manned by Spaniards. She had been owned for many years by Pedro Roses Valenti, a citizen of Barcelona. Her last voyage began at Barcelona, whence she proceeded to Montevideo, Uruguay, with a cargo of wine and salt. All of the outward cargo was discharged at Montevideo,

<sup>23</sup> It has been held, that the charter party is not the measure by which the captor is, in all cases, bound, even where no fraud is imputed to the contract itself. When, by the events of war, navigation is rendered so hazardous as to raise the price of freight to an extraordinary height, captors are not, necessarily, bound to that inflated rate of freight. When no such circumstances exist, when a ship is carrying on an ordinary trade, the charter party is undoubtedly the rule of valuation, unless impeached; the captor puts himself in the place of the owner of the cargo, and takes with that specific lien upon it. But a very different rule is to be applied, when the trade is subjected to very extraordinary risk and hazard, from its connection with the events of war, and the redoubled activity and success of the belligerent cruisers. *The Twilling Riget*, 5 Rob. 82 (1804).

"Freight, then, is property insurable and collectible. It has value, although the right as against the freighter may be inchoate until delivery. As to the freighter the ship-owner is without redress, unless there be delivery in accordance with the contract, but as to an insurer or tort-feasor, there is a right to redress upon the happening of an interruption of the voyage. \* \* \* The decisions on this question in the United States do not go so far as those in England, but we lean to the doctrine of Sir William Scott and Dr. Lushington, as better applicable to the cases now before us, that when a vessel is actually under contract for a voyage from one port to another, thence to proceed to a third, she has such 'a present existing title' in the freight money of the entire voyage as to authorize a recovery based upon the total freight money for the round trip." *Per Davis, J., in Hooper, Adm'r, v. United States*, 22 Ct. Cl. 408, 461, 463 (1887).

where the vessel took on a cargo consisting of jerked beef and garlic to be delivered at Havana, Cuba, and sailed for the latter port on March 16, 1898. On May 17, when in the Bahama Channel off Punta de Maternillos, Cuba, and on her course to Havana, she was captured by the United States cruiser New York and sent to Key West in charge of a prize crew. The bark and her cargo were duly libelled May 20. All of the ship's papers were delivered to the prize commissioners, and the deposition of Maristany, her master, was taken in preparatorio. Kleinwort Sons & Co. of London, England, made claim to the cargo, consisting of a shipment of 110,256 kilos of jerked beef and 19,980 strings of garlic, and a further shipment of 165,384 kilos of jerked beef, alleging that they were its owners and that it was not lawful prize of war. In support of the claim the firm's agent in the United States filed a test affidavit made on information and belief. \* \* \*

The cause was heard on the libel and claims of the master of the bark and Kleinwort & Co., and the evidence taken in preparatorio. The vessel was condemned as enemy property, and the court ordered the claimants of the cargo to "have sixty days in which to file further proof of ownership"; and because of its perishable nature the marshal of the court was ordered to advertise and sell the same, and deposit the proceeds in accordance to law. No appeal was taken on behalf of the vessel. The cargo was sold and the proceeds deposited with the assistant treasurer of the United States at New York, subject to the order of the court. The time for claimants to take further proofs was twice extended. No witnesses were produced by claimants, but Charles F. Harcke, claimants' manager in London, made three ex parte affidavits before the United States consul general, which were offered in evidence by claimants. Appended to the affidavits were a large number of exhibits purporting to be papers, or copies of papers, relating to the shipment of the cargo, and some of the financial transactions of some of those who had to do with it. \* \* \*

The ship's manifest appears to have been signed by Maristany, her master, at Montevideo, on March 15, 1898, and was viséd by the Spanish consul at that port the previous day. It described the ship's destination as Havana, and her cargo as made up of two lots of jerked beef containing 248,076 kilos and 29,970 kilos respectively, and one lot of garlic containing 19,980 strings, all shipped by Gibernau & Co., "to order." On March 14, Maristany issued three bills of lading, in which it was stated that the shipments were received from Gibernau & Co. for transportation to Havana "for account and at the risk of whom it may concern"; one of the bills covering a shipment of 165,384 kilos of jerked beef; another of 110,256 kilos of jerked beef; and the third of 19,980 bunches of garlic.

March 15, Gibernau & Co. drew this bill of exchange:

"No. 128. Montevideo, March 15, 1898. For £2714.13.8. Ninety days after sight you will please pay for this first of exchange (the



second and third being unpaid), to the order of the London River Plate Bank, L'd, the sum of £2714.13.8., value received, which you will charge to the account of Pedro Pagés of Havana as per advice.

"Pla Gibernau & Co.

"To Messrs. Kleinwort Sons & Co., London."

On the same day Maristany drew this bill of exchange:

"No. 129. Montevideo, March 15, 1898. For £3583.11.6. Ninety days after sight you will please pay for this first of exchange (the second and third being unpaid), to the order of Pla Gibernau & Co. the sum of £3583.11.6., invoice value of jerked beef, per Carlos F. Roses, which you will charge to the account of P. Roses Valenti, of Barcelona, as per advice.

Ysidro Bertran Maristany.

"To Messrs. Kleinwort Sons & Co., London."

This was indorsed by Gibernau & Co.

Valenti was the managing owner of the Carlos F. Roses. Both bills of exchange passed through the London River Plate Bank, L'd, at Montevideo. On April 6 they were accepted by Kleinwort Sons & Co., and on May 9 were paid under discount by that firm. \* \* \*

The cause of the cargo was heard a second time on the claim, test affidavit, and Harcke's affidavits, and a decree was entered for the payment to claimants of the proceeds of sale; from which decree the United States took this appeal. \* \* \*

Mr. Chief Justice FULLER, after stating the case, delivered the opinion of the court.

The President's proclamation of April 26, 1898, declared the policy of the government in the conduct of the war would be to adhere to the rules of the Declaration of Paris therein set forth, one of them being thus expressed: "Neutral goods, not contraband of war, are not liable to confiscation under the enemy's flag."

The question is whether this cargo when captured was enemy property or not. The District Court held that both the title and right of possession were in these neutral claimants at the time of the capture, "as evidenced by the indorsed bills of lading and the paid bills of exchange," and, therefore, entered the decree in claimant's favor. As the vessel was an enemy vessel the presumption was that the cargo was enemy's property, and this could only be overcome by clear and positive evidence to the contrary. The burden of proving ownership rested on claimants. The London Packet, 5 Wheat. 132, 5 L. Ed. 52; The Sally Magee, 3 Wall. 451, 18 L. Ed. 197; The Benito Estenger, 176 U. S. 568, 20 Sup. Ct. 489, 44 L. Ed. 592. \* \* \*

In the case in hand, the captors succeeded to the enemy owners' rights, and could have introduced evidence as to the real nature of the transactions, and so have rebutted any presumption in favor of the bankers as purchasers for value, and although they did not do this, the question still remains that in prize courts it is necessary for claimants to show the absence of anything to impeach the transaction, and

at least to disclose fully all the surrounding circumstances. And this we think claimants have failed to do.

The right of capture acts on the proprietary interest of the thing captured at the time of the capture and is not affected by the secret liens or private engagements of the parties. Hence the prize courts have rejected in its favor the lien of bottomry bonds, of mortgages, for supplies, and of bills of lading. The assignment of bills of lading transfers the *jus ad rem*, but not necessarily the *jus in rem*. The *jus in re* or *in rem* implies the absolute dominion—the ownership independently of any particular relation with another person. The *jus ad rem* has for its foundation an obligation incurred by another. Sand. Inst. Just. Introd. xlviii; 2 Marcadé, Expl. du Code Napoléon, 350; 2 Bouvier (Rawle's Revision) 73; The Young Mechanic, 2 Curtis, 404, Fed. Cas. No. 18,180.

Claimants did not obtain the *jus in rem*, and, according to the great weight of authority, the right of capture was superior.

In *The Frances*, 8 Cranch, 418, 3 L. Ed. 609, a New York merchant claimed two shipments of goods, one in consequence of an advance made to enemy shippers by him in consideration of the consignment, and the other in virtue of a general balance of account due to him from the shippers as their factor. Both consignments were at the risk of the enemy shippers. The goods were condemned as enemy property, and the sentence was affirmed. This court said:

"The doctrine of liens seems to depend chiefly upon the rules of jurisprudence established in different countries. There is no doubt but that, agreeably to the principles of the common law of England, a factor has a lien upon the goods of his principal in his possession, for the balance of account due to him; and so has a consignee for advances made by him to the consignor. \* \* \* But this doctrine is unknown in prize courts, unless in very peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. Such is the case of freight upon enemies' goods seized in the vessel of a friend, which is always decreed to the owner of the vessel. \* \* \* But in cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors, and even upon the prize courts, in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral claimants, have excluded such cases from the consideration of those courts. \* \* \* The principal strength of the argument in favor of the claimant in this case, seemed to be rested upon the position, that the consignor in this case could not have countermanded the consignment after delivery of the goods to the master of the vessel; and hence it was inferred that the captor had no right to intercept the passage of the property to the consignee. This doctrine would be well founded,

if the goods had been sent to the claimant upon his account and risk, except in the case of insolvency. But when goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee; and it is competent to the consignor, at any time before actual delivery to the consignee, to countermand it, and thus to prevent his lien from attaching. Upon the whole, the court is of opinion that, upon the reason of the case, as well as upon authority, this claim cannot be supported, and that the sentence of the court below must be affirmed with costs."

In *The Mary and Susan*, 1 Wheat. 25, 4 L. Ed. 27, an American merchantman bound from Liverpool to New York was captured by a privateer of the United States during the War of 1812. In her cargo were certain goods which had been shipped by British subjects to citizens of the United States, in pursuance of orders received before the declaration of war. Previous to the execution of the orders the shippers became embarrassed, and assigned the goods to certain bankers to secure advances made by them, with a request to the consignees to remit the amount to the bankers, who also repeated the same request, the invoices being for gain and risk of the consignees, and stating the goods to be then the property of the bankers, and it was held that the goods having been purchased and shipped in pursuance of orders from the consignees, the property was originally vested in them, and was not divested by the intermediate assignment, which was merely intended to transfer the right to the debt due from the consignees.

In *The Hampton*, 5 Wall. 372, 18 L. Ed. 659, the schooner Hampton and her cargo had been captured, libelled and condemned as prize of war. The master of the vessel was her owner, but interposed no claim; nor did any one claim the cargo. One Brinckley appeared and claimed the vessel as mortgagee. The bona fides of this mortgage was not disputed; nor that he was a loyal citizen. But his claim was dismissed, and, the case having been certified to this court, it was held that in proceedings in prize, and under the principles of international law, mortgages on vessels captured *jure belli* are to be treated only as liens subject to be overridden by the capture. Mr. Justice Miller said:

"The ground on which appellant relies is, that the mortgage, being a *jus in re* held by an innocent party, is something more than a mere lien, and is protected by the law of nations. The mortgagee was not in possession in this case, and the real owner who was in possession admits that his vessel was in *delicto* by failing to set up any claim for her. It would require pretty strong authority to induce us to import into the prize courts the strict common law doctrine, which is sometimes applied to the relation of a mortgagee to the property mortgaged. It is certainly much more in accordance with the liberal principles which govern admiralty courts to treat mortgages as equity courts treat them, as a mere security for the debt for which they are given, and therefore no more than a lien on the property conveyed. But it is unnecessary to examine this question minutely, because an obvious principle

of necessity must forbid a prize court from recognizing the doctrine here contended for. If it were once admitted in these courts, there would be an end of all prize condemnation. As soon as a war was threatened, the owners of vessels and cargoes which might be so situated as to be subject to capture, would only have to raise a sufficient sum of money on them, by bona fide mortgages, to indemnify them in case of such capture. If the vessel or cargo was seized, the owner need not appear, because he would be indifferent, having the value of his property in his hands already. The mortgagee having an honest mortgage which he could establish in a court of prize, would either have the property restored to him or get the amount of the mortgage out of the proceeds of the sale. The only risk run by enemy vessels or cargoes on the high seas, or by neutrals engaged in an effort to break the blockade would be the costs and expenses of capture and condemnation, a risk too unimportant to be of any value to a belligerent in reducing his opponent to terms. The principle which thus abolishes the entire value of prize capture on the high seas, and deprives blockades of all danger to parties disposed to break them, cannot be recognized as a rule of prize courts."

In *The Battle*, 6 Wall. 498, 18 L. Ed. 933, the steamer *Battle* and cargo were captured on the high seas as prize of war, brought into port and condemned, for breach of blockade and also as enemy property. Two claims were set up against the steamer in the court below, one for supplies, and another for materials, furnished, and for work and labor in building a cabin on the boat. These claims were dismissed, and the decree affirmed by this court, Mr. Justice Nelson delivering the opinion, saying: "The principle is too well settled that capture as prize of war, *jure belli*, overrides all previous liens, to require examination."

Such is the rule in the British prize courts. *The Tobago*, 5 C. Rob. 218; *The Marianna*, 6 C. Rob. 24; *The Ida*, Spinks' Prize Cases, 26.

*The Tobago* was a case of claim to a captured French vessel, made on behalf of a British merchant as the holder of a bottomry bond executed and delivered to him by the master of the ship before the commencement of hostilities between Great Britain and France. Sir William Scott said:

"The integrity of this transaction is not impeached, but I am called upon to consider whether the court can, consistently with the principles of law that govern its practice, afford relief. It is the case of a bottomry bond, given fairly in times of peace, without any view of infringing the rights of war, to relieve a ship in distress. \* \* \* But can the court recognize bonds of this kind as titles of property, so as to give persons a right to stand in judgment, and demand restitution of such interests in a court of prize? \* \* \* The person advancing money on bonds of this nature, acquires, by that act, no property in the vessel; he acquires the *jus in rem*, but not the *jus in re*, until it has been converted and appropriated by the final process of a court

of justice. \* \* \* But it is said that the captor takes cum onere, and, therefore, that this obligation would devolve upon him. That he is held to take cum onere is undoubtedly true, as a rule which is to be understood to apply where the onus is immediately and visibly incumbent upon it. A captor who takes the cargo of an enemy on board the ship of a friend, takes it liable to the freight due to the owner of the ship; because the owner of the ship has the cargo in his possession, subject to that demand by the general law, independent of all contract. \* \* \* But it is a proposition of a much wider extent, which affirms that a mere right of action is entitled to the same favorable consideration in its transfer from a neutral to a captor. It is very obvious that claims of such a nature may be so framed as that no powers belonging to this court can enable it to examine them with effect. They are private contracts, passing between parties who may have an interest in colluding; the captor has no access whatever to the original private understanding of the parties in forming such contracts; and it is, therefore, unfit that he should be affected by them. His rights of capture act upon the property, without regard to secret liens possessed by third parties. \* \* \* I am of opinion that there is no instance in which the court has recognized bonds of this kind as titles of property, and that they are not entitled to be recognized as such in the prize courts."

In *The Marianna*, the vessel had been sold at Buenos Ayres by American owners to a Spanish merchant; the purchase money, however, had not been paid in full, but was to be satisfied out of the proceeds of a quantity of tallow on board the vessel for sale, consigned to the agents of the American vendors at London. The vessel was seized on her voyage to England, documented as belonging to a Spanish merchant, and sailing under the flag and pass of Spain. The former American proprietors made claim to the cargo, but the claim was disallowed because the claimants' interest was not sufficient to support it; and the court said:

"Captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding, between other parties, which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them, if such documents were liable to be overruled by liens which could not in any manner come to their knowledge. It would be equally impossible for the court, which has to decide upon the question of property, to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims, would require of the court a perfect knowledge of the law of covenant, and the application of that law in all countries, under all the diversities in which that law exists. From necessity, there-

fore, the court would be obliged to shut the door against such discussions and to decide on the simple title of property, with scarcely any exceptions. \* \* \* As to the title of property in the goods, which are said to have been going as the funds out of which the payment for the ship was to have been made. That they were going for the payment of a debt will not alter the property; there must be something more. Even if bills of lading are delivered, that circumstance will not be sufficient, unless accompanied with an understanding that he who holds the bill of lading is to bear the risk of the goods as to the voyage, and as to the market to which they are consigned; otherwise, though the security may avail pro tanto, it cannot be held to work any change in the property."

These cases were cited by Dr. Lushington in *The Ida* as settling the law. In that case, claim was made by a neutral merchant to a cargo of coffee which had been consigned to him by an enemy on the credit of certain advances, as security for payment of which bills of lading covering the cargo had been delivered to him. But the court declined to recognize the lien, and condemned the cargo as enemy property. Dr. Lushington referred to *The San Jose Indiano and Cargo*, 2 Gall. 267, Fed. Cas. No. 12,322, and subscribed to what was there said by Mr. Justice Story, but thought his remarks inapplicable to the case in hand.

The case referred to was affirmed by this court. 1 Wheat. 208. Goods were shipped by Dyson, Brothers & Co. of Liverpool on board a neutral ship bound to Rio de Janeiro, which was captured and brought into the United States for adjudication. The invoice was headed: "Consigned to Messrs. Dyson, Brothers & Finnie, by order and for account of J. Lizaur." In a letter accompanying the bill of lading and invoice, Dyson, Brothers & Co. wrote Dyson, Brothers & Finnie: "For Mr. Lizaur we open an account in our books here, and debit him, etc. We cannot yet ascertain the proceeds of his hides, etc., but find his order for goods will far exceed the amount of these shipments, therefore we consign the whole to you, that you may come to a proper understanding with him." The two houses consisted of the same persons. It was held that the goods were, during their transit, the property and at the risk of the enemy shippers, and therefore subject to condemnation. Lizaur's claim was rejected although Dyson, Brothers & Co. had the proceeds of his hides in their hands. \* \* \*

We are of opinion that a valid transfer of title to this enemy property to claimants was not satisfactorily made out, and that

The decree below must be reversed, and a decree of condemnation directed to be entered, and it is so ordered.<sup>24</sup>

<sup>24</sup> Part of the opinion of Mr. Chief Justice Fuller and the dissenting opinion of Mr. Shiras, in which Mr. Justice Brewer concurred are omitted.

"But the firm of Gehrckens further bases its claim upon the statement that as the result of expenditures incurred at the direction of the captain, it has acquired a lien upon the ship, the exercise of which is reserved to it in case

## THE BARMBEK.

(French Prize Court, 1916. Journal Officiel, July 24, 1916, p. 6611.)

In the name of the French people, the Prize Court has rendered the following decision between:

On the one hand, the captain, owner, charterers, shippers and consignees of the cargo of the sailing vessel Barmbek, captured at sea on August 18, 1914, by the auxiliary cruiser Flandre;

And, on the other hand, the Minister of the Navy, acting on account of the captors and the fund for disabled sailors.

Considering the decision of the Prize Court under date of December 8, 1914, of which paragraph 4 reads as follows: "Judgment is suspended with regard to the return to the owners of the cargo of the sum deposited by them as representing the proportional part of the freight acquired by the vessel. Within the delay of two months beginning from the notification of the present decision the interested parties shall present to the Prize Court, by one of the modes indicated in articles 7 and 9 of the Decree of May 9, 1859, all documents in support of their claims. The Minister of the Navy shall furnish his statements within the month following the transmission to him of the aforementioned documents; at the expiration of this latter delay, final judgment shall be rendered;" \* \* \*

Having heard M. Paul Gauthier, member of the Court, in his report, and M. Chardenet, Commissioner of the Government, in his statements in support of the aforementioned motions:

THE COURT, after having duly deliberated thereon,

Whereas, the German sailing vessel, Barmbek, the capture of which was declared legal and valid by the decision of the Court under date of December 8, 1914, \* \* \*

Whereas, it is furthermore not in order to apply articles 296 and 303 of the Commercial Code prescribing that in case of interruption of the voyage by force majeure the shipper shall pay freight for the distance covered; whereas, in fact the Commercial Code has the object in the above-mentioned articles to regulate the commercial relations between shipowners on the one hand and shippers and freighters on the other hand;

Whereas, the provisions that it lays down concerning the execution or the consequences of the non-execution between parties of a contract of a private nature can not be extended to cover the consequences

of the seizure of the ship. However, the question need not now be raised as to whether the said firm has acquired a right in rem to the steamer on account of its expenditures or on account of any part thereof. For this lien would automatically become null in case of capture of the vessel. Capture under prize law is an original mode of acquisition, an *occupatio lue belli* which gives the occupant unencumbered ownership of the seized property, in accordance with generally recognized principles of international law." The *Fenlx* (1914) *Entscheidungen des Oberprisengerichts in Berlin*, 1, 8, (1918).

of an act of war, such as the capture of a ship, in the relations of the belligerent state exercising its right of prize, and of the private ship-owners of a captured vessel, or the shippers of its cargo.

Whereas, the capture of a vessel is an act of war, the legitimacy of which is recognized by the law of nations and the consequences of which must be judged according to the general principles of this law; and whereas, with regard to the acquisition of freight in proportion to the distance covered, the maritime powers have different systems of legislation; whereas, under these conditions, each national jurisdiction can refer only to the principles constantly admitted in the country to which it belongs;

Whereas, the British Prize Court has stated (case of *The Roland*, March 22, and 29, 1915) that "every other solution would necessitate \* \* \* a close investigation of all the terms, conditions, and circumstances involved in the contractual obligations of the parties, and of their rights and liabilities under foreign municipal law, which this Court has always refused to undertake";

Whereas, likewise, it is not in order for the French Prize Court to apply the British laws and usages;

Whereas, this Court must admit freight for distance covered, as has been repeatedly sanctioned by French jurisprudence in matters of prize (see especially the decision of the Prize Court of November 25, 1870, case of *The Julius*; decree of November 2, 1871, case of *The Vorsetzen*; decree of December 13, 1871, case of *The Alma*);

Whereas, consequently, the interested parties are not justified in claiming reimbursement for the sums which they have deposited as representing the freight proportional to the distance covered by the goods which they have laden on the *Barmbek*;

Whereas, the claims for indemnity, presented by the interested parties, are based on conditions under which the cargo had been stowed and should have been delivered according to the charter-party; whereas, they refer, therefore, to the execution of the contract which was made between the shippers and the shipowner and which, as has been stated above, could not bind the French State;

Whereas, consequently, these claims can not be sustained. \* \* \*<sup>25</sup>

<sup>25</sup> In *The Prins der Nederlanden*, L. R., [1921] 1 App. Cas. 754, 756, Lord Sumner, speaking for the Privy Council, said:

"The allowance of freight for the carriage of contraband is undoubtedly very rare. Two reported cases only have been found in which it has been ordered: *The Brita Caecilia*, Hay & Marriott, 234 (1779), and *The Neptunus*, 3 C. Rob. 108 (1800)."



## CHAPTER XIX

### TERMINATION OF WAR

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#### THE MENTOR.

(High Court of Admiralty, 1799. 1 C. Rob. 179.)

Sir W. SCOTT. \* \* \*<sup>1</sup> The circumstances of the case, as far as it is necessary to state them, are these: The ship, being American property, was on a voyage from the Havana to Philadelphia [in 1783]; off the Delaware she was pursued by his Majesty's ships, the Centurion and the Vulture, then cruising off that river, under the command of the admiral on that station, Admiral Digby. All parties were in complete ignorance of the cessation of hostilities; not only the persons on board the King's ships, but the Americans, as well those on the shore, as those on board the vessel. In the pursuit, shots were fired on both sides, and, it is alleged on the part of the British, that the ship was set on fire by her own crew, who took to the shore.

Now, I incline to assent to Dr. Lawrence's position, that if an act of mischief was done by the King's officers, though through ignorance, in a place where no act of hostility ought to have been exercised, it does not necessarily follow that mere ignorance of that fact would protect the officers from civil responsibility. If by articles, a place or district was put under the King's peace, and an act of hostility was afterwards committed therein, the injured party might have a right to resort to a court of prize to show that he had been injured by this breach of the peace, and was entitled to compensation; and if the officer acted through ignorance, his own government must protect him: for it is the duty of governments, if they put a certain district within the King's peace, to take care that due notice shall be given to those persons by whose conduct that peace is to be maintained; and if no such notice has been given, nor due diligence used to give it, and a breach of the peace is committed through the ignorance of those persons, they are to be borne harmless, at the expense of that government whose duty it was to have given that notice.

I am, therefore, inclined to think that the determination of the judge in the former case did not turn upon the mere circumstance of ignorance on the part of the King's ships, but that looking at all the circumstances under which the event took place, and considering their just and legal effect, he was of opinion upon the whole result, that the protest on the part of the captors was well sustained. If that

<sup>1</sup> The statement of facts and parts of the opinion are omitted.

opinion of the judge was erroneous, an appeal ought to have been prosecuted. No appeal was prosecuted, though such a purpose was formerly declared, and a protocol entered, but no farther proceedings were pursued thereon.\* \* \* \*

### THE SCHOONE SOPHIE.

(High Court of Admiralty, 1805. 6 C. Rob. 138.)

This was a question, as to the ship, reserved at the former hearing, on a claim given by the British proprietor, who stated her to have belonged to him, and to have been captured by the French, and carried into a port in Norway, and condemned by the French Consular Court in that country, 1799. It now appeared that other proceedings had been afterwards had, on the former evidence, in the regular Court of Prize in Paris,<sup>2</sup> where a sentence of condemnation had been pronounced, professing to affirm the sentence of the Consular Court.

Sir W. SCOTT. I am of opinion that the title of the former owner is completely barred by the intervention of peace, which has the effect

<sup>2</sup> The Austrian vessel *Thétis* was captured March 8, 1801, twenty-nine days after the signing of the treaty of Lunéville, but eight days before the date of the ratification of the treaty. The vessel was restored. *La Thétis*, *Conseil des Prises*, 1 *Pistoye et Duverdy*, 148 (1802).

Preliminaries of peace between France and England were signed at London October 1, 1801, and ratifications exchanged October 10. It was provided that as soon as the ratifications were exchanged sincere amity would be re-established and that every conquest that might take place after such exchange would be regarded as void. It was further provided, to avoid disputes respecting prizes taken after the signature of the preliminary articles, that prizes taken after the lapse of certain periods after the exchange of ratifications should be restored. These periods varied from 12 days for the Channel to five months for East Indian waters. Two British vessels were seized by the French before the expiration of the treaty periods and sought to annul the capture on the ground that the captors had knowledge of the treaty. The French Prize Council decided that when a treaty of peace fixes the periods of time after which prizes will no longer be valid absolute ignorance of the peace is not indispensable to the validity of a prize taken before the expiration of the period stated; that within the period in which prizes can still be legally made the presumption of ignorance of peace is one of law and it cannot be rebutted except by complete proof that the captor has had positive knowledge of the peace; that such notice must be certain and admitting of no doubt; it cannot result from oral information nor even unauthenticated documents furnished by the enemy; it must emanate from the government of the captor although it may come through the channel of the enemy authorities by virtue of special and official instructions. On these grounds the Prize Council condemned *Le Porcher* but restored *La Nymphe*. *La Bellone contre Le Porcher*, *La Petite-Renommée contre La Nymphe*, French Prize Council, 1 *Pistoye et Duverdy*, 149 (1803).

<sup>3</sup> On the effect of the sentences of the prize tribunals of France, pronounced on vessels carried into neutral ports, the Editor takes this opportunity of inserting the recent (August 7, 1807) decision of the Court of Appeal in the case of *The Henric and Maria*, *Baar*.

From the decision of the High Court of Admiralty in that case (4 C. Rob. 48), upholding such a title under the circumstances and considerations there noticed, an appeal was prosecuted, and two other questions of the same kind

of quieting all titles of possession arising from the war; and if the vessel has been transferred to the subject of another country, he also will be entitled to the same benefit from the treaty as the captor himself would have been, if he had continued in possession. It is admitted that as to the enemy it would have this effect, and that it would not be lawful to look back beyond the general amnesty to examine the title of his possession. If his property is transferred, the purchaser must also be entitled to the benefit of the same considerations, for otherwise it could not be said that the intervention of peace would have the effect of quieting the possession of the enemy; because, if the neutral purchaser was to be dispossessed, he would have a right to resort back to the belligerent seller, and demand compensation from him. I am of opinion, therefore, that the intervention of peace has put a total end to the claim of the British proprietor, and that it is no longer competent to him to look back to the enemy's title, either in his own possession, or in the hands of neutral purchasers. As to any effect of the new war, though that may change the relation of those who are parties to it, it can have no effect on neutral purchasers, who stand in the same situation as before. Those purchasers, though no parties to the treaty, are entitled to the full benefit of it, because they derive their title from those who are. \* \* \*

### THE NEUSTRA SEÑORA DE LOS DOLORES.

(High Court of Admiralty, 1809. Edwards, 60.)

This was the case of a Spanish ship which had been captured before Spanish hostilities, and restored with costs and damages; but no further proceedings took place at the time, in consequence of the breaking out of the war between the two countries. An application was now made to the court for a reference to the registrar and merchants, on the ground that hostilities having ceased, the Spanish claimant was entitled to the benefit of the former decree for costs and damages. \* \* \*

Sir WILLIAM SCOTT. I am clearly of the opinion that the objection is not sustainable; it is true that the intervention of hostilities puts

were brought from Vice Admiralty Courts, in the cases of *The Gluclicke Peter* and *The Jonge Jan*.

On August 7, 1807, the judgment of the Court of Appeal was delivered by the Master of the Rolls (Sir William Grant), to the following effect:

"This case involves a question as to the validity of sentences of condemnation pronounced in a belligerent country on prizes carried into neutral ports. There was some difference of opinion among the members of the board, before whom the case was originally argued. But it appeared to me that the acknowledged practice of this country must have the effect of making those sentences valid, whilst that practice continued. For there could be no equity, on which we could deny the validity of that title to neutrals purchasing of the enemy, at the same time that they were invited to take them from ourselves."

the property of the enemy in such a situation that confiscation may ensue, but unless some step is taken for that purpose, unless there is some legal declaration of the forfeiture, the right of the owner revives on the return of peace. This is an acknowledged principle in the Courts of Common Law, borrowed, in all probability, from the general law of nations, and I see no reason for any distinction here. We know that, in captures at sea, the general law is, that the bringing *infra præsidia*, and even a sentence of condemnation, is necessary to convert the property; and although in some instances positive institutions have determined that a possession of a certain number of hours is sufficient, yet this proceeds upon the ground that a possession of so many hours is an evidence of firm possession. Here there was no bodily possession, nor indeed could there be; but still some judicial act might have been done declaratory of the forfeiture to the crown of those rights which vested in the claimant under the decree for costs and damages. It appears, however, that no step was taken for this purpose on the part of the crown; and I am, therefore, of opinion that the rights of the Spanish proprietor do revive, and I refer it to the registrar and merchants to ascertain the amount of the compensation to which he is entitled under the decree.

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#### THE SPEEDWELL.

BAIN. et al. v. THE SPEEDWELL et al.

(Federal Court of Appeals of the United States, 1784. 2 Dall. 40, 1 L. Ed. 280.)

This was an appeal from the Admiralty of the State of Rhode Island, where the schooner had been condemned as prize; and the record was submitted to the decision of the court, without argument. On the 24th of May, 1784, GRIFFIN, READ, and LOWELL, the presiding commissioners, delivered the following judgment:

BY THE COURT. It appearing, by the inspection of the record, that the schooner in question was captured from the British, since the operation of the preliminary articles of peace (to wit, on the ——— day of ———) the condemnation cannot be sustained.

Decree reversed.

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#### THE PROTECTOR.

(Supreme Court of the United States, 1871. 12 Wall. 700, 20 L. Ed. 463.)

Appeal from the Circuit Court of the United States for the District of Louisiana.

This was a motion by Mr. P. Phillips to dismiss an appeal from a decree of the Circuit Court of the United States in the Southern District of Alabama. \* \* \* The ground of this present motion was

that more than five years, excluding the time of the rebellion, elapsed after the rendering of the decree, before the appeal was brought.

\* \* \*

In *Hanger v. Abbott*<sup>4</sup> it was held that the statute of limitations did not run, during the rebellion, against citizens of states adhering to the national government having demands against citizens of the insurgent states. And the question of course was whether, making allowance for the suspension of time produced by the rebellion, the appeal was or was not in season. \* \* \*

The CHIEF JUSTICE [CHASE] delivered the opinion of the court.<sup>5</sup>

The question, in the present case is, when did the rebellion begin and end? In other words, what space of time must be considered as excepted from the operation of the statute of limitations by the war of the rebellion?

Acts of hostility by the insurgents occurred at periods so various, and of such different degrees of importance, and in parts of the country so remote from each other, both at the commencement and the close of the late Civil War, that it would be difficult, if not impossible, to say on what precise day it began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken.

The proclamation of intended blockade by the President may, therefore, be assumed as marking the first of these dates, and the proclamation that the war had closed, as marking the second. But the war did not begin or close at the same time in all the states. There were two proclamations of intended blockade: The first of the 19th of April, 1861 (12 Stat. 1258), embracing the states of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana and Texas; the second, of the 27th of April, 1861 (12 Stat. 1259), embracing the states of Virginia, and North Carolina; and there were two proclamations declaring that the war had closed; one issued on the 2d of April, 1866 (14 Stat. 811), embracing the states of Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Alabama, Louisiana, and Arkansas, and the other issued on the 20th of August, 1866 (14 Stat. 814), embracing the state of Texas.

In the absence of more certain criteria, of equally general application, we must take the dates of these proclamations as ascertaining the commencement and the close of the war in the states mentioned in them. Applying this rule to the case before us, we find that the war began in Alabama on the 19th of April, 1861, and ended on the

<sup>4</sup> 6 Wall. 532, 19 L. Ed. 969 (1867); *The Protector*, 9 Wall. 687, 19 L. Ed. 812 (1869).

<sup>5</sup> The statement of facts is abridged.

2d of April, 1866. More than five years, therefore, had elapsed from the close of the war till the 17th of May, 1871, when this appeal was brought. The motion to dismiss, therefore, must be granted.<sup>6</sup>

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### THE JOHN.

(British-American Claims Commission of 1853. Report of Commission [1856] 427.)

In the early part of the year 1815, the American schooner *John* sailed from the port of Matanzas, in the island of Cuba, with a cargo of molasses, coffee, etc., for the port of Portsmouth, in the state of New Hampshire.

On the 5th day of March, in the same year, when in latitude 31° 40' north, and longitude 78° 10' west from the meridian of Greenwich, she fell in with the British ship-of-war *Talbot*, Lieutenant Maudesley, acting commander, and was captured and taken possession of as a prize of war.

She was then put in charge of a prize master and crew from the *Talbot*, and taken in tow by that vessel for Jamaica. On the 11th of March, while the two vessels were yet in company, they made land, which the officers commanding erroneously supposed to be Atwood's Key. On the 12th, they made what they supposed to be the French Keys, and subsequently, what they took to be the place called the Hogsties, and shaped and continued their course as if these suppositions were correct, although assured of their mistake by Beck, the deposed master of the *John*.

In a few hours the schooner was ashore at a place called Point Mulas, in the island of Cuba, and the *Talbot* was saved from the same fate only by hastily putting about, and standing out to sea. The next day the crew were taken from the wreck, which was abandoned, and totally lost.

On arriving at Jamaica, the master and crew were detained as prisoners of war. On the 29th of March, news of the ratification of the treaty of peace having been received, they were released. Captain Beck, the master, thereupon addressed a letter to Lieutenant Maudesley, demanding his papers, and was by that officer referred to the Vice Admiralty Court at Kingston; but, upon application there, he was informed that neither the log-book nor the papers of the *John* had been lodged there. Whereupon he, with others of the crew, made protest, at Kingston, upon the foregoing state of facts.

On returning to the United States a more specific and detailed pro-

<sup>6</sup> See *Brown v. Hlatts*, 15 Wall. 177, 21 L. Ed. 128 (1872).

In the case of *Phillips v. Hatch*, 1 Dillon, 571, Fed. Cas. No. 11,094 (1871), the United States Circuit Court for Iowa held that a contract entered into in the spring of 1866 between a resident of the state of Iowa and a resident of the state of Texas, was void as a contract between enemies.

test was made; and subsequently the owners of the schooner commenced a suit in admiralty against Lieutenant Maudesley for the value of the vessel and cargo, which was finally decided against them by Sir William Scott, on December 18, 1818, on the ground that the commander of a vessel of war, when notice has not reached him of the conclusion of peace, is not personally liable for such a capture.

The owners had incurred heavy expenses in the prosecution of this suit, and, owing to this circumstance and various adverse events personal to them, delayed for many years making application to the United States government, as they should originally have done. Application was at length made, and the claim was earnestly urged on the attention of the British government by Mr. Lawrence, while minister at London.

It is as yet unsettled; and is now presented for the consideration and final action of this commission. \* \* \*

UPHAM, United States Commissioner. In the able argument addressed to us by her Majesty's counsel, the British agent, some stress has been laid on the decision of Sir William Scott (2 Dodson, 336) on a suit brought against the commander of the *Talbot* for the capture of the *John*; and that authority is considered as conclusive of this claim.

But, in that case, the learned judge expressly declined determining whether or not the claimant had a remedy elsewhere; he only decided, for reasons which he gives at length, that the captor should be personally exonerated.

On determining this question, he says:

"I certainly go no further than the expressions used by me warrant, that this individual captor is not liable to this individual sufferer."

"That does not exclude a liability elsewhere, if it exists. Whether there be such a liability in the government is a question I am not called upon to examine; I have neither the proper parties nor the evidence before me. It is sufficient to observe, upon that matter, that there may be such a liability; there doubtless would be, if the government had not made due diligence in advertising the cessation of hostilities, in the quarters and at the periods stipulated, if that were practicable."

"Where property, captured after peace has taken effect, is lost by mere chance, without any fault on the part of the captor, whether an obligation is incurred to restore in value what has been taken away by mere misfortune, the terms of the contract have not specifically provided for; and just principle seems to point another way; that, however, is not the question before me for my decision." *Schooner John, Beck, Master, 2 Dodson, 336.*

This case conflicts with the opinion of the same learned judge in *The Mentor, 1 Robinson, 183*. He there says: "that the seizure of a vessel is a belligerent right which is not exercisable in time of peace. When there is peace, a seizure, *jure belli*, is a wrongful act, and the

injured party is entitled to restitution and compensation." He further says: "It is not so clear that the captor is liable to costs and damages, where peace has not been notified. The better opinion seems to be, that the captor is liable to costs and damages, and entitled to indemnification from his government, whose duty it was to have given notice."

Both these cases sustain this point, that, when there is a want of due diligence, in advertising the cessation of hostilities, the injured party is clearly entitled to indemnification; and Vattel says, also, "that those who shall, through their own fault, remain ignorant of the publication of the truce, would be bound to repair any damage they may have caused contrary to its tenor." Vattel, bk. 3, ch. 16.

There seems to be no doubt that the principle, thus laid down, is correct. But what constitutes due diligence, under such circumstances, is a question at times of difficult determination. It is, therefore, exceedingly desirable that it should be settled by the parties in advance. Vattel says, in the same section, "in order as far as possible to avoid any difficulty," on this point, "it is usual with sovereigns, in their truces, as well as treaties of peace, to assign different periods for the cessation of hostilities according to the situation and distance of places."

The question then arises, whether this assignment of different periods for the cessation of hostilities, according to the situation and distance of places, was not designed by the parties to establish the time to be holden as reasonable notice within such limits. Such clearly is the ground assigned by Vattel for such provisions in treaties. What would be reasonable, can be determined just as well before the treaty as after, and the whole tenor of the treaty, in this case, goes to show that the contracting parties had this question in view, in establishing the various periods within which peace should take place in different localities.

The treaty provides that, "immediately after the ratification, orders shall be sent to the armies, squadrons, officers, subjects, and citizens of the two powers, to cease from all hostilities; and, to prevent all causes of complaint which may arise on account of prizes, which may be taken at sea after said ratification, it is reciprocally agreed, that all vessels and effects, which may be taken after the space of twelve days from the said ratification, upon all parts of the coast of North America, from the latitude of 23° north, to the latitude of 50° north, and as far eastward in the Atlantic Ocean as the 36° of west longitude from the meridian of Greenwich, shall be restored on each side; that the time shall be thirty days in all other parts of the Atlantic Ocean, north of the equator, and the same time for the British and Irish channels, for the Gulf of Mexico, and all parts of the West Indies; forty days for the North Seas, for the Baltic, and for all parts of the Mediterranean; sixty days for the Atlantic Ocean, south of the equator, as far as the latitude of the Cape of Good Hope; ninety days for every part of the world south of the equator, and one hundred and twenty days for all



the other parts of the world without exception." 8 United States Statutes at Large, p. 219. These several periods were undoubtedly agreed upon as equivalent to notice that peace existed within the prescribed limits. It cannot be supposed that the contending parties designed to append to these periods a further indefinite, uncertain time, as to what should constitute due diligence in giving notice, or to restrain or limit the fact in its consequences, that peace should exist at the times named.

After the periods thus agreed upon, the obligation to cease from hostilities was imperative.

Such being the case, we have the true starting-point from which to consider the question of the respective rights of the parties. It is manifest that collisions might then occur without the imputation of any willful wrong in the violation of the compact entered into. The injury would, however, exist, and the actual loss sustained should, on every principle of equity and justice, as well as of compact, be fully met.

The stipulation was, therefore, entered into by the parties, that "all vessels and effects" that should be taken after the several times specified "should be restored." The question then arises, what interpretation we shall place on this provision? Does it mean that vessels and effects captured shall be returned in specie, or that the identical property merely shall be returned, and where this has become impracticable that no restitution or satisfaction shall be had? I cannot believe that such was the intent of the parties. They acknowledge themselves bound by a constructive notice of the peace, and it was their own fault that they did not take time enough, or did not use diligence enough to give actual notice of the peace "to their armies, squadrons, officers, subjects, and citizens," as was specially provided should be done by the treaty.

Under such circumstances, the doctrine of Vattel, adopted by Sir William Scott, applies, "that those who through their own fault remain ignorant of the publication of the truce are bound to repair any damage they may have caused contrary to its tenor."

The party injured is in the same situation as a neutral whose vessel has been seized and destroyed as the property of a hostile power, where it is holden the neutral can only be justified by a full restitution in value. 1 Wildman, vol. 2, p. 175.

There is no other measure of damage that justly meets the requirements of the case. The treaty provides not only that "all vessels," but also "their effects," which may be taken, after a certain specified number of days, within certain described limits, shall be restored on either side. But if the effects of a vessel, consisting of provisions or other articles, are taken and consumed, or are otherwise disposed of, so they cannot be restored specifically, it will hardly be contended that no remuneration is to be made.

If this be so, the rule would equally follow in relation to the vessel. Restoration and restitution are synonymous. One meaning of the word "restore," as laid down by Webster is, "to make restitution or satisfaction for a thing taken, by returning something else, or something of different value," and this is the meaning which should be rightfully attached to the word in the treaty.

I do not understand that this is, in reality, denied; but the position is taken by Great Britain in this case, that she is relieved from restoring the vessel, for the reason that it was subsequently cast away and lost by the act of God, and no one is accountable.

If the case can be brought within this principle the excuse might avail, but there are circumstances connected with it that preclude such defence. No one can plead the destruction of property as the act of God, who is wrongfully in the use and control of such property. He is a wrong-doer from the outset; he has converted the property from the instant of possession, and the subsequent calamity which may happen, however inevitable it may be, is no excuse for its loss.

The *John* was in the rightful pursuit of a lawful voyage, at a time and place when peace existed by the express stipulations of the parties, after taking such period for notice as they held that the case required.

She had pursued her course northwardly some four or five hundred miles out from harbor, on her way to her destined port. She was there seized, placed under the charge of new men, and her course was directly reversed, until she was taken back to the West Indies, and through mismanagement, or misadventure, was run on shore and lost.

It may have been the ordinary accident of the seas, or may not; but, in any event, she was taken there without right, and subjected to risks to which she was not legally and justly liable. The plea that she was lost by the act of God is not, under such circumstances, admissible. The vessel itself cannot be restored, but such compensation and restitution should be made as the nature of the case admits of.

In the argument, considerable stress has been laid on a quotation in Kent and Wheaton, said to be founded on Grotius, that where collisions arise after peace exists, the governments "are not amenable in damages, but it is their duty to restore what has been captured, but not destroyed." The citation from Grotius is, however, erroneous. He merely says, in the section referred to, that if any acts be done, in violation of the truce, before notice can be given, "the government will not be liable to punishment, but the contracting parties will be bound to make good the damage." Whewell's Grotius, lib. 3, c. 21, § 5.

What shall be the precise effect, as a matter of notice, where different periods of time are stipulated in which peace shall take place, does not seem to have been fully considered and settled. If it shall be held as an acknowledgment of notice, then every subsequent act of violation of it is the act of a wrong-doer, and full compensation follows of necessity. I can see no possible mode of avoiding the justness

or soundness of the construction at which we have arrived, but think it should prevail on every ground of public policy and right interpretation of international compacts of this character.

I am happy to say that my colleague, though he hesitates somewhat as to the views presented, waives his objection to the allowance of the claim, except on the score of interest, and this question is to be submitted to the umpire.

Interest was allowed.

### THE ELBE.

(French Prize Court, 1919. *Journal Officiel*, November 7, 1919, p. 12507.)

In the name of the French people the Prize Court has rendered the following decision:

Between, on the one hand, the proprietor, captain and the proprietor of the cargo of the German steamer *Elbe*, captured with its cargo, on February 16, 1919, in the Baltic Sea by the French torpedo boat *Oriflamme*, and on the other hand, the Minister of the Navy, acting in the name of the State and on behalf of the rightful claimants to the proceeds of the prize, in conformity with the laws and regulations in force: \* \* \*

Considering the Armistice Convention concluded with Germany on November 11, 1918;

Having heard M. Henri Fromageot, member of the Court, in his report, and M. Gauthier, member of the Court, replacing M. Chardenet, Commissioner of the Government, who is prevented from attending, in his statements in support of his aforementioned motions;

After having duly deliberated thereon:

Whereas, the Armistice concluded with Germany on November 11, 1918, stipulates:

"Article XX. Immediate cessation of all hostilities on sea and precise indication of the situation and the movements of German vessels. Notice given to the neutrals of the freedom of navigation granted to the vessels of war and of commerce of the Allied and Associated Powers in all territorial waters without raising the question of neutrality."

"Article XXVI. Maintenance of the blockade of the Allied and Associated Powers under the present conditions, the German vessels of commerce found on the sea remaining subject to capture."

Whereas, according to the minute drawn up at sea on February 16, 1919, the steamer *Elbe* of  $\frac{1,027.77}{596.65}$  tons, of the port of Hamburg, bound from Lübeck to Memel, with a full cargo of 1396 tons of salt, was captured together with its cargo, in the Baltic Sea, at 12° 27' east longitude (Greenwich) and 54° 30' north latitude by the French torpedo boat *Oriflamme*;

Whereas, it appears from the ship's papers and especially from an authentic extract of the certificate of registry of the said vessel, dated

at Hamburg July 22, 1890, that the said steamer Elbe was German and belonged to the "Vereinigte Bugsier und Frachtschiffahrt Gesellschaft" of Hamburg;

Whereas, it appears, on the other hand, from the charter-party dated at Hamburg February 1, 1919, and from the bill of lading dated at Lübeck February 14, 1919, that the cargo was shipped by a Mr. Franz Heinrich of Hamburg to Mr. Eduard Krause of Memel, whose German nationality is not disputed;

Whereas, for these reasons the said steamer Elbe together with its cargo are a good prize as being an enemy vessel and cargo;

Whereas, the German authorities by a note addressed on April 20, 1919, to the President of the Permanent Interallied Armistice Commission and likewise the "Vereinigte Bugsier und Frachtschiffahrt Gesellschaft" and Mr. Eduard Krause dispute the legality of the capture, maintaining that the Armistice brought about the cessation of hostilities and that the stipulation of the Armistice Convention with Germany of November 11, 1918, concerning the maintenance of the blockade of Germany did not apply to the Baltic Sea where, according to the claimants, this blockade did not exist;

But whereas, the said Armistice, while providing for the cessation of hostilities at sea, expressly maintained in Article XXVI, above quoted, the right of capturing the German vessels found at sea, without any condition of provenience, destination or place of seizure;

Whereas, only the regular issuance of a pass by the competent allied authorities could exempt from capture;

Whereas, the Elbe had not received any pass from the allied authorities and whereas, it appears from the documents appended to the dossier and from the examination of the captain himself that no authorization had been granted to the said vessel by the said authorities: \* \* \*

Decides:

The capture of the German steamer Elbe together with its accessories, fittings and equipment, as well as of its cargo, is declared good and valid and the net proceeds thereof are to be paid to the rightful claimants in conformity with the laws and regulations in force.

## APPENDIX I

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### THE COVENANT OF THE LEAGUE OF NATIONS<sup>1</sup>

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The High Contracting Parties Agree to this Covenant of the League of Nations.

In order to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war, by the prescription of open, just and honorable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another.

#### ARTICLE 1

The original Members of the League of Nations shall be those of the Signatories which are named in the Annex to this Covenant and also such of those other States named in the Annex as shall accede without reservation to this Covenant. Such accession shall be effected by a Declaration deposited with the Secretariat within two months of the coming into force of the Covenant. Notice thereof shall be sent to all other Members of the League.

Any fully self-governing State, Dominion or Colony not named in the Annex, may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval, and air forces and armaments.

Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.

<sup>1</sup> Extract from the treaty of peace between the allied and associated powers and Germany, signed at Versailles, June 28, 1919.

## ARTICLE 2

The action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council, with a permanent Secretariat.

## ARTICLE 3

The Assembly shall consist of Representatives of the Members of the League.

The Assembly shall meet at stated intervals and from time to time as occasion may require at the Seat of the League, or at such other place as may be decided upon.

The Assembly may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world.

At meetings of the Assembly each member of the League shall have one vote, and may have not more than three Representatives.

## ARTICLE 4

The Council shall consist of Representatives of the Principal Allies and Associated Powers, together with Representatives of four other members of the League. These four Members of the League shall be selected by the Assembly from time to time in its discretion. Until the appointment of the Representatives of the four Members of the League first selected by the Assembly, Representatives of Belgium, Brazil, Spain and Greece shall be members of the Council.

With the approval of the majority of the Assembly, the council may name additional Members of the League whose Representatives shall always be members of the Council; the Council with like approval may increase the number of Members of the League to be selected by the Assembly for representation on the Council.

The Council shall meet from time to time, as occasion may require, and at least once a year, at the Seat of the League, or at such other place as may be decided upon.

The Council may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world.

Any Member of the League not represented on the Council shall be invited to send a Representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member of the League.

At meetings of the Council, each Member of the League represented on the Council shall have one vote, and may have not more than one Representative.

## ARTICLE 5

Except where otherwise expressly provided in this Covenant, or by the terms of the present Treaty, decisions at any meeting of the As-

sembly or of the Council shall require the agreement of all the Members of the League represented at the meeting.

All matters of procedure at meetings of the Assembly or of the Council, including the appointment of Committees to investigate particular matters, shall be regulated by the Assembly or by the Council and may be decided by a majority of the Members of the League represented at the meeting.

The first meeting of the Assembly and the first meeting of the Council shall be summoned by the President of the United States of America.

#### ARTICLE 6

The permanent Secretariat shall be established at the Seat of the League. The Secretariat shall comprise a Secretary General and such secretaries and staff as may be required.

The first Secretary General shall be the person named in the Annex; thereafter the Secretary General shall be appointed by the Council with the approval of the majority of the Assembly.

The secretaries and staff of the Secretariat shall be appointed by the Secretary General with the approval of the Council.

The Secretary General shall act in that capacity at all meetings of the Assembly and of the Council.

The expenses of the Secretariat shall be borne by the members of the League in accordance with the apportionment of the expenses of the International Bureau of the Universal Postal Union.

#### ARTICLE 7

The Seat of the League is established at Geneva.

The Council may at any time decide that the Seat of the League shall be established elsewhere.

All positions under or in connection with the League, including the Secretariat, shall be open equally to men and women.

Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities.

The buildings and other property occupied by the League or its officials or by Representatives attending its meetings shall be inviolable.

#### ARTICLE 8

The Members of the League recognize that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations.

The Council, taking account of the geographical situation and circumstances of each State, shall formulate plans for such reduction for the consideration and action of the several governments.

Such plans shall be subject to reconsideration and revision at least every ten years.

After these plans shall have been adopted by the several Governments, the limits of armaments therein fixed shall not be exceeded without the concurrence of the Council.

The Members of the League agree that the manufacture by private enterprise of munitions and implements of war is open to grave objections. The Council shall advise how the evil effects attendant upon such manufacture can be prevented, due regard being had to the necessities of those Members of the League which are not able to manufacture the munitions and implements of war necessary for their safety.

The Members of the League undertake to interchange full and frank information as to the scale of their armaments, their military, naval and air programmes, and the condition of such of their industries as are adaptable to war-like purposes.

#### ARTICLE 9

A permanent Commission shall be constituted to advise the Council on the execution of the provisions of Articles 1 and 8 and on military, naval, and air questions generally.

#### ARTICLE 10

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

#### ARTICLE 11

Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary General shall on the request of any Member of the League forthwith summon a meeting of the Council.

It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.



## ARTICLE 12

The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the report by the Council.

In any case under this Article the award of the arbitrators shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute.

## ARTICLE 13

The Members of the League agree that whenever any dispute shall arise between them which they recognize to be suitable for submission to arbitration and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject matter to arbitration.

Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration.

For the consideration of any such dispute the court of arbitration to which the case is referred shall be the Court agreed on by the Parties to the dispute or stipulated in any convention existing between them.

The Members of the League agree that they will carry out in full good faith any award that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award, the Council shall propose what steps should be taken to give effect thereto.

## ARTICLE 14

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

## ARTICLE 15

It there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration in accordance with Article 13, the Members of the League agree that they

will submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary General, who will make all necessary arrangements for a full investigation and consideration thereof.

For this purpose the parties to the dispute will communicate to the Secretary General, as promptly as possible, statements of their case with all the relevant facts and papers, and the Council may forthwith direct the publication thereof.

The Council shall endeavor to effect a settlement of the dispute, and if such efforts are successful, a statement shall be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council may deem appropriate.

If the dispute is not thus settled, the Council either unanimously or by a majority vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.

Any Member of the League represented on the Council may make public a statement of the facts of the dispute and of its conclusions regarding the same.

If a report by the Council is unanimously agreed to by the members thereof other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report.

If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.

If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

The Council may in any case under this Article refer the dispute to the Assembly. The dispute shall be so referred at the request of either party to the dispute, provided that such request be made within fourteen days after the submission of the dispute to the Council.

In any case referred to the Assembly all the provisions of this Article and of Article 12 relating to the action and powers of the Council shall apply to the action and powers of the Assembly, provided that a report made by the Assembly if concurred in by the Representatives of those Members of the League represented on the Council and of a majority of the other Members of the League, exclusive in each case of the Representatives of the parties to the dispute, shall have the same force as a report by the Council concurred in by all the members thereof other than the Representatives of one or more of the parties to the dispute.

## ARTICLE 16

Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13, or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial, or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimize the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.

Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.

## ARTICLE 17

In the event of a dispute between a Member of the League and a State which is not a Member of the League, or between States not Members of the League, the State or States not Members of the League shall be invited to accept the obligations of membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just. If such invitation is accepted, the provisions of Articles 12 to 16 inclusive shall be applied with such modifications as may be deemed necessary by the Council.

Upon such invitation being given the Council shall immediately institute an inquiry into the circumstances of the dispute and recommend such action as may seem best and most effectual in the circumstances.

If a State so invited shall refuse to accept the obligations of membership in the League for the purposes of such dispute, and shall resort to war against a Member of the League, the provisions of Article 16 shall be applicable as against the State taking such action.

If both parties to the dispute when so invited refuse to accept the obligations of membership in the League for the purposes of such dispute, the Council may take such measures and make such recommendations as will prevent hostilities and will result in the settlement of the dispute.

#### ARTICLE 18

Every treaty or international engagement entered into hereafter by any Member of the League, shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.

#### ARTICLE 19

The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.

#### ARTICLE 20

The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings inter se which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.

In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligations inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations.

#### ARTICLE 21

Nothing in this covenant shall be deemed to affect the validity of international engagements such as treaties of arbitration or regional understandings like the Monroe Doctrine for securing the maintenance of peace.

#### ARTICLE 22

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centers of civilization, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above-mentioned in the interests of the indigenous population.

In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

The degree of authority, control, or administration to be exercised by the Mandatory shall if not previously agreed upon by the Members of the League be explicitly defined in each case by the Council.

A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.

#### ARTICLE 23

Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon,

The Members of the League:

(a) will endeavor to secure and maintain fair and humane conditions of labor for men, women and children both in their own countries and

in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organizations;

(b) undertake to secure just treatment of the native inhabitants of territories under their control;

(c) will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children, and the traffic in opium and other dangerous drugs;

(d) will entrust the League with the general supervision of the trade in arms and ammunition with the countries in which the control of this traffic is necessary in the common interest;

(e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. In this connection, the special necessities of the regions devastated during the war of 1914-1918 shall be borne in mind;

(f) will endeavor to take steps in matters of international concern for the prevention and control of disease.

#### ARTICLE 24

There shall be placed under the direction of the League all international bureaux already established by general treaties if the parties to such treaties consent. All such international bureaux and all commissions for the regulation of matters of international interest hereafter constituted shall be placed under the direction of the League.

In all matters of international interest which are regulated by general conventions but which are not placed under the control of international bureaux or commissions, the Secretariat of the League shall, subject to the consent of the Council and if desired by the parties, collect and distribute all relevant information and shall render any other assistance which may be necessary or desirable.

The Council may include as part of the expenses of the Secretariat the expenses of any bureau or commission which is placed under the direction of the League.

#### ARTICLE 25

The Members of the League agree to encourage and promote the establishment and co-operation of duly authorized voluntary national Red Cross organizations having as purposes the improvement of health, the prevention of disease and the mitigation of suffering throughout the world.

#### ARTICLE 26

Amendments to this Covenant will take effect when ratified by the Members of the League whose Representatives compose the Council and by a majority of the Members of the League whose Representatives compose the Assembly.

No such amendment shall bind any Member of the League which signifies its dissent therefrom, but in that case it shall cease to be a Member of the League.\*

#### ANNEX TO THE COVENANT

##### 1. Original members of the League of Nations.

###### *Signatories of the Treaty of Peace.*

United States of America, Belgium, Bolivia, Brazil, British Empire (Canada, Australia, South Africa, New Zealand, India), China, Cuba, Czecho-Slovakia, Ecuador, France, Greece, Guatemala, Haiti, Hedjaz, Honduras, Italy, Japan, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Rumania, Serbia, Siam, Uruguay.

###### *States Invited to Accede to the Covenant:*

Argentine Republic, Chili, Colombia, Denmark, Netherlands, Norway, Paraguay, Persia, Salvador, Spain, Sweden, Switzerland, Venezuela.

\*The members of the League through the coming into effect of the Treaty of Versailles on January 10, 1920, are: Belgium, Bolivia, Brazil, British Empire Canada, Australia, New Zealand, South Africa, India, Czecho-Slovakia, France, Guatemala, Honduras, Italy, Japan, Nicaragua, Peru, Poland, Siam, Uruguay.

The members of the League through subsequent ratification of the Treaty of Versailles, with the date of deposit of ratification, are: The Serb-Croat-Slovene State, February 10, 1920; Cuba, March 8, 1920; Greece, March 30, 1920; Portugal, April 8, 1920; Haiti, June 30, 1920; Liberia, June 30, 1920; Panama and Roumania (ratifications announced by telegram, but not yet deposited).

The members of the League through accession to the Covenant under the invitation contained in the Annex to the Covenant, with date of accession are: Argentine Republic, July 18, 1919; Chile, November 4, 1919; Persia, November 21, 1919; Paraguay, December 26, 1919; Spain, January 10, 1920; Columbia, February 18, 1920; Venezuela, March 3, 1920; Norway, March 5, 1920; Denmark, March 8, 1920; Switzerland, March 8, 1920; Netherlands, March 9, 1920; Sweden, March 9, 1920; Salvador, March 10, 1920.

China is a member of the League through the coming into effect of the Treaty of St. Germain, July 16, 1920.

The members admitted by the First Assembly of the League of Nations are: Austria, Luxemburg, Bulgaria, Costa Rica, Finland and Albania, December 15 to 17, 1920.

The members admitted by the Second Assembly of the League of Nations are: Esthonia, Latvia, and Lithuania, September 22, 1921. League of Nations, Official Journal, July, 1920, to October, 1921.

**STATUTE FOR THE PERMANENT COURT OF INTERNATIONAL JUSTICE PROVIDED FOR BY ARTICLE 14 OF THE COVENANT OF THE LEAGUE OF NATIONS <sup>1</sup>**

Article 1. A Permanent Court of International Justice is hereby established, in accordance with article 14 of the Covenant of the League of Nations. This Court shall be in addition to the Court of Arbitration organized by the Conventions of The Hague of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement.

<sup>1</sup> The relevant portions of the Pacific Settlement Convention relating to the Permanent Court of Arbitration at The Hague, have been printed, ante, p. 476.

It seems advisable to print in the Appendix the Statute of the Permanent Court of International Justice, inasmuch as the Court has been organized and was installed in the Peace Palace at The Hague on February 15, 1922.

At the time of the election of the Judges, forty-four States—of which the United States was not one—had accepted the Statute for the establishment of the Court. The eleven Judges were elected on September 14th, and the four Deputy Judges on September 14th–15th, by the concurrent and separate action of the Assembly and the Council of the League of Nations, at Geneva, in 1921. The first regular session of the Court after its organization will be held at The Hague, on June 15, 1922.

The Court of Arbitration was devised in the First Peace Conference of 1899. An attempt was made to constitute a permanent court in the technical sense of the word at the Second Conference of 1907. A draft convention of thirty-five articles, dealing with the constitution, competency and procedure, was adopted. The Conference, however, was unable to devise a method of appointing the Judges which proved to be acceptable to the Powers generally. But the draft convention was adopted and the Conference recommended the Court's constitution as soon as an agreement had been reached upon the method of appointing the Judges.

The Covenant of the League of Nations provided in its fourteenth article for the constitution of such a court.

The Council of the League selected jurists to prepare the draft, and in the summer of 1920 five drawn from the Great Powers and five from the Small Powers met at The Hague. A method of appointing the judges was found, and an elaborate draft of the Court was recommended to the Council. That body suggested some, and the Assembly many, amendments, and in a modified form it was adopted by the Assembly of the League on December 13, 1920.

In its amended form it is in substance the draft convention of 1907, with the addition of a method of appointing the judges, and the articles of procedure taken, as recommended by the draft convention, from the Pacific Settlement Convention.

It is a matter of interest, and to Americans of pride, that the Permanent Court of International Justice was proposed by the American Delegation to the Second Conference at The Hague in 1907, in pursuance of instructions from the Secretary of State of the United States, Elihu Root, and that the method of appointing the judges and thus constituting the Court, was proposed by Mr. Root himself, and in person, at the meeting of the jurists at The Hague in 1920.



CHAPTER I.—ORGANIZATION OF THE COURT

Art. 2. The Permanent Court of International Justice shall be composed of a body of independent judges, elected regardless of their nationality from amongst persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults of recognized competence in international law.

Art. 3. The Court shall consist of fifteen members: eleven judges and four deputy-judges. The number of judges and deputy-judges may hereafter be increased by the Assembly, upon the proposal of the Council of the League of Nations, to a total of fifteen judges and six deputy-judges.

Art. 4. The members of the Court shall be elected by the Assembly and by the Council from a list of persons nominated by the national groups in the Court of Arbitration, in accordance with the following provisions.

In the case of Members of the League of Nations not represented in the Permanent Court of Arbitration, the lists of candidates shall be drawn up by national groups appointed for this purpose by their Governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.

Art. 5. At least three months before the date of the election, the Secretary-General of the League of Nations shall address a written request to the Members of the Court of Arbitration belonging to the States mentioned in the Annex to the Covenant or to the States which join the League subsequently, and to the persons appointed under paragraph 2 of article 4, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case must the number of candidates nominated be more than double the number of seats to be filled.

Art. 6. Before making these nominations, each national group is recommended to consult its Highest Court of Justice, its Legal Faculties and Schools of Law, and its National Academies and national sections of International Academies devoted to the study of Law.

Art. 7. The Secretary-General of the League of Nations shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in article 12, paragraph 2, these shall be the only persons eligible for appointment.

The Secretary-General shall submit this list to the Assembly and to the Council.

Art. 8. The Assembly and the Council shall proceed independently of one another to elect, firstly the judges, then the deputy-judges.

Art. 9. At every election, the electors shall bear in mind that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilization and the principal legal systems of the world.

Art. 10. Those candidates who obtain an absolute majority of votes in the Assembly and in the Council shall be considered as elected.

In the event of more than one national of the same Member of the League being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected.

Art. 11. If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

Art. 12. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the Assembly and three by the Council, may be formed, at any time, at the request of either the Assembly or the Council, for the purpose of choosing one name for each seat still vacant, to submit to the Assembly and the Council for their respective acceptance.

If the Conference is unanimously agreed upon any person who fulfills the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in articles 4 and 5.

If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been appointed shall, within a period to be fixed by the Council, proceed to fill the vacant seats by selection from amongst those candidates who have obtained votes either in the Assembly or in the Council.

In the event of an equality of votes amongst the judges, the eldest judge shall have a casting vote.

Art. 13. The members of the Court shall be elected for nine years. They may be re-elected.

They shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

Art. 14. Vacancies which may occur shall be filled by the same method as that laid down for the first election. A member of the Court elected to replace a member whose period of appointment had not expired will hold the appointment for the remainder of his predecessor's term.

Art. 15. Deputy-judges shall be called upon to sit in the order laid down in a list.

This list shall be prepared by the Court and shall have regard firstly to priority of election and secondly to age.

Art. 16. The ordinary Members of the Court may not exercise any political or administrative function. This provision does not apply to the deputy-judges except when performing their duties on the Court.

Any doubt on this point is settled by the decision of the Court.

Art. 17. No Member of the Court can act as agent, counsel or advocate in any case of an international nature. This provision only applies to the deputy-judges as regards cases in which they are called upon to exercise their functions on the Court.

No Member may participate in the decision of any case in which he has previously taken an active part, as agent, counsel or advocate for one of the contesting parties, or as a Member of a national or international Court, or of a Commission of inquiry, or in any other capacity.

Any doubt on this point is settled by the decision of the Court.

Art. 18. A member of the Court can not be dismissed unless in the unanimous opinion of the other members, he has ceased to fulfill the required conditions.

Formal notification thereof shall be made to the Secretary-General of the League of Nations, by the Registrar.

This notification makes the place vacant.

Art. 19. The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

Art. 20. Every member of the Court shall, before taking up his duties, make a solemn declaration in open Court that he will exercise his powers impartially and conscientiously.

Art. 21. The Court shall elect its President and Vice-President for three years; they may be re-elected.

It shall appoint its Registrar.

The duties of Registrar of the Court shall not be deemed incompatible with those of Secretary-General of the Permanent Court of Arbitration.

Art. 22. The seat of the Court shall be established at The Hague.

The President and Registrar shall reside at the seat of the Court.

Art. 23. A session of the Court shall be held every year.

Unless otherwise provided by rules of Court, this session shall begin on the 15th of June, and shall continue for so long as may be deemed necessary to finish the cases on the list.

The President may summon an extraordinary session of the Court whenever necessary.

Art. 24. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.

If the President considers that for some special reason one of the

members of the Court should not sit on a particular case, he shall give him notice accordingly.

If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

Art. 25. The full Court shall sit except when it is expressly provided otherwise.

If eleven judges can not be present, the number shall be made up by calling on deputy-judges to sit.

If, however, eleven judges are not available, a quorum of nine judges shall suffice to constitute the Court.

Art. 26. Labor cases, particularly cases referred to in Part XIII (Labor) of the Treaty of Versailles and the corresponding portions of the other Treaties of Peace, shall be heard and determined by the Court under the following conditions:

The Court will appoint every three years a special chamber of five judges, selected so far as possible with due regard to the provisions of article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this chamber. In the absence of any such demand, the Court will sit with the number of judges provided for in article 25. On all occasions the judges will be assisted by four technical assessors sitting with them, but without the right to vote, and chosen with a view to insuring a just representation of the competing interests.

If there is a national of one only of the parties sitting as a judge in the chamber referred to in the preceding paragraph, the President will invite one of the other judges to retire in favor of a judge chosen by the other party in accordance with article 31.

The technical assessors shall be chosen for each particular case in accordance with rules of procedure under article 30 from a list of "Assessors for Labor Cases" composed of two persons nominated by each Member of the League of Nations and an equivalent number nominated by the Governing Body of the Labor Office. The Governing Body will nominate, as to one half, representatives of the workers, and as to one half, representatives of employers from the list referred to in article 412 of the Treaty of Versailles and the corresponding articles of the other Treaties of Peace.

In Labor cases the International Labor Office shall be at liberty to furnish the Court with all relevant information, and for this purpose the Director of that Office shall receive copies of all the written proceedings.

Art. 27. Cases relating to transit and communications, particularly cases referred to in Part XII (Ports, Waterways and Railways) of the Treaty of Versailles and the corresponding portions of the other Treaties of Peace shall be heard and determined by the Court under the following conditions:

The Court will appoint every three years a special chamber of five judges, selected so far as possible with due regard to the provisions of article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this chamber. In the absence of any such demand, the Court will sit with the number of judges provided for in article 25. When desired by the parties or decided by the Court, the judges will be assisted by four technical assessors sitting with them, but without the right to vote.

If there is a national of one only of the parties sitting as a judge in the chamber referred to in the preceding paragraph, the President will invite one of the other judges to retire in favor of a judge chosen by the other party in accordance with article 31.

The technical assessors shall be chosen for each particular case in accordance with rules of procedure under article 30 from a list of "Assessors for Transit and Communications Cases" composed of two persons nominated by each Member of the League of Nations.

Art. 28. The special chambers provided for in articles 26 and 27 may, with the consent of the parties to the dispute, sit elsewhere than at The Hague.

Art. 29. With a view to the speedy dispatch of business, the Court shall form annually a chamber composed of three judges who, at the request of the contesting parties, may hear and determine cases by summary procedure.

Art. 30. The Court shall frame rules for regulating its procedure. In particular, it shall lay down rules for summary procedure.

Art. 31. Judges of the nationality of each contesting party shall retain their right to sit in the case before the Court.

If the Court includes upon the Bench a judge of the nationality of one of the parties only, the other party may select from among the deputy-judges a judge of its nationality, if there be one. If there should not be one, the party may choose a judge, preferably from among those persons who have been nominated as candidates as provided in articles 4 and 5.

If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these may proceed to select or choose a judge as provided in the preceding paragraph.

Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point is settled by the decision of the Court.

Judges selected or chosen as laid down in paragraphs 2 and 3 of this article shall fulfill the conditions required by articles 2, 16, 17, 20, 24 of this Statute. They shall take part in the decision on an equal footing with their colleagues.

Art. 32. The judges shall receive an annual indemnity to be deter-

mined by the Assembly of the League of Nations upon the proposal of the Council. This indemnity must not be decreased during the period of a judge's appointment.

The President shall receive a special grant for his period of office, to be fixed in the same way.

The Vice-President, judges and deputy-judges shall receive a grant for the actual performance of their duties, to be fixed in the same way.

Traveling expenses incurred in the performance of their duties shall be refunded to judges and deputy-judges who do not reside at the seat of the Court.

Grants due to judges selected or chosen as provided in article 31 shall be determined in the same way.

The salary of the Registrar shall be decided by the Council upon the proposal of the Court.

The Assembly of the League of Nations shall lay down, on the proposal of the Council, a special regulation fixing the conditions under which retiring pensions may be given to the personnel of the Court.

Art. 33. The expenses of the Court shall be borne by the League of Nations, in such a manner as shall be decided by the Assembly upon the proposal of the Council.

## CHAPTER II.—COMPETENCE OF THE COURT

Art. 34. Only States or Members of the League of Nations can be parties in cases before the Court.

Art. 35. The Court shall be open to the Members of the League and also to States mentioned in the Annex to the Covenant.

The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Council, but in no case shall such provisions place the parties in a position of inequality before the Court.

When a State which is not a Member of the League of Nations is a party to a dispute, the Court will fix the amount which that party is to contribute toward the expenses of the Court.

Art. 36. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in Treaties and Conventions in force.

The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory, ipso facto and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

(a) The interpretation of a Treaty.

(b) Any question of International Law.

(c) The existence of any fact which, if established, would constitute a breach of an international obligation.

(d) The nature or extent of the reparation to be made for the breach of an international obligation.

The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Art. 37. When a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such tribunal.

Art. 38. The Court shall apply:

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

2. International custom, as evidence of a general practice accepted as law;

3. The general principles of law recognized by civilized nations;

4. Subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This provision shall not prejudice the power of the Court to decide a case *ex æquo et bono*, if the parties agree thereto.

### CHAPTER III.—PROCEDURE

Art. 39. The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment will be delivered in French. If the parties agree that the case shall be conducted in English, the judgment will be delivered in English.

In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court will be given in French and English. In this case the Court will at the same time determine which of the two texts shall be considered as authoritative.

The Court may, at the request of the parties, authorize a language other than French or English to be used.

Art. 40. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the contesting parties must be indicated.

The Registrar shall forthwith communicate the application to all concerned.

He shall also notify the Members of the League of Nations through the Secretary-General.

Art. 41. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to reserve the respective rights of either party.

Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council.

Art. 42. The parties shall be represented by Agents.

They may have the assistance of Counsel or Advocates before the Court.

Art. 43. The procedure shall consist of two parts: written and oral.

The written proceedings shall consist of the communication to the judges and to the parties of cases, counter-cases and, if necessary, replies; also all papers and documents in support.

These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

A certified copy of every document produced by one party shall be communicated to the other party.

The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates.

Art. 44. For the service of all notices upon persons other than the agents, counsel and advocates, the Court shall apply direct to the Government of the State upon whose territory the notice has to be served.

The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

Art. 45. The hearing shall be under the control of the President or, in his absence, of the Vice-President; if both are absent, the senior judge shall preside.

Art. 46. The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.

Art. 47. Minutes shall be made at each hearing, and signed by the Registrar and the President.

These minutes shall be the only authentic record.

Art. 48. The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

Art. 49. The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.

Art. 50. The Court may, at any time, intrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an inquiry or giving an expert opinion.

Art. 51. During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in article 30.



Art. 52. After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

Art. 53. Whenever one of the parties shall not appear before the Court, or shall fail to defend his case, the other party may call upon the Court to decide in favor of his claim.

The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with articles 36 and 37, but also that the claim is well founded in fact and law.

Art. 54. When, subject to the control of the Court, the agents, advocates and counsel have completed their presentation of the case, the President shall declare the hearing closed.

The Court shall withdraw to consider the judgment.

The deliberations of the Court shall take place in private and remain secret.

Art. 55. All questions shall be decided by a majority of the judges present at the hearing.

In the event of an equality of votes, the President or his deputy shall have a casting vote.

Art. 56. The judgment shall state the reasons on which it is based.

It shall contain the names of the judges who have taken part in the decision.

Art. 57. If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion.

Art. 58. The judgment shall be signed by the President and by the Registrar. It shall be read in open Court, due notice having been given to the agents.

Art. 59. The decision of the Court has no binding force except between the parties and in respect of that particular case.

Art. 60. The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

Art. 61. An application for revision of a judgment can be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

The proceedings for revision will be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

The application for revision must be made at latest within six months of the discovery of the new fact.

No application for revision may be made after the lapse of ten years from the date of the sentence.

Art. 62. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene as a third party.

It will be for the Court to decide upon this request.

Art. 63. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith.

Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

Art. 64. Unless otherwise decided by the Court, each party shall bear its own costs.

#### PROTOCOL OF SIGNATURE

The Members of the League of Nations, through the undersigned, duly authorized, declare their acceptance of the adjoined Statute of the Permanent Court of International Justice, which was approved by a unanimous vote of the Assembly of the League on December 13th, 1920, at Geneva.

Consequently, they hereby declare that they accept the jurisdiction of the Court in accordance with the terms and subject to the conditions of the above-mentioned Statute.

The present Protocol, which has been drawn up in accordance with the decision taken by the Assembly of the League of Nations on December 13th, 1920, is subject to ratification. Each Power shall send its ratification to the Secretary-General of the League of Nations; the latter shall take the necessary steps to notify such ratification to the other signatory Powers. The ratification shall be deposited in the archives of the Secretariat of the League of Nations.

The said Protocol shall remain open for signature by the Members of the League of Nations and by the States mentioned in the Annex to the Covenant of the League.

The Statute of the Court shall come into force as provided in the above-mentioned decision.

Executed at Geneva, in a single copy, the French and English texts of which shall both be authentic, on the sixteenth day of December in the year nineteen hundred and twenty.

#### OPTIONAL CLAUSE

The undersigned, being duly authorized thereto, further declare, on behalf of their Government, that, from this date, they accept as com-

pulsory "ipso facto" and without special convention, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, under the following conditions: \*

\*The following states have signed the Protocol of Signature up to January 6, 1922:

Albania	Finland	Paraguay
Australia	France	Persia
Austria	Greece	Poland
Belgium	Haiti	Portugal
Bolivia	India	Roumania
Brazil	Italy	Salvador
Bulgaria	Japan	Serb-Croat-Slovene State
Canada	Latvia	Siam
Chile	Liberia	South Africa
China	Lithuania	Spain
Colombia	Luxemburg	Sweden
Costa Rica	Netherlands	Switzerland
Cuba	New Zealand	United Kingdom
Czecho-Slovakia	Norway	Uruguay
Denmark	Panama	Venezuela
Estonia		

The following states have signed the optional clause concerning compulsory jurisdiction of the Court:

Austria	Haiti	Panama
Brazil	Liberia	Portugal
Bulgaria	Lithuania	San Salvador
China	Luxemburg	Sweden
Costa Rica	Netherlands	Switzerland
Denmark	Norway	Uruguay
Finland		

The following states have deposited deeds of ratification to the general protocol:

Albania	Greece	Roumania
Australia	Haiti	Serb-Croat-Slovene State
Austria	India	Siam
Belgium	Italy	South Africa
Brazil	Japan	Spain
Bulgaria	Lithuania	Sweden
Canada	Netherlands	Switzerland
Cuba	New Zealand	United Kingdom
Czecho-Slovakia	Norway	Uruguay
Denmark	Poland	Venezuela
France	Portugal	

The following states have ratified their signature of the optional clause:

Bulgaria	Lithuania	Portugal
Brazil	Netherlands	Switzerland
China	Norway	Uruguay
Denmark		

The Cuban ratification of the general protocol has been received, but not yet notified to the Powers, because there is a slight doubt about its legal validity. The Chinese and Siamese ratifications of the general protocol are complete, although they have not yet been received in the Secretariat. Brazil has signed the optional clause with the reserve that its signature shall be considered invalid unless the clause is signed by at least two Powers permanently represented on the Council of the League of Nations—League of Nations, Official Journal, Feb., 1922, Annex 284, pp. 119, 120; March, 1922, p. 203.

## APPENDIX II

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### DECLARATION OF PARIS

April 16, 1856

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The above-mentioned Plenipotentiaries, being duly authorized, resolved to concert among themselves as to the means of attaining this object; and having come to an agreement, have adopted the following solemn declaration:

1. Privateering is and remains abolished.
  2. The neutral flag covers enemy's goods, with the exception of contraband of war.
  3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag.
  4. Blockades, in order to be binding, must be effective—that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy. \* \* \*
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### DECLARATION OF ST. PETERSBURG

Nov. 29—Dec. 11, 1868

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Considering that the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

That the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity;

The Contracting Parties engage mutually to renounce, in case of war among themselves, the employment by their military or naval forces of any projectile of less weight than 400 grammes, which is explosive or is charged with fulminating or inflammable substances. \* \* \*

**DECLARATION CONCERNING ASPHYXIATING GASES**

Signed at The Hague, July 29, 1899

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The contracting Powers agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases.

The present Declaration is only binding on the contracting Powers in the case of a war between two or more of them.

It shall cease to be binding from the time when, in a war between the contracting Powers, one of the belligerents shall be joined by a non-contracting Power.

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**DECLARATION CONCERNING EXPANDING BULLETS**

Signed at The Hague, July 29, 1899

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The contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

The present Declaration is only binding for the contracting Powers in the case of a war between two or more of them.

It shall cease to be binding from the time when, in a war between the contracting Powers, one of the belligerents is joined by a non-contracting Power.

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**GENEVA CONVENTION OF 1906 FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED IN ARMIES IN THE FIELD**

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**CHAPTER I.—THE SICK AND WOUNDED**

Article 1. Officers, soldiers, and other persons officially attached to armies, who are sick or wounded, shall be respected and cared for, without distinction of nationality, by the belligerent in whose power they are.

A belligerent, however, when compelled to leave his sick or wounded in the hands of his adversary, shall leave with them, so far as military conditions permit, a portion of the personnel and matériel of his sanitary service to assist in caring for them.

Art. 2. Subject to the care that must be taken of them under the preceding article, the sick and wounded of an army who fall into the power of the other belligerent become prisoners of war, and the general rules of international law in respect to prisoners become applicable to them.

The belligerents remain free, however, to mutually agree upon such clauses, by way of exception or favor, in relation to the wounded or sick as they may deem proper. They shall especially have authority to agree—

1. To mutually return the sick and wounded left on the field of battle after an engagement.

2. To send back to their own country the sick and wounded who have recovered, or who are in a condition to be transported and whom they do not desire to retain as prisoners.

3. To send the sick and wounded of the enemy to a neutral State, with the consent of the latter and on condition that it shall charge itself with their internment until the close of hostilities.

Art. 3. After every engagement the belligerent who remains in possession of the field of battle shall take measures to search for the wounded and to protect the wounded and dead from robbery and ill-treatment.

He will see that a careful examination is made of the bodies of the dead prior to their interment or incineration.

Art. 4. As soon as possible each belligerent shall forward to the authorities of their country or army the marks or military papers of identification found upon the bodies of the dead, together with a list of names of the sick and wounded taken in charge by him.

Belligerents will keep each other mutually advised of internments and transfers, together with admissions to hospitals and deaths which occur among the sick and wounded in their hands. They will collect all objects of personal use, valuables, letters, etc., which are found upon the field of battle, or have been left by the sick or wounded who have died in sanitary formations or other establishments, for transmission to persons in interest through the authorities of their own country.

Art. 5. Military authority may make an appeal to the charitable zeal of the inhabitants to receive and, under its supervision, to care for the sick and wounded of the armies, granting to persons responding to such appeals special protection and certain immunities.

#### CHAPTER II.—SANITARY FORMATIONS AND ESTABLISHMENTS

Art. 6. Mobile sanitary formations (i. e., those which are intended to accompany armies in the field) and the fixed establishments belonging to the sanitary service shall be protected and respected by belligerents.

Art. 7. The protection due to sanitary formations and establishments ceases if they are used to commit acts injurious to the enemy.

Art. 8. A sanitary formation or establishment shall not be deprived of the protection accorded by article 6 by the fact—

1. That the personnel of a formation or establishment is armed and uses its arms in self-defense or in defense of its sick and wounded.

2. That in the absence of armed hospital attendants, the formation is guarded by an armed detachment or by sentinels acting under competent orders.

3. That arms or cartridges, taken from the wounded and not yet turned over to the proper authorities, are found in the formation or establishment.

### CHAPTER III.—PERSONNEL

Art. 9. The personnel charged exclusively with the removal, transportation, and treatment of the sick and wounded, as well as with the administration of sanitary formations and establishments, and the chaplains attached to armies, shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be considered as prisoners of war.

These provisions apply to the guards of sanitary formations and establishments in the case provided for in section 2 of article 8.

Art. 10. The personnel of volunteer aid societies, duly recognized and authorized by their own governments, who are employed in the sanitary formations and establishments of armies, are assimilated to the personnel contemplated in the preceding article, upon condition that the said personnel shall be subject to military laws and regulations.

Each State shall make known to the other, either in time of peace or at the opening, or during the progress of hostilities, and in any case before actual employment, the names of the societies which it has authorized to render assistance, under its responsibility, in the official sanitary service of its armies.

Art. 11. A recognized society of a neutral State can only lend the services of its sanitary personnel and formations to a belligerent with the prior consent of its own government and the authority of such belligerent. The belligerent who has accepted such assistance is required to notify the enemy before making any use thereof.

Art. 12. Persons described in articles 9, 10, and 11 will continue in the exercise of their functions, under the direction of the enemy, after they have fallen into his power.

When their assistance is no longer indispensable they will be sent back to their army or country, within such period and by such route as may accord with military necessity. They will carry with them such effects, instruments, arms, and horses as are their private property.

Art. 13. While they remain in his power, the enemy will secure to the personnel mentioned in Article 9 the same pay and allowances to which persons of the same grade in his own army are entitled.

## CHAPTER IV.—MATÉRIEL

Art. 14. If mobile sanitary formations fall into the power of the enemy, they shall retain their matériel, including the teams, whatever may be the means of transportation and the conducting personnel. Competent military authority, however, shall have the right to employ it in caring for the sick and wounded. The restitution of the matériel shall take place in accordance with the conditions prescribed for the sanitary personnel, and, as far as possible, at the same time.

Art. 15. Buildings and matériel pertaining to fixed establishments shall remain subject to the laws of war, but can not be diverted from their use so long as they are necessary for the sick and wounded. Commanders of troops engaged in operations, however, may use them, in case of important military necessity, if, before such use, the sick and wounded who are in them have been provided for.

Art. 16. The matériel of aid societies admitted to the benefits of this Convention, in conformity to the conditions therein established, is regarded as private property, and, as such, will be respected under all circumstances, save that it is subject to the recognized right of requisition by belligerents in conformity to the laws and usages of war.

## CHAPTER V.—CONVOYS OF EVACUATION

Art. 17. Convoys of evacuation shall be treated as mobile sanitary formations subject to the following special provisions:

1. A belligerent intercepting a convoy may, if required by military necessity, break up such convoy, charging himself with the care of the sick and wounded whom it contains.

2. In this case the obligation to return the sanitary personnel, as provided for in article 12, shall be extended to include the entire military personnel employed, under competent orders, in the transportation and protection of the convoy.

The obligation to return the sanitary matériel, as provided for in article 14, shall apply to railway trains and vessels intended for interior navigation which have been especially equipped for evacuation purposes, as well as to the ordinary vehicles, trains, and vessels which belong to the sanitary service.

Military vehicles, with their teams, other than those belonging to the sanitary service, may be captured.

The civil personnel and the various means of transportation obtained by requisition, including railway matériel and vessels utilized for convoys, are subject to the general rules of international law.

## CHAPTER VI.—DISTINCTIVE EMBLEM

Art. 18. Out of respect to Switzerland the heraldic emblem of the red cross on a white ground, formed by the reversal of the federal



colors, is continued as the emblem and distinctive sign of the sanitary service of armies.

Art. 19. This emblem appears on flags and brassards as well as upon all matériel appertaining to the sanitary service, with the permission of the competent military authority.

Art. 20. The personnel protected in virtue of the first paragraph of article 9, and articles 10 and 11, will wear attached to the left arm a brassard bearing a red cross on a white ground, which will be issued and stamped by competent military authority, and accompanied by a certificate of identity in the case of persons attached to the sanitary service of armies who do not have military uniform.

Art. 21. The distinctive flag of the Convention can only be displayed over the sanitary formations and establishments which the Convention provides shall be respected and with the consent of the military authorities. It shall be accompanied by the national flag of the belligerent to whose service the formation or establishment is attached.

Sanitary formations which have fallen into the power of the enemy, however, shall fly no other flag than that of the Red Cross so long as they continue in that situation.

Art. 22. The sanitary formations of neutral countries which, under the conditions set forth in article 11, have been authorized to render their services, shall fly, with the flag of the Convention, the national flag of the belligerent to which they are attached. The provisions of the second paragraph of the preceding article are applicable to them.

Art. 23. The emblem of the red cross on a white ground and the words "Red Cross" or "Geneva Cross" may only be used, whether in time of peace or war, to protect or designate sanitary formations and establishments, the personnel and matériel protected by the Convention.

#### CHAPTER VII.—APPLICATION AND EXECUTION OF THE CONVENTION

Art. 24. The provisions of the present Convention are obligatory only on the contracting Powers, in case of war between two or more of them. The said provisions shall cease to be obligatory if one of the belligerent Powers should not be signatory to the Convention.

Art. 25. It shall be the duty of the commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing articles, as well as for unforeseen cases, in accordance with the instructions of their respective governments, and conformably to the general principles of this Convention.

Art. 26. The signatory Governments shall take the necessary steps to acquaint their troops, and particularly the protected personnel, with the provisions of this Convention and to make them known to the people at large. \* \* \*

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Art. 26. The signatory Governments shall take the necessary steps to acquaint their troops, and particularly the protected personnel, with the provisions of this Convention and to make them known to the people at large. \* \* \*

### CONVENTION RELATIVE TO THE OPENING OF HOSTILITIES

Signed at The Hague, October 18, 1907

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Article 1. The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.

Art. 2. The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph. Neutral Powers, nevertheless, cannot rely on the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war.

Art. 3. Article 1 of the present Convention shall take effect in case of war between two or more of the contracting Powers.

Article 2 is binding as between a belligerent Power which is a party to the Convention and neutral Powers which are also parties to the Convention. \* \* \*

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### CONVENTION RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND

Signed at The Hague, October 18, 1907

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Article 1. The contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention.

Art. 2. The provisions contained in the Regulations referred to in article 1, as well as in the present Convention, do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.

Art. 3. A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces. \* \* \*

SCOTT INT.LAW

**ANNEX TO THE CONVENTION**  
**REGULATIONS RESPECTING THE LAWS AND CUSTOMS OF WAR**  
**ON LAND**

**SECTION I.—ON BELLIGERENTS**

**CHAPTER I.—THE QUALIFICATIONS OF BELLIGERENTS**

Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

Art. 2. The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

Art. 3. The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.

**CHAPTER II.—PRISONERS OF WAR**

Art. 4. Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.

They must be humanely treated.

All their personal belongings, except arms, horses, and military papers, remain their property.

Art. 5. Prisoners of war may be interned in a town, fortress, camp, or other place, and bound not to go beyond certain fixed limits; but they can not be confined except as an indispensable measure of safety and only while the circumstances which necessitate the measure continue to exist.

Art. 6. The State may utilize the labor of prisoners of war according to their rank and aptitude, officers excepted. The tasks shall not be excessive and shall have no connection with the operations of the war.

Prisoners may be authorized to work for the public service, for private persons, or on their own account.

Work done for the State is paid for at the rates in force for work of a similar kind done by soldiers of the national army, or, if there are none in force, at a rate according to the work executed.

When the work is for other branches of the public service or for private persons the conditions are settled in agreement with the military authorities.

The wages of the prisoners shall go towards improving their position, and the balance shall be paid them on their release, after deducting the cost of their maintenance.

Art. 7. The Government into whose hands prisoners of war have fallen is charged with their maintenance.

In the absence of a special agreement between the belligerents, prisoners of war shall be treated as regards board, lodging, and clothing on the same footing as the troops of the Government who captured them.

Art. 8. Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary.

Escaped prisoners who are retaken before being able to rejoin their own army or before leaving the territory occupied by the army which captured them are liable to disciplinary punishment.

Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of the previous flight.

Art. 9. Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, and if he infringes this rule, he is liable to have the advantages given to prisoners of his class curtailed.

Art. 10. Prisoners of war may be set at liberty on parole if the laws of their country allow, and, in such cases, they are bound, on their personal honor, scrupulously to fulfil, both towards their own Government and the Government by whom they were made prisoners, the engagements they have contracted.

In such cases their own Government is bound neither to require of nor accept from them any service incompatible with the parole given.

Art. 11. A prisoner of war can not be compelled to accept his liberty on parole; similarly the hostile Government is not obliged to accede to the request of the prisoner to be set at liberty on parole.

Art. 12. Prisoners of war liberated on parole and recaptured bearing arms against the Government to whom they had pledged their honor, or against the allies of that Government, forfeit their right to be treated as prisoners of war, and can be brought before the courts.

Art. 13. Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands and whom the latter thinks expedient to detain, are entitled to be treated as prisoners of war, pro-

vided they are in possession of a certificate from the military authorities of the army which they were accompanying.

Art. 14. An inquiry office for prisoners of war as instituted on the commencement of hostilities in each of the belligerent States, and, when necessary, in neutral countries which have received belligerents in their territory. It is the function of this office to reply to all inquiries about the prisoners. It receives from the various services concerned full information respecting internments and transfers, releases on parole, exchanges, escapes, admissions into hospital, deaths, as well as other information necessary to enable it to make out and keep up to date an individual return for each prisoner of war. The office must state in this return the regimental number, name and surname, age, place of origin, rank, unit, wounds, date and place of capture, internment, wounding, and death, as well as any observations of a special character. The individual return shall be sent to the Government of the other belligerent after the conclusion of peace.

It is likewise the function of the inquiry office to receive and collect all objects of personal use, valuables, letters, etc., found on the field of battle or left by prisoners who have been released on parole, or exchanged, or who have escaped, or died in hospitals or ambulances, and to forward them to those concerned.

Art. 15. Relief societies for prisoners of war, which are properly constituted in accordance with the laws of their country and with the object of serving as the channel for charitable effort shall receive from the belligerents, for themselves and their duly accredited agents every facility for the efficient performance of their humane task within the bounds imposed by military necessities and administrative regulations. Agents of these societies may be admitted to the places of internment for the purpose of distributing relief, as also to the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an undertaking in writing to comply with all measures of order and police which the latter may issue.

Art. 16. Inquiry offices enjoy the privilege of free postage. Letters, money orders, and valuables, as well as parcels by post, intended for prisoners of war, or dispatched by them, shall be exempt from all postal duties in the countries of origin and destination, as well as in the countries they pass through.

Presents and relief in kind for prisoners of war shall be admitted free of all import or other duties, as well as of payments for carriage by the State railways.

Art. 17. Officers taken prisoners shall receive the same rate of pay as officers of corresponding rank in the country where they are detained, the amount to be ultimately refunded by their own Government.

Art. 18. Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of whatever

church they may belong to, on the sole condition that they comply with the measures of order and police issued by the military authorities.

Art. 19. The wills of prisoners of war are received or drawn up in the same way as for soldiers of the national army.

The same rules shall be observed regarding death certificates as well as for the burial of prisoners of war, due regard being paid to their grade and rank.

Art. 20. After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.

### CHAPTER III.—THE SICK AND WOUNDED

Art. 21. The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention.

## SECTION II.—HOSTILITIES

### CHAPTER I.—MEANS OF INJURING THE ENEMY, SIEGES, AND BOMBARDMENTS

Art. 22. The right of belligerents to adopt means of injuring the enemy is not unlimited.

Art. 23. In addition to the prohibitions provided by special Conventions, it is especially forbidden—

- (a) To employ poison or poisoned weapons;
- (b) To kill or wound treacherously individuals belonging to the hostile nation or army;
- (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;
- (d) To declare that no quarter will be given;
- (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering;
- (f) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;
- (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;
- (h) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.

A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

Art. 24. Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.



Art. 25. The attack or bombardment, *by whatever means*, of towns, villages, dwellings, or buildings which are undefended is prohibited.

Art. 26. The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.

Art. 27. In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

Art. 28. The pillage of a town or place, even when taken by assault, is prohibited.

#### CHAPTER II.—SPIES

Art. 29. A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, intrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.

Art. 30. A spy taken in the act shall not be punished without previous trial.

Art. 31. A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.

#### CHAPTER III.—FLAGS OF TRUCE

Art. 32. A person is regarded as a parlementaire who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag. He has a right to inviolability, as well as the trumpeter, bugler or drummer, the flag-bearer and interpreter who may accompany him.

Art. 33. The commander to whom a parlementaire is sent is not in all cases obliged to receive him.

He may take all the necessary steps to prevent the parlementaire taking advantage of his mission to obtain information.

In case of abuse, he has the right to detain the parlementaire temporarily.

Art. 34. The parlementaire loses his rights of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treason.

#### CHAPTER IV.—CAPITULATIONS

Art. 35. Capitulations agreed upon between the contracting Parties must take into account the rules of military honor.

Once settled, they must be scrupulously observed by both parties.

#### CHAPTER V.—ARMISTICES

Art. 36. An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

Art. 37. An armistice may be general or local. The first suspends the military operations of the belligerent States everywhere; the second only between certain fractions of the belligerent armies and within a fixed radius.

Art. 38. An armistice must be notified officially and in good time to the competent authorities and to the troops. Hostilities are suspended immediately after the notification, or on the date fixed.

Art. 39. It rests with the contracting Parties to settle, in the terms of the armistice, what communications may be held in the theatre of war with the inhabitants and between the inhabitants of one belligerent State and those of the other.

Art. 40. Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.

Art. 41. A violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the punishment of the offenders, or, if necessary, compensation for the losses sustained.

#### SECTION III.—MILITARY AUTHORITY OVER THE TERRITORY OF THE HOSTILE STATE

Art. 42. Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

Art. 43. The authority of the legitimate power having in fact passed

into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Art. 44. A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense.

Art. 45. It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.

Art. 46. Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

Private property can not be confiscated.

Art. 47. Pillage is formally forbidden.

Art. 48. If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.

Art. 49. If, in addition to the taxes mentioned in the above article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question.

Art. 50. No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they can not be regarded as jointly and severally responsible.

Art. 51. No contribution shall be collected except under a written order, and on the responsibility of a commander-in-chief.

The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.

For every contribution a receipt shall be given to the contributors.

Art. 52. Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

Art. 53. An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and,

generally, all movable property belonging to the State which may be used for military operations.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

Art. 54. Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made.

Art. 55. The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

Art. 56. The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

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## CONVENTION RESPECTING THE RIGHTS AND DUTIES OF NEUTRAL POWERS AND PERSONS IN CASE OF WAR ON LAND

Signed at The Hague, October 18, 1907

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### CHAPTER I.—THE RIGHTS AND DUTIES OF NEUTRAL POWERS

Article 1. The territory of neutral Powers is inviolable.

Art. 2. Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power.

Art. 3. Belligerents are likewise forbidden to—

(a) Erect on the territory of a neutral Power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea;

(b) Use any installation of this kind established by them before the war on the territory of a neutral Power for purely military purposes, and which has not been opened for the service of public messages.

Art. 4. Corps of combatants can not be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.

Art. 5. A neutral Power must not allow any of the acts referred to in articles 2 to 4 to occur on its territory.

It is not called upon to punish acts in violation of its neutrality unless the said acts have been committed on its own territory.

Art. 6. The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.

Art. 7. A neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet.

Art. 8. A neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals.

Art. 9. Every measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in articles 7 and 8 must be impartially applied by it to both belligerents.

A neutral Power must see to the same obligation being observed by companies or private individuals owning telegraph or telephone cables or wireless telegraphy apparatus.

Art. 10. The fact of a neutral Power resisting, even by force, attempts to violate its neutrality can not be regarded as a hostile act.

## CHAPTER II.—BELLIGERENTS INTERNED AND WOUNDED TENDED IN NEUTRAL TERRITORY

Art. 11. A neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war.

It may keep them in camps and even confine them in fortresses or in places set apart for this purpose.

It shall decide whether officers can be left at liberty on giving their parole not to leave the neutral territory without permission.

Art. 12. In the absence of a special convention to the contrary, the neutral Power shall supply the interned with the food, clothing, and relief required by humanity.

At the conclusion of peace the expenses caused by the internment shall be made good.

Art. 13. A neutral Power which receives escaped prisoners of war shall leave them at liberty. If it allows them to remain in its territory it may assign them a place of residence.

The same rule applies to prisoners of war brought by troops taking refuge in the territory of a neutral Power.

Art. 14. A neutral Power may authorize the passage over its territory of the sick and wounded belonging to the belligerent armies, on condition that the trains bringing them shall carry neither personnel nor war material. In such a case, the neutral Power is bound to take whatever measures of safety and control are necessary for the purpose.

The sick or wounded brought under these conditions into neutral territory by one of the belligerents, and belonging to the hostile party, must be guarded by the neutral Power so as to ensure their not taking part again in the military operations. The same duty shall devolve on the neutral State with regard to wounded or sick of the other army who may be committed to its care.

Art. 15. The Geneva Convention applies to sick and wounded interned in neutral territory.

### CHAPTER III.—NEUTRAL PERSONS

Art. 16. The nationals of a State which is not taking part in the war are considered as neutrals.

Art. 17. A neutral can not avail himself of his neutrality—

(a) If he commits hostile acts against a belligerent;

(b) If he commits acts in favor of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties.

In such a case, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act.

Art. 18. The following acts shall not be considered as committed in favor of one belligerent in the sense of article 17, letter (b):

(a) Supplies furnished or loans made to one of the belligerents, provided that the person who furnishes the supplies or who makes the loans lives neither in the territory of the other party nor in the territory occupied by him, and that the supplies do not come from these territories;

(b) Services rendered in matters of police or civil administration.

### CHAPTER IV.—RAILWAY MATERIAL

Art. 19. Railway material coming from the territory of neutral Powers, whether it be the property of the said Powers or of companies or private persons, and recognizable as such, shall not be requisitioned or utilized by a belligerent except where and to the extent that it is absolutely necessary. It shall be sent back as soon as possible to the country of origin.

A neutral Power may likewise, in case of necessity, retain and utilize to an equal extent material coming from the territory of the belligerent Power.

Compensation shall be paid by one party or the other in proportion to the material used, and to the period of usage.

CHAPTER V.—FINAL PROVISIONS

Art. 20. The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention. \* \* \*

CONVENTION RELATING TO THE STATUS OF ENEMY  
MERCHANT SHIPS AT THE OUTBREAK  
OF HOSTILITIES

Signed at The Hague, October 18, 1907

Article 1. When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.

The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out.

Art. 2. A merchant ship unable, owing to circumstances of force majeure, to leave the enemy port within the period contemplated in the above article, or which was not allowed to leave, can not be confiscated.

The belligerent may only detain it, without payment of compensation, but subject to the obligation of restoring it after the war, or requisition it on payment of compensation.

Art. 3. Enemy merchant ships which left their last port of departure before the commencement of the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities can not be confiscated. They are only liable to detention on the understanding that they shall be restored after the war without compensation, or to be requisitioned, or even destroyed, on payment of compensation, but in such cases provision must be made for the safety of the persons on board as well as the security of the ship's papers.

After touching at a port in their own country or at a neutral port, these ships are subject to the laws and customs of maritime war.

Art. 4. Enemy cargo on board the vessels referred to in articles 1 and 2 is likewise liable to be detained and restored after the termination of the war without payment of compensation, or to be requisitioned on payment of compensation, with or without the ship.

The same rule applies in the case of cargo on board the vessels referred to in article 3.

Art. 5. The present Convention does not affect merchant ships whose build shows that they are intended for conversion into war-ships.

Art. 6. The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention. \* \* \*

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### CONVENTION RELATING TO THE CONVERSION OF MERCHANT SHIPS INTO WAR SHIPS

Signed at The Hague, October 18, 1907

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Article 1. A merchant ship converted into a war ship can not have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control, and responsibility of the Power whose flag it flies.

Art. 2. Merchant ships converted into war ships must bear the external marks which distinguish the war ships of their nationality.

Art. 3. The commander must be in the service of the State and duly commissioned by the competent authorities. His name must figure on the list of the officers of the fighting fleet.

Art. 4. The crew must be subject to military discipline.

Art. 5. Every merchant ship converted into a war ship must observe in its operations the laws and customs of war.

Art. 6. A belligerent who converts a merchant ship into a war ship must, as soon as possible, announce such conversion in the list of war ships.

Art. 7. The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention. \* \* \*

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### CONVENTION RELATIVE TO THE LAYING OF AUTO- MATIC SUBMARINE CONTACT MINES

Signed at The Hague, October 18, 1907

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Article 1. It is forbidden—

1. To lay unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them;

2. To lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings;

3. To use torpedoes which do not become harmless when they have missed their mark.

Art. 2. It is forbidden to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping.



Art. 3. When anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping.

The belligerents undertake to do their utmost to render these mines harmless within a limited time, and, should they cease to be under surveillance, to notify the danger zones as soon as military exigencies permit, by a notice addressed to ship owners, which must also be communicated to the Governments through the diplomatic channel.

Art. 4. Neutral Powers which lay automatic contact mines off their coasts must observe the same rules and take the same precautions as are imposed on belligerents.

The neutral Power must inform ship owners, by a notice issued in advance, where automatic contact mines have been laid. This notice must be communicated at once to the Governments through the diplomatic channel.

Art. 5. At the close of the war, the contracting Powers undertake to do their utmost to remove the mines which they have laid, each Power removing its own mines.

As regards anchored automatic contact mines laid by one of the belligerents off the coast of the other, their position must be notified to the other party by the Power which laid them, and each Power must proceed with the least possible delay to remove the mines in its own waters.

Art. 6. The contracting Powers which do not at present own perfected mines of the pattern contemplated in the present Convention, and which, consequently, could not at present carry out the rules laid down in articles 1 and 3, undertake to convert the matériel of their mines as soon as possible, so as to bring it into conformity with the foregoing requirements.

Art. 7. The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention. \* \* \*

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## CONVENTION CONCERNING BOMBARDMENT BY NAVAL FORCES IN TIME OF WAR

Signed at The Hague, October 18, 1907

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### CHAPTER I.—THE BOMBARDMENT OF UNDEFENDED PORTS, TOWNS, VILLAGES, DWELLINGS, OR BUILDINGS

Article 1. The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden.

A place cannot be bombarded solely because automatic submarine contact mines are anchored off the harbor.

Art. 2. Military works, military or naval establishments, depots of

arms or war matériel, workshops or plant which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbor, are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable time of waiting, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed.

He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.

If for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is understood that the prohibition to bombard the undefended town holds good, as in the case given in paragraph 1, and that the commander shall take all due measures in order that the town may suffer as little harm as possible.

Art. 3. After due notice has been given, the bombardment of undefended ports, towns, villages, dwellings, or buildings may be commenced, if the local authorities, after a formal summons has been made to them, decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question.

These requisitions shall be in proportion to the resources of the place. They shall only be demanded in the name of the commander of the said naval force, and they shall, as far as possible, be paid for in cash; if not, they shall be evidenced by receipts.

Art. 4. Undefended ports, towns, villages, dwellings, or buildings may not be bombarded on account of failure to pay money contributions.

#### CHAPTER II.—GENERAL PROVISIONS

Art. 5. In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes.

It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large, stiff rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white.

Art. 6. If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities.

Art. 7. A town or place, even when taken by storm, may not be pillaged.

## CHAPTER III.—FINAL PROVISIONS

Art. 8. The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention. \* \* \*

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**CONVENTION FOR THE ADAPTATION TO MARITIME  
WARFARE OF THE PRINCIPLES OF THE  
GENEVA CONVENTION**

Signed at The Hague, October 18, 1907

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Article 1. Military hospital ships, that is to say, ships constructed or assigned by States specially and solely with a view to assisting the wounded, sick, and shipwrecked, the names of which have been communicated to the belligerent Powers at the commencement or during the course of hostilities, and in any case before they are employed, shall be respected, and can not be captured while hostilities last.

These ships, moreover, are not on the same footing as war ships as regards their stay in a neutral port.

Art. 2. Hospital ships, equipped wholly or in part at the expense of private individuals or officially recognized relief societies, shall be likewise respected and exempt from capture, if the belligerent Power to whom they belong has given them an official commission and has notified their names to the hostile Power at the commencement of or during hostilities, and in any case before they are employed.

These ships must be provided with a certificate from the competent authorities declaring that the vessels have been under their control while fitting out and on final departure.

Art. 3. Hospital ships, equipped wholly or in part at the expense of private individuals or officially recognized societies of neutral countries shall be respected and exempt from capture, on condition that they are placed under the control of one of the belligerents, with the previous consent of their own Government and with the authorization of the belligerent himself, and that the latter has notified their names to his adversary at the commencement of or during hostilities, and in any case, before they are employed.

Art. 4. The ships mentioned in articles 1, 2, and 3 shall afford relief and assistance to the wounded, sick, and shipwrecked of the belligerents without distinction of nationality.

The Governments undertake not to use these ships for any military purpose.

These vessels must in no wise hamper the movements of the combatants.

During and after an engagement they will act at their own risk and peril.

The belligerents shall have the right to control and search them; they can refuse to help them, order them off, make them take a certain course, and put a commissioner on board; they can even detain them, if important circumstances require it.

As far as possible, the belligerents shall enter in the log of the hospital ships the orders which they give them.

Art. 5. Military hospital ships shall be distinguished by being painted white outside with a horizontal band of green about a meter and a half in breadth.

The ships mentioned in articles 2 and 3 shall be distinguished by being painted white outside with a horizontal band of red about a meter and a half in breadth.

The boats of the ships above mentioned, as also small craft which may be used for hospital work, shall be distinguished by similar painting.

All hospital ships shall make themselves known by hoisting, with their national flag, the white flag with a red cross provided by the Geneva Convention, and further, if they belong to a neutral State, by flying at the mainmast the national flag of the belligerent under whose control they are placed.

Hospital ships which, in the terms of article 4, are detained by the enemy must haul down the national flag of the belligerent to whom they belong.

The ships and boats above mentioned which wish to ensure by night the freedom from interference to which they are entitled, must, subject to the assent of the belligerent they are accompanying, take the necessary measures to render their special painting sufficiently plain.

Art. 6. The distinguishing signs referred to in article 5 can only be used, whether in time of peace or war, for protecting or indicating the ships therein mentioned.

Art. 7. In the case of a fight on board a war ship, the sick wards shall be respected and spared as far as possible.

The said sick wards and the matériel belonging to them remain subject to the laws of war; they can not, however, be used for any purpose other than that for which they were originally intended, so long as they are required for the sick and wounded.

The commander, however, into whose power they have fallen may apply them to other purposes, if the military situation requires it, after seeing that the sick and wounded on board are properly provided for.

Art. 8. Hospital ships and sick wards of vessels are no longer entitled to protection if they are employed for the purpose of injuring the enemy.

The fact of the staff of the said ships and sick wards being armed for maintaining order and for defending the sick and wounded, and

the presence of wireless telegraphy apparatus on board, is not a sufficient reason for withdrawing protection.

Art. 9. Belligerents may appeal to the charity of the commanders of neutral merchant ships, yachts, or boats to take on board and tend the sick and wounded.

Vessels responding to this appeal, and also vessels which have of their own accord rescued sick, wounded, or shipwrecked men, shall enjoy special protection and certain immunities. In no case can they be captured for having such persons on board, but, apart from special undertakings that have been made to them, they remain liable to capture for any violations of neutrality they may have committed.

Art. 10. The religious, medical, and hospital staff of any captured ship is inviolable, and its members can not be made prisoners of war. On leaving the ship they take away with them the objects and surgical instruments which are their own private property.

This staff shall continue to discharge its duties while necessary, and can afterwards leave, when the commander-in-chief considers it possible.

The belligerents must guarantee to the said staff, when it has fallen into their hands, the same allowances and pay which are given to the staff of corresponding rank in their own navy.

Art. 11. Sailors and soldiers on board, when sick or wounded, as well as other persons officially attached to fleets or armies, whatever their nationality, shall be respected and tended by the captors.

Art. 12. Any war ship belonging to a belligerent may demand that sick, wounded, or shipwrecked men on board military hospital ships, hospital ships belonging to relief societies or to private individuals, merchant ships, yachts, or boats, whatever the nationality of these vessels, should be handed over.

Art. 13. If sick, wounded, or shipwrecked persons are taken on board a neutral war ship, every possible precaution must be taken that they do not again take part in the operations of the war.

Art. 14. The shipwrecked, wounded, or sick of one of the belligerents who fall into the power of the other belligerent are prisoners of war. The captor must decide, according to circumstances, whether to keep them, send them to a port of his own country, to a neutral port, or even to an enemy port. In this last case, prisoners thus repatriated cannot serve again while the war lasts.

Art. 15. The shipwrecked, sick, or wounded, who are landed at a neutral port with the consent of the local authorities, must, unless an arrangement is made to the contrary between the neutral State and the belligerent States, be guarded by the neutral State so as to prevent them again taking part in the operations of the war.

The expenses of tending them in hospital and interning them shall be borne by the State to which the shipwrecked, sick, or wounded persons belong.

Art. 16. After every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them, as well as the dead, against pillage and ill-treatment.

They shall see that the burial, whether by land or sea, or cremation of the dead shall be preceded by a careful examination of the corpse.

Art. 17. Each belligerent shall send, as early as possible, to the authorities of their country, navy, or army the military marks or documents of identity found on the dead and the description of the sick and wounded picked up by him.

The belligerents shall keep each other informed as to internments and transfers as well as to the admissions into hospitals and deaths which have occurred among the sick and wounded in their hands. They shall collect all the objects of personal use, valuables, letters, etc., which are found in the captured ships, or which have been left by the sick or wounded who died in hospital, in order to have them forwarded to the persons concerned by the authorities of their own country.

Art. 18. The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.

Art. 19. The commanders-in-chief of the belligerent fleets must see that the above articles are properly carried out; they will have also to see to cases not covered thereby, in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention.

Art. 20. The signatory Powers shall take the necessary measures for bringing the provisions of the present Convention to the knowledge of their naval forces, and especially of the members entitled thereunder to immunity, and for making them known to the public.

Art. 21. The signatory Powers likewise undertake to enact or to propose to their legislatures, if their criminal laws are inadequate, the measures necessary for checking in time of war individual acts of pillage and ill-treatment in respect to the sick and wounded in the fleet, as well as for punishing, as an unjustifiable adoption of naval or military marks, the unauthorized use of the distinctive marks mentioned in article 5 by vessels not protected by the present Convention.

They will communicate to each other, through the Netherland Government, the enactments for preventing such acts at the latest within five years of the ratification of the present Convention.

Art. 22. In the case of operations of war between the land and sea forces of belligerents, the provisions of the present Convention do not apply except between the forces actually on board ship. \* \* \*

## CONVENTION RELATIVE TO CERTAIN RESTRICTIONS WITH REGARD TO THE EXERCISE OF THE RIGHT OF CAPTURE IN NAVAL WAR

Signed at The Hague, October 18, 1907

### CHAPTER I.—POSTAL CORRESPONDENCE

Article 1. The postal correspondence of neutrals or belligerents, whatever its official or private character may be, found on the high seas on board a neutral or enemy ship, is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay.

The provisions of the preceding paragraph do not apply, in case of violation of blockade, to correspondence destined for or proceeding from a blockaded port.

Art. 2. The inviolability of postal correspondence does not exempt a neutral mail ship from the laws and customs of maritime war as to neutral merchant ships in general. The ship, however, may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible.

### CHAPTER II.—THE EXEMPTION FROM CAPTURE OF CERTAIN VESSELS

Art. 3. Vessels used exclusively for fishing along the coast or small boats employed in local trade are exempt from capture, as well as their appliances, rigging, tackle, and cargo.

They cease to be exempt as soon as they take any part whatever in hostilities.

The contracting Powers agree not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance.

Art. 4. Vessels charged with religious, scientific, or philanthropic missions are likewise exempt from capture.

### CHAPTER III.—REGULATIONS REGARDING THE CREWS OF ENEMY MERCHANT SHIPS CAPTURED BY A BELLIGERENT

Art. 5. When an enemy merchant ship is captured by a belligerent, such of its crew as are nationals of a neutral State are not made prisoners of war.

The same rule applies in the case of the captain and officers likewise nationals of a neutral State, if they promise formally in writing not to serve on an enemy ship while the war lasts.

The captain, officers, and members of the crew, when nationals of the enemy State, are not made prisoners of war, on condition that they

make a formal promise in writing, not to undertake, while hostilities last, any service connected with the operations of the war.

Art. 7. The names of the persons retaining their liberty under the conditions laid down in article 5, paragraph 2, and in article 6, are notified by the belligerent captor to the other belligerent. The latter is forbidden knowingly to employ the said persons.

Art. 8. The provisions of the three preceding articles do not apply to ships taking part in the hostilities.

#### CHAPTER IV.—FINAL PROVISIONS

Art. 9. The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention. \* \* \*

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### CONVENTION CONCERNING THE RIGHTS AND DUTIES OF NEUTRAL POWERS IN NAVAL WAR

Signed at The Hague, October 18, 1907

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Article 1. Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.

Art. 2. Any act of hostility, including capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.

Art. 3. When a ship has been captured in the territorial waters of a neutral Power, this Power must employ, if the prize is still within its jurisdiction, the means at its disposal to release the prize with its officers and crew, and to intern the prize crew.

If the prize is not in the jurisdiction of the neutral Power, the captor Government, on the demand of that Power, must liberate the prize with its officers and crew.

Art. 4. A prize court can not be set up by a belligerent on neutral territory or on a vessel in neutral waters.

Art. 5. Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea.

Art. 6. The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war ships, ammunition, or war material of any kind whatever, is forbidden.



Art. 7. A neutral Power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunition, or, in general, of anything which could be of use to an army or fleet.

Art. 8. A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which had been adapted entirely or partly within the said jurisdiction for use in war.

Art. 9. A neutral Power must apply impartially to the two belligerents the conditions, restrictions, or prohibitions made by it in regard to the admission into its ports, roadsteads, or territorial waters, of belligerent warships or of their prizes.

Nevertheless, a neutral Power may forbid a belligerent vessel which has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports or roadsteads.

Art. 10. The neutrality of a Power is not affected by the mere passage through its territorial waters of war ships or prizes belonging to belligerents.

Art. 11. A neutral Power may allow belligerent war ships to employ its licensed pilots.

Art. 12. In the absence of special provisions to the contrary in the legislation of a neutral Power, belligerent war ships are not permitted to remain in the ports, roadsteads, or territorial waters of the said Power for more than twenty-four hours, except in the cases covered by the present Convention.

Art. 13. If a Power which has been informed of the outbreak of hostilities learns that a belligerent warship is in one of its ports or roadsteads, or in its territorial waters, it must notify the said ship to depart within twenty-four hours or within the time prescribed by local regulations.

Art. 14. A belligerent war ship may not prolong its stay in a neutral port beyond the permissible time except on account of damage or stress of weather. It must depart as soon as the cause of the delay is at an end.

The regulations as to the question of the length of time which these vessels may remain in neutral ports, roadsteads, or waters, do not apply to war ships, devoted exclusively to religious, scientific, or philanthropic purposes.

Art. 15. In the absence of special provisions to the contrary in the legislation of a neutral Power, the maximum number of war ships belonging to a belligerent which may be in one of the ports or roadsteads of that Power simultaneously shall be three.

Art. 16. When war ships belonging to both belligerents are present simultaneously in a neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of the ship belonging to one belligerent and the departure of the ship belonging to the other.

The order of departure is determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of its stay is permissible.

A belligerent war ship may not leave a neutral port or roadstead until twenty-four hours after the departure of a merchant ship flying the flag of its adversary.

Art. 17. In neutral ports and roadsteads belligerent war ships may only carry out such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatsoever to their fighting force. The local authorities of the neutral Power shall decide what repairs are necessary, and these must be carried out with the least possible delay.

Art. 18. Belligerent war ships may not make use of neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war material or their armament, or for completing their crews.

Art. 19. Belligerent war ships may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard.

Similarly these vessels may only ship sufficient fuel to enable them to reach the nearest port in their own country. They may, on the other hand, fill up their bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied.

If, in accordance with the law of the neutral Power, the ships are not supplied with coal within twenty-four hours of their arrival, the permissible duration of their stay is extended by twenty-four hours.

Art. 20. Belligerent war ships which have shipped fuel in a port belonging to a neutral Power may not within the succeeding three months replenish their supply in a port of the same Power.

Art. 21. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

Art. 22. A neutral Power, must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in article 21.

Art. 23. A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there

to be sequestered pending the decision of a Prize Court. It may have the prize taken to another of its ports.

If the prize is convoyed by a war ship, the prize crew may go on board the convoying ship.

If the prize is not under convoy, the prize crew are left at liberty.

Art. 24. If, notwithstanding the notification of the neutral Power, a belligerent ship of war does not leave a port where it is not entitled to remain, the neutral Power is entitled to take such measures as it considers necessary to render the ship incapable of taking the sea during the war, and the commanding officer of the ship must facilitate the execution of such measures.

When a belligerent ship is detained by a neutral Power, the officers and crew are likewise detained.

The officers and crew thus detained may be left in the ship or kept either on another vessel or on land, and may be subjected to the measures of restriction which it may appear necessary to impose upon them. A sufficient number of men for looking after the vessel must, however, be always left on board.

The officers may be left at liberty on giving their word not to quit the neutral territory without permission.

Art. 25. A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above articles occurring in its ports or roadsteads or in its waters.

Art. 26. The exercise by a neutral Power of the rights laid down in the present Convention can under no circumstances be considered as an unfriendly act by one or other belligerent who has accepted the articles relating thereto.

Art. 27. The contracting Powers shall communicate to each other in due course all laws, proclamations, and other enactments regulating in their respective countries the status of belligerent war ships in their ports and waters, by means of a communication addressed to the Government of the Netherlands, and forwarded immediately by that Government to the other contracting Powers.

Art. 28. The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention. \* \* \*

## DECLARATION PROHIBITING THE DISCHARGE OF PROJECTILES AND EXPLOSIVES FROM BALLOONS

Signed at the Hague, October 18, 1907

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The contracting Powers agree to prohibit, for a period extending to the close of the Third Peace Conference, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature.

The present Declaration is only binding on the contracting Powers in case of war between two or more of them.

It shall cease to be binding from the time when, in a war between the contracting Powers, one of the belligerents is joined by a noncontracting Power. \* \* \*

In the event of one of the high contracting Parties denouncing the present Declaration, such denunciation shall not take effect until a year after the notification made in writing to the Netherland Government, and forthwith communicated by it to all the other contracting Powers.

This denunciation shall only have effect in regard to the notifying Power. \* \* \*

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## DECLARATION OF LONDON <sup>1</sup>

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### CHAPTER I.—BLOCKADE IN TIME OF WAR

Article 1. A blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy.

Art. 2. In accordance with the Declaration of Paris of 1856, a blockade, in order to be binding, must be effective; that is to say,

<sup>1</sup> The Declaration of London of February 26, 1909, signed by Austria-Hungary, France, Germany, Great Britain, Italy, Japan, the Netherlands, Russia, Spain and the United States, was not ratified by any of the Signatory Powers. At the commencement of the World War it was proposed by the United States, on August 6, 1914, that its provisions should be observed by the various belligerents. They complied, with certain additions and modifications, but during the war, the Allied Powers withdrew their assent. The British Order in Council withdrawing its assent to the Declaration of London was dated July 7, 1916. See Special Supplement to the American Journal of International Law, vol. 10, 1916, p. 5. The French decree was of the same date. *Id.* p. 11. The withdrawal in each case was accompanied by a memorandum in which the Powers stated the reasons which led them to withdraw their assent to the Declaration of London and "to restrict themselves solely to the application of the rules of international law as formerly recognized."

Because of frequent reference in adjudged prize cases to the Declaration of London, it has been deemed advisable to include it in the Appendix to this volume.

it must be maintained by a force sufficient really to prevent access to the enemy coastline.

Art. 3. The question whether a blockade is effective is a question of fact.

Art. 4. A blockade is not regarded as raised if the blockading force is temporarily withdrawn on account of stress of weather.

Art. 5. A blockade must be applied impartially to the ships of all nations.

Art. 6. The Commander of a blockading force may give permission to a warship to enter, and subsequently to leave, a blockaded port.

Art. 7. In circumstances of distress, acknowledged by an officer of the blockading force, a neutral vessel may enter a place under blockade and subsequently leave it, provided that she has neither discharged nor shipped any cargo there.

Art. 8. A blockade, in order to be binding, must be declared in accordance with article 9, and notified in accordance with articles 11 and 16.

Art. 9. A declaration of blockade is made either by the blockading Power or by the naval authorities acting in its name.

It specifies—

- (1) The date when the blockade begins;
- (2) The geographical limits of the coast line under blockade;
- (3) The period within which neutral vessels may come out.

Art. 10. If the operations of the blockading Power, or of the naval authorities acting in its name, do not tally with the particulars, which, in accordance with article 9 (1) and (2), must be inserted in the declaration of blockade, the declaration is void, and a new declaration is necessary in order to make the blockade operative.

Art. 11. A declaration of blockade is notified—

(1) To neutral Powers, by the blockading Power by means of a communication addressed to the Governments direct, or to their representatives accredited to it;

(2) To the local authorities, by the officer commanding the blockading force. The local authorities will, in turn, inform the foreign consular officers at the port or on the coastline under blockade as soon as possible.

Art. 12. The rules as to declaration and notification of blockade apply to cases where the limits of a blockade are extended, or where a blockade is re-established after having been raised.

Art. 13. The voluntary raising of a blockade, as also any restriction in the limits of a blockade, must be notified in the manner prescribed by article 11.

Art. 14. The liability of a neutral vessel to capture for breach of blockade is contingent on her knowledge, actual or presumptive, of the blockade.

Art. 15. Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notifi-

cation of the blockade to the Power to which such port belongs, provided that such notification was made in sufficient time.

Art. 16. If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, the notification must be made to the vessel itself by an officer of one of the ships of the blockading force. This notification should be entered in the vessel's log-book, and must state the day and hour, and the geographical position of the vessel at the time.

If, through the negligence of the officer commanding the blockading force, no declaration of blockade has been notified to the local authorities, or, if in the declaration, as notified, no period has been mentioned within which neutral vessels may come out, a neutral vessel coming out of the blockaded port must be allowed to pass free.

Art. 17. Neutral vessels may not be captured for breach of blockade except within the area of operations of the warships detailed to render the blockade effective.

Art. 18. The blockading forces must not bar access to neutral ports or coasts.

Art. 19. Whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured for breach of blockade, if, at the moment, she is on her way to a non-blockaded port.

Art. 20. A vessel which has broken blockade outwards, or which has attempted to break blockade inwards, is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned, or if the blockade is raised, her capture can no longer be effected.

Art. 21. A vessel found guilty of breach of blockade is liable to condemnation. The cargo is also condemned, unless it is proved that at the time of the shipment of the goods the shipper neither knew nor could have known of the intention to break the blockade.

## CHAPTER II.—CONTRABAND OF WAR

Art. 22. The following articles may, without notice, be treated as contraband of war, under the name of absolute contraband:

(1) Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.

(2) Projectiles, charges, and cartridges of all kinds, and their distinctive component parts.

(3) Powder and explosives specially prepared for use in war.

(4) Gun-mountings, limber boxes, limbers, military wagons, field forges, and their distinctive component parts.

(5) Clothing and equipment of a distinctively military character.

(6) All kinds of harness of a distinctively military character.

(7) Saddle, draught, and pack animals suitable for use in war.

(8) Articles of camp equipment, and their distinctive component parts.

(9) Armour plates.

(10) Warships, including boats, and their distinctive component parts of such a nature that they can only be used on a vessel of war.

(11) Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea.

Art. 23. Articles exclusively used for war may be added to the list of absolute contraband by a declaration, which must be notified.

Such notification must be addressed to the Governments of other Powers, or to their representatives accredited to the Power making the declaration. A notification made after the outbreak of hostilities is addressed only to neutral Powers.

Art. 24. The following articles, susceptible of use in war as well as for purposes of peace, may, without notice, be treated as contraband of war, under the name of conditional contraband:

(1) Foodstuffs.

(2) Forage and grain, suitable for feeding animals.

(3) Clothing, fabrics for clothing, and boots and shoes, suitable for use in war.

(4) Gold and silver in coin or bullion; paper money.

(5) Vehicles of all kinds available for use in war, and their component parts.

(6) Vessels, craft, and boats of all kinds; floating docks, parts of docks and their component parts.

(7) Railway material, both fixed and rolling-stock, and material for telegraphs, wireless telegraphs, and telephones.

(8) Balloons and flying machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying machines.

(9) Fuel; lubricants.

(10) Powder and explosives not specially prepared for use in war.

(11) Barbed wire and implements for fixing and cutting the same.

(12) Horseshoes and shoeing materials.

(13) Harness and saddlery.

(14) Field Glasses, telescopes, chronometers, and all kinds of nautical instruments.

Art. 25. Articles susceptible of use in war as well as for purposes of peace, other than those enumerated in articles 22 and 24, may be added to the list of conditional contraband by a declaration, which must be notified in the manner provided for in the second paragraph of article 23.

Art. 26. If a Power waives, so far as it is concerned, the right to treat as contraband of war an article comprised in any of the classes enumerated in articles 22 and 24, such intention shall be announced by a declaration, which must be notified in the manner provided for in the second paragraph of article 23.

Art. 27. Articles which are not susceptible of use in war may not be declared contraband of war.

Art. 28. The following may not be declared contraband of war:

- (1) Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries, and yarns of the same.
- (2) Oil seeds and nuts; copra.
- (3) Rubber, resins, gums, and lacs; hops.
- (4) Raw hides and horns, bones and ivory.
- (5) Natural and artificial manures, including nitrates and phosphates for agricultural purposes.
- (6) Metallic ores.
- (7) Earths, clays, lime, chalk, stone, including marble, bricks, slates, and tiles.
- (8) Chinaware and glass.
- (9) Paper and paper-making materials.
- (10) Soap, paint and colours, including articles exclusively used in their manufacture, and varnish.
- (11) Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper.
- (12) Agricultural, mining, textile, and printing machinery.
- (13) Precious and semi-precious stones, pearls, mother-of-pearl, and coral.
- (14) Clocks and watches other than chronometers.
- (15) Fashion and fancy goods.
- (16) Feathers of all kinds, hairs, and bristles.
- (17) Articles of household furniture and decoration; office furniture and requisites.

Art. 29. Likewise the following may not be treated as contraband of war:

(1) Articles serving exclusively to aid the sick and wounded. They can, however, in case of urgent military necessity and subject to the payment of compensation be requisitioned if their destination is that specified in article 30.

(2) Articles intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage.

Art. 30. Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails transshipment or a subsequent transport by land.

Art. 31. Proof of the destination specified in article 30 is complete in the following cases:

(1) When the goods are documented for discharge in an enemy port, or for delivery to the armed forces of the enemy.

(2) When the vessel is to call at enemy ports only, or when she is to touch at an enemy port or meet the armed forces of the enemy



before reaching the neutral port for which the goods in question are documented.

Art. 32. Where a vessel is carrying absolute contraband, her papers are conclusive proof as to the voyage on which she is engaged, unless she is found clearly out of the course indicated by her papers and unable to give adequate reasons to justify such deviation.

Art. 33. Conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or of a government department of the enemy State, unless in this latter case the circumstances show that the goods cannot in fact be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under article 24(4).

Art. 34. The destination referred to in article 33 is presumed to exist if the goods are consigned to enemy authorities, or to a contractor established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy. A similar presumption arises if the goods are consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy. No such presumption, however, arises in the case of a merchant vessel bound for one of these places if it is sought to prove that she herself is contraband.

In cases where the above presumptions do not arise, the destination is presumed to be innocent.

The presumptions set up by this article may be rebutted.

Art. 35. Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port.

The ship's papers are conclusive proof both as to the voyage on which the vessel is engaged and as to the port of discharge of the goods, unless she is found clearly out of the course indicated by her papers, and unable to give adequate reasons to justify such deviation.

Art. 36. Notwithstanding the provisions of article 35, conditional contraband, if shown to have the destination referred to in article 33, is liable to capture in cases where the enemy country has no seaboard.

Art. 37. A vessel carrying goods liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerents throughout the whole of her voyage, even if she is to touch at a port of call before reaching the hostile destination.

Art. 38. A vessel may not be captured on the ground that she has carried contraband on a previous occasion if such carriage is in point of fact at an end.

Art. 39. Contraband goods are liable to condemnation.

Art. 40. A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo.

Art. 41. If a vessel carrying contraband is released, she may be condemned to pay the costs and expenses incurred by the captor in respect of the proceedings in the national prize court and the custody of the ship and cargo during the proceedings.

Art. 42. Goods which belong to the owner of the contraband and are on board the same vessel are liable to condemnation.

Art. 43. If a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation; the vessel herself and the remainder of the cargo are not liable to condemnation or to the costs and expenses referred to in article 41. The same rule applies if the master, after becoming aware of the outbreak of hostilities, or of the declaration of contraband, has had no opportunity of discharging the contraband.

A vessel is deemed to be aware of the existence of a state of war, or of a declaration of contraband, if she left a neutral port subsequently to the notification to the Power to which such port belongs of the outbreak of hostilities or of the declaration of contraband respectively, provided that such notification was made in sufficient time. A vessel is also deemed to be aware of the existence of a state of war if she left an enemy port after the outbreak of hostilities.

Art. 44. A vessel which has been stopped on the ground that she is carrying contraband, and which is not liable to condemnation on account of the proportion of contraband on board, may, when the circumstances permit, be allowed to continue her voyage if the master is willing to hand over the contraband to the belligerent warship.

The delivery of the contraband must be entered by the captor on the logbook of the vessel stopped, and the master must give the captor duly certified copies of all relevant papers.

The captor is at liberty to destroy the contraband that has been handed over to him under these conditions.

### CHAPTER III.—UNNEUTRAL SERVICE

Art. 45. A neutral vessel will be condemned and will, in a general way, receive the same treatment as a neutral vessel liable to condemnation for carriage of contraband:

(1) If she is on a voyage specially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy, or with a view to the transmission of intelligence in the interest of the enemy.

(2) If, to the knowledge of either the owner, the charterer, or the master, she is transporting a military detachment of the enemy, or one or more persons who, in the course of the voyage, directly assist the operations of the enemy.

In the cases specified under the above heads, goods belonging to the owner of the vessel are likewise liable to condemnation.

The provisions of the present article do not apply if the vessel is

encountered at sea while unaware of the outbreak of hostilities, or if the master, after becoming aware of the outbreak of hostilities, has had no opportunity of disembarking the passengers. The vessel is deemed to be aware of the existence of a state of war if she left an enemy port subsequently to the outbreak of hostilities, or a neutral port subsequently to the notification of the outbreak of hostilities to the Power to which such port belongs, provided that such notification was made in sufficient time.

Art. 46. A neutral vessel will be condemned and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel:

- (1) If she takes a direct part in the hostilities;
- (2) If she is under the orders or control of an agent placed on board by the enemy Government;
- (3) If she is in the exclusive employment of the enemy Government;
- (4) If she is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy.

In the cases covered by the present article, goods belonging to the owner of the vessel are likewise liable to condemnation.

Art. 47. Any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel, may be made a prisoner of war, even though there be no ground for the capture of the vessel.

#### CHAPTER IV.—DESTRUCTION OF NEUTRAL PRIZES

Art. 48. A neutral vessel which has been captured may not be destroyed by the captor; she must be taken into such port as is proper for the determination there of all questions concerning the validity of the capture.

Art. 49. As an exception, a neutral vessel which has been captured by a belligerent warship, and which would be liable to condemnation, may be destroyed if the observance of article 48 would involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time.

Art. 50. Before the vessel is destroyed all persons on board must be placed in safety, and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the warship.

Art. 51. A captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the prize, establish that he only acted in the face of an exceptional necessity of the nature contemplated in Article 49. If he fails to do this, he must compensate the parties interested and no examination shall be made of the question whether the capture was valid or not.

Art. 52. If the capture of a neutral vessel is subsequently held to be invalid, though the act of destruction has been held to have been justifiable, the captor must pay compensation to the parties interested, in place of the restitution to which they would have been entitled.

Art. 53. If neutral goods not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation.

Art. 54. The captor has the right to demand the handing over, or to proceed himself to the destruction of, any goods liable to condemnation found on board a vessel not herself liable to condemnation, provided that the circumstances are such as would, under article 49, justify the destruction of a vessel herself liable to condemnation. The captor must enter the goods surrendered or destroyed in the logbook of the vessel stopped, and must obtain duly certified copies of all relevant papers. When the goods have been handed over or destroyed, and the formalities duly carried out, the master must be allowed to continue his voyage.

The provisions of articles 51 and 52 respecting the obligations of a captor who has destroyed a neutral vessel are applicable.

#### CHAPTER V.—TRANSFER TO A NEUTRAL FLAG

Art. 55. The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void. This presumption may be rebutted.

Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of, nor the profits arising from the employment of, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities and if the bill of sale is not on board, the capture of the vessel gives no right to damages.

Art. 56. The transfer of an enemy vessel to a neutral flag effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.

There, however, is an absolute presumption that a transfer is void:

(1) If the transfer has been made during a voyage or in a blockaded port.

(2) If a right to repurchase or recover the vessel is reserved to the vendor.

(3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing, have not been fulfilled.

#### CHAPTER VI.—ENEMY CHARACTER

Art. 57. Subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly.

The case where a neutral vessel is engaged in a trade which is closed in time of peace, remains outside the scope of, and is in no wise affected by, this rule.

Art. 58. The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner.

Art. 59. In the absence of proof of the neutral character of goods found on board an enemy vessel, they are presumed to be enemy goods.

Art. 60. Enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded.

If, however, prior to the capture, a former neutral owner exercises, on the bankruptcy of an existing enemy owner, a recognized legal right to recover the goods, they regain their neutral character.

#### CHAPTER VII.—CONVOY

Art. 61. Neutral vessels under national convoy are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent warship, all information as to the character of the vessels and their cargoes, which could be obtained by search.

Art. 62. If the commander of the belligerent warship has reason to suspect that the confidence of the commander of the convoy has been abused, he communicates his suspicions to him. In such a case it is for the commander of the convoy alone to investigate the matter. He must record the result of such investigation in a report, of which a copy is handed to the officer of the warship. If, in the opinion of the commander of the convoy, the facts shown in the report justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels.

#### CHAPTER VIII.—RESISTANCE TO SEARCH

Art. 63. Forcible resistance to the legitimate exercise of the right of stoppage, search, and capture, involves in all cases the condemnation of the vessel. The cargo is liable to the same treatment as the cargo of an enemy vessel. Goods belonging to the master or owner of the vessel are treated as enemy goods.

## CHAPTER IX.—COMPENSATION

Art. 64. If the capture of a vessel or of goods is not upheld by the prize court, or if the prize is released without any judgment being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or goods. \* \* \*

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**DECLARATION OF WASHINGTON IN RELATION TO  
THE USE OF SUBMARINES AND NOXIOUS  
GASES IN WARFARE**

February 6, 1922 :

The United States of America, the British Empire, France, Italy and Japan, hereinafter referred to as the Signatory Powers, desiring to make more effective the rules adopted by civilized nations for the protection of the lives of neutrals and non-combatants at sea in time of war, and to prevent the use in war of noxious gases and chemicals, have determined to conclude a Treaty to this effect and have appointed as their Plenipotentiaries: \* \* \*

Who, having communicated their full powers, found in good and due form, have agreed as follows:

**ARTICLE I**

The Signatory Powers declare that among the rules adopted by civilized nations for the protection of the lives of neutrals and non-combatants at sea in time of war, the following are to be deemed an established part of international law:

(1) A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized.

A merchant vessel must not be attacked unless it refuse to submit to visit and search after warning, or to proceed as directed after seizure.

A merchant vessel must not be destroyed unless the crew and passengers have been first placed in safety.

(2) Belligerent submarines are not under any circumstances exempt from the universal rules above stated; and if a submarine cannot capture a merchant vessel in conformity with these rules the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested.

\* Senate Document No. 126, 67th Congress, Second Session, p. 886.

## ARTICLE II

The Signatory Powers invite all other civilized Powers to express their assent to the foregoing statement of established law so that there may be a clear public understanding throughout the world of the standards of conduct by which the public opinion of the world is to pass judgment upon future belligerents.

## ARTICLE III

The Signatory Powers, desiring to insure the enforcement of the humane rules of existing law declared by them with respect to attacks upon and the seizure and destruction of merchant ships, further declare that any person in the service of any Power who shall violate any of those rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found.

## ARTICLE IV

The Signatory Powers recognize the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914-1918, the requirements universally accepted by civilized nations for the protection of the lives of neutrals and non-combatants, and to the end that the prohibition of the use of submarines as commerce destroyers shall be universally accepted as a part of the law of nations they now accept that prohibition as henceforth binding as between themselves and they invite all other nations to adhere thereto.

## ARTICLE V

The use in war of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world and a prohibition of such use having been declared in treaties to which a majority of the civilized Powers are parties,

The Signatory Powers, to the end that this prohibition shall be universally accepted as a part of international law binding alike the conscience and practice of nations, declare their assent to such prohibition, agree to be bound thereby as between themselves and invite all other civilized nations to adhere thereto. \* \* \*

**WASHINGTON RESOLUTION FOR A COMMISSION OF  
JURISTS TO CONSIDER AMENDMENT  
OF LAWS OF WAR**

February 4, 1922 \*

The United States of America, the British Empire, France, Italy and Japan have agreed:

I. That a Commission composed of not more than two members representing each of the above-mentioned Powers shall be constituted to consider the following questions:

(a) Do existing rules of International Law adequately cover new methods of attack or defense resulting from the introduction or development, since the Hague Conference of 1907, of new agencies of warfare?

(b) If not so, what changes in the existing rules ought to be adopted in consequence thereof as a part of the law of nations?

II. That notices of appointment of the members of the Commission shall be transmitted to the Government of the United States of America within three months after the adjournment of the present Conference, which after consultation with the Powers concerned will fix the day and place for the meeting of the Commission.

III. That the Commission shall be at liberty to request assistance and advice from experts in International Law and in land, naval and aerial warfare.

IV. That the Commission shall report its conclusions to each of the Powers represented in its membership.

Those Powers shall thereupon confer as to the acceptance of the report and the course to be followed to secure the consideration of its recommendations by the other civilized Powers.

Adopted by the Conference on the Limitation of Armament at the Sixth Plenary Session, February 4, 1922.<sup>4</sup>

\* Senate Document No. 128, 67th Congress, Second Session, p. 902.

<sup>4</sup> The Conference stated in another resolution that "it is not the intention of the Powers agreeing to the appointment of a Commission to consider and report upon the rules of International Law respecting new agencies of warfare that the Commission shall review or report upon the rules or declarations relating to submarines or the use of noxious gases and chemicals already adopted by the Powers in this Conference."



## APPENDIX III

### No. 1

#### ORDER IN COUNCIL FRAMING REPRISALS FOR RESTRICTING FURTHER THE COMMERCE OF GERMANY<sup>1</sup>

March 11, 1915. London Gazette, March 15, 1915, p. 2805.

At the Court at Buckingham Palace, the 11th day of March, 1915.

Present: The King's Most Excellent Majesty in Council.

Whereas, the German Government has issued certain Orders which, in violation of the usages of war, purport to declare the waters surrounding the United Kingdom a military area, in which all British and allied merchant vessels will be destroyed irrespective of the safety of the lives of passengers and crew, and in which neutral shipping will be exposed to similar danger in view of the uncertainties of naval warfare;

And whereas, in a memorandum accompanying the said Orders neutrals are warned against entrusting crews, passengers, or goods to British or allied ships;

And whereas, such attempts on the part of the enemy give to His Majesty an unquestionable right of retaliation;

And whereas, His Majesty has therefore decided to adopt further measures in order to prevent commodities of any kind from reaching or leaving Germany, though such measures will be enforced without risk to neutral ships or to neutral or noncombatant life, and in strict observance of the dictates of humanity;

And whereas, the Allies of His Majesty are associated with him in the steps now to be announced for restricting further the commerce of Germany:

His Majesty is therefore pleased, by and with the advice of his Privy Council, to order and it is hereby ordered as follows:

I. No merchant vessel which sailed from her port of departure after the 1st March, 1915, shall be allowed to proceed on her voyage to any German port.

Unless the vessel receives a pass enabling her to proceed to some neutral or allied port to be named in the pass, goods on board any such vessel must be discharged in a British port and placed in the custody of the Marshal of the Prize Court. Goods so discharged, not

<sup>1</sup> For the similar decree of France, dated March 13, 1915, see *Journal Officiel*, March 16, 1915, p. 1388; English translation, *Special Supplement to American Journal of International Law*, vol. 9, 1915, p. 113.

being contraband of war, shall, if not requisitioned for the use of His Majesty, be restored by order of the Court, upon such terms as the Court may in the circumstances deem to be just, to the person entitled thereto.

II. No merchant vessel which sailed from any German port after the 1st March, 1915, shall be allowed to proceed on her voyage with any goods on board laden at such port.

All goods laden at such port must be discharged in a British or allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court. The proceeds of the goods so sold shall be paid into Court and dealt with in such manner as the Court may in the circumstances deem to be just:

Provided that no proceeds of the sale of such goods shall be paid out of Court until the conclusion of peace, except on the application of the proper officer of the Crown, unless it be shown that the goods had become neutral property before the issue of this Order:

Provided also that nothing herein shall prevent the release of neutral property laden at such enemy port on the application of the proper officer of the Crown.

III. Every merchant vessel which sailed from her port of departure after the 1st March, 1915, on her way to a port other than a German port, carrying goods with an enemy destination, or which are enemy property, may be required to discharge such goods in a British or allied port. Any goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, unless they are contraband of war, shall, if not requisitioned for the use of His Majesty, be restored by order of the Court, upon such terms as the Court may in the circumstances deem to be just, to the person entitled thereto:

Provided that this Article shall not apply in any case falling within Articles II or IV of this Order.

IV. Every merchant vessel which sailed from a port other than a German port after the 1st March, 1915, having on board goods which are of enemy origin or are enemy property may be required to discharge such goods in a British or allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court. The proceeds of goods so sold shall be paid into Court and dealt with in such manner as the Court may in the circumstances deem to be just:

Provided that no proceeds of the sale of such goods shall be paid out of Court until the conclusion of peace except on the application of the proper officer of the Crown, unless it be shown that the goods had become neutral property before the issue of this Order.

Provided also that nothing herein shall prevent the release of neutral property of enemy origin on the application of the proper officer of the Crown.

V. (1) Any person claiming to be interested in, or to have any claim in respect of, any goods (not being contraband of war) placed in the custody of the Marshal of the Prize Court under this Order, or in the proceeds of such goods, may forthwith issue a writ in the Prize Court against the proper Officer of the Crown and apply for an order that the goods should be restored to him, or that their proceeds should be paid to him, or for such other order as the circumstances of the case may require.

(2) The practice and procedure of the Prize Court shall, so far as applicable, be followed *mutatis mutandis* in any proceedings consequential upon this Order.

VI. A merchant vessel which has cleared for a neutral port from a British or allied port, or which has been allowed to pass having an ostensible destination to a neutral port, and proceeds to any enemy port, shall, if captured on any subsequent voyage, be liable to condemnation.

VII. Nothing in this Order shall be deemed to affect the liability of any vessel or goods to capture or condemnation independently of this Order.

VIII. Nothing in this Order shall prevent the relaxation of the provisions of this Order in respect of the merchant vessels of any country which declares that no commerce intended for or originating in Germany or belonging to German subjects shall enjoy the protection of its flag.

ALMERIC FITZROY.

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## No. 2

### ORDER IN COUNCIL DEFINING THE EXPRESSIONS "ENEMY DESTINATION," "ENEMY ORIGIN," AND "ENEMY PROPERTY" IN ARTICLES III AND IV OF THE ORDER IN COUNCIL OF MARCH 11, 1915

January 10, 1917. London Gazette, January 12, 1917, p. 489.

At the Court at Buckingham Palace, the 10th day of January, 1917.  
Present: The King's Most Excellent Majesty in Council.

Whereas, on the 11th day of March, 1915, an Order was issued by His Majesty in Council directing that all ships which sailed from their ports of departure after the 1st day of March, 1915, might be required to discharge in a British or Allied port goods which were of enemy origin or of enemy destination or which were enemy property;

And whereas, such Order in Council was consequent upon certain

Orders issued by the German Government purporting to declare, in violation of the usages of war, the waters surrounding the United Kingdom a military area, in which all British and Allied merchant vessels would be destroyed, irrespective of the lives of passengers and crew, and in which neutral shipping would be exposed to similar danger, in view of the uncertainties of naval warfare;

And whereas, the sinking of British, Allied, and neutral merchant ships, irrespective of the lives of passengers and crews, and in violation of the usages of war, has not been confined to the waters surrounding the United Kingdom, but has taken place in a large portion of the area of naval operations;

And whereas, such illegal acts have been committed not only by German warships but by warships flying the flag of each of the enemy countries;

And whereas, on account of the extension of the scope of the illegal operations carried out under the said German Orders, and in retaliation therefor, vessels have been required under the provisions of the Order in Council aforementioned to discharge in a British or Allied port goods which were of enemy origin or of enemy destination or which were enemy property, irrespective of the enemy country from or to which such goods were going or of the enemy country in which was domiciled the person whose property they were;

And whereas, doubts have arisen as to whether the term "enemy" in articles 3 and 4 of the said Order in Council includes enemy countries other than Germany:

Now, therefore, His Majesty is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows:

1. In articles 3 and 4 of the said Order in Council of the 11th March, 1915, aforementioned, the terms "enemy destination" and "enemy origin" shall be deemed to apply and shall apply to goods destined for or originating in any enemy country, and the term "enemy property" shall be deemed to apply and shall apply to goods belonging to any person domiciled in any enemy country.

2. Effect shall be given to this Order in the application of the said Order in Council of the 11th March, 1915, to goods which previous to the date of this Order have been discharged at a British or Allied port, being goods of destination or origin or property which was enemy though not German, and all such goods shall be detained and dealt with in all respects as is provided in the said Order in Council of the 11th March, 1915.

J. C. LEDLIE.

## No. 3

**ORDER IN COUNCIL SUPPLEMENTAL TO THE ORDERS  
IN COUNCIL OF MARCH 11, 1915. AND JANUARY 10,  
1917, FOR PREVENTING COMMODITIES OF ANY  
KIND FROM REACHING, OR LEAVING, ENEMY  
COUNTRIES**

February 16, 1917. London Gazette, February 21, 1917, p. 1845.

At the Court at Buckingham Palace, the 16th day of February, 1917.  
Present: The King's Most Excellent Majesty in Council.

Whereas, by an Order in Council dated the 11th day of March, 1915, His Majesty was pleased to direct certain measures to be taken against the commerce of the enemy;

And whereas, the German Government has now issued a memorandum declaring that from the 1st February, 1917, all sea traffic will be prevented in certain zones therein described adjacent to Great Britain and France and Italy, and that neutral ships will navigate the said zones at their own risk;

And whereas, similar directions have been given by other enemy powers;

And whereas, the orders embodied in the said memorandum are in flagrant contradiction with the rules of international law, the dictates of humanity, and the treaty obligations of the enemy:

And whereas, such proceedings on the part of the enemy render it necessary for His Majesty to adopt further measures in order to maintain the efficiency of those previously taken to prevent commodities of any kind from reaching or leaving the enemy countries, and for this purpose to subject to capture and condemnation vessels carrying goods with an enemy destination or of enemy origin unless they afford unto the forces of His Majesty and His Allies ample opportunities of examining their cargoes, and also to subject such goods to condemnation:

His Majesty is therefore pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, that the following directions shall be observed in respect of all vessels which sail from their port of departure after the date of this Order:

1. A vessel which is encountered at sea on her way to or from a port in any neutral country affording means of access to the enemy territory without calling at a port in British or Allied territory shall, until the contrary is established, be deemed to be carrying goods with an enemy destination, or of enemy origin, and shall be brought in for examination, and, if necessary, for adjudication before the Prize Court.
2. Any vessel carrying goods with an enemy destination, or of enemy origin, shall be liable to capture and condemnation in respect of the carriage of such goods; provided that, in the case of any vessel which

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